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ARTICLES

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Definition and Regulation as an Effective Measure to Fight Fake News in the European Union*

Viktoria Mazur
&
Archil Chochia**

Summary: Fake news is relevant in most countries of the world; nowadays the disinformation and fake news are of great importance as they greatly affect different political and social aspects of public life including healthcare, elections, migration, economy, etc. People are free to express themselves in different forms on the Internet, including publishing any content due to the freedom of expression. In order to understand how to legally frame fake news, it should first be clearly defined. The problem of disinformation and fake news is closely connected to the fact that providing a new law on fake news is likely to not just overlap but even often to conflict with the legislations that guarantee freedom of expression as fundamental freedom in the European Union. After considering existing laws, comparing, and analyzing measures taken to combat fake news, it appears that legislation may lead to over-censoring, violating freedom of expression. For effective fighting with fake news and its negative impact on the EU public, regulation on fake news is not necessary, it brings more legal issues than benefits to combating the dissemination of disinformation. Clearly defining the borderline between fake news and lies in the context of freedom of expression can therefore be more useful, taking a balancing approach. The general public is in many cases lacking media literacy and it can be improved by strengthening the role of media, which should be more consistent and be aimed at educating modern society.

Keywords: disinformation, fake news, freedom of expression, legal definition, regulation

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1. Introduction

Technological evolution has led humanity to great achievements, having an impact on both economy and society.[1] Along with the development, the era of digital technologies brings a certain lack of control over the information freely flowing on the Internet.[2] In 2020 in Estonia, 89% of population has used Internet, in the world the number is smaller, however still sufficient – 56,7%.[3] The tendency of Internet usage grows tremendously, it is also demonstrated by rates of social media use all over the world, as well as in the EU. Social media has become a platform for generating content rather than platform meant purely for communication.[4] Such a new role of social media leads to the fact that enormous amount of content is left out of control, including illegal content and fake news. Fake news may lead to different issues, such as influence and interference with elections,[5] casting doubts on the trustworthiness of authorities and public health system during the COVID-19 pandemic.[6] The dissemination of fake news poses a risk to both

[1] SHEPHERD, J. What is the Digital Era? In: DOUKIDIS, G., MYLONOPOULOS, N., POULOUDI, N. (ed.). *Social and Economic Transformation in the Digital Era,* UK: Idea Group Inc. 2004, pp. 1–18.; HOFFMANN, T. The Impact of Digital Autonomous Tools on Private Autonomy. *Baltic Yearbook of International Law Online*. 2020, vol. 18, pp. 18−31; KERIKMÄE, T., HOFFMANN, T., CHOCHIA, A. Legal Technology for Law Firms: Determining Roadmaps for Innovation. *Croatian International Relations Review*. 2018, vol. 24, no. 81, pp. 91−112. DOI: 10.2478%20/cirr-2018-0005

[2] KERIKMÄE, T., NYMAN-METCALF, K. The Rule of Law and the Protection of Fundamental Human Rights in an Era of Automation. In: GORDON, J.-S. (ed.). *Smart Technologies and Fundamental Rights.* Brill: Philosophy and Human Rights; 2020, vol. 350, pp. 221−239. DOI: 10.1163/9789004437876_011; NYMAN-METCALF, K., KERIKMÄE, T. Machines are taking over – are we ready? Law and Artificial Intelligence. *Singapore Academy of Law Journal*. 2021, vol. 33, pp. 24−49.

[3] The World bank, Individuals using the internet (% of population), 2020.

[4] Please see *e.g.* KOBERNJUK, A., KASPER, A. Normativity in the EU's Approach towards Disinformation. *TalTech Journal of European Studies*. 2021, vol. 11, no. 1, pp. 170−202. DOI: 10.2478/bjes-2021-0011; LAMBERT, P., NYMAN-METCALF, K. Country Reports: Estonia. In: LAMBERT, P. (ed.). *International Handbook of Social Media Laws*. Croydon: Bloomsbury. 2015, pp. 299−304.

[5] ALCOTT, H., GENTZKOW, M. Social Media and Fake News in the 2016 Election. *Journal of Economic Perspectives*. 2017, vol. 31, no. 2, pp. 211–236.

[6] GUTIÉRREZ, C., COBA-GUTIÉRREZ, L. M., GÓMEZ-DÍAZ, J. A. Fake news about COVID-19: a comparative analysis of six Ibero-American countries. *Revista Latina De Comunicacion Social.* 2020, no. 78, pp. 237–264.

freedom of expression and the right to access information. Legislation is few steps behind the technology, confirmed by the fact that fake news, that is being disseminated in different forms (text, images, videos, deepfakes or combination of these forms)[7] all over the internet, often cannot be forbidden on legal grounds, because fake news has not been defined or regulated. Such a situation has occurred due to the overlapping with freedom of expression, fundamental freedom which is an integral part of human dignity.[8] This research discusses whether definition and regulation of fake news is a necessary measure to combat fake news. The aim of this research is to assess how much it is necessary to restrict freedom of expression in the context of fake news and if fake news should be eventually regulated. The first section explains how freedom of expression is being balanced with other rights and freedoms. Through interpretation of case-law different approaches are explained. These approaches are necessary in context of possible categorization of fake news as a form of expression. The second section provides information on existing measures to combat fake news in the EU. The comparison between legal acts on the matter in different countries shows lack of harmonization. Additionally, it considers the research in context of definition of fake news taking place in the EU and slightly discusses the approach of United States. The US approach is necessary for understanding legal issues that would possibly arise if a common definition is not adopted.

2. Interference with Freedom of Expression

Freedom of expression is a fundamental freedom and therefore an integral part of a modern democratic society.[9] The freedom of expression is protected by Article 11 of Charter of Fundamental Rights of the European Union (hereinafter Charter), which is a primary law. European Convention on Human Rights (hereinafter Convention) also guarantees specific rights and freedoms, including freedom of expression in accordance with Article 10. The meaning of freedom of expression does not only consist of interpretation of Article 10 paragraph 1 of the Convention but also derives from the case-law. Along with the expression of opinion,

[7] BOTHA, J., PIETERSE, H. Fake News and Deepfakes: A Dangerous Threat for 21st Century Information Security. *International Conference on Cyber Warfare and Security*. 2020, vol. 15, pp. 57–66.

[8] KOCHARYAN, H., VARDANYAN, L., HAMUĽÁK, O., KERIKMÄE, T. Critical Views on the Right to be Forgotten after the Entry into Force of the GDPR: Is it Able to Effectively Ensure our Privacy? *International and Comparative Law Review.* 2021, vol. 21, no. 2, pp. 96−115. DOI: 10.2478/ iclr-2021-0015

[9] ELFORD, G. Freedom of expression and social coercion. *Legal theory*. 2021, vol. 27, no. 2, pp. 149–175.

information or ideas through speech,[10] freedom of expression includes expressing oneself in clothing,[11] the access to public information,[12] the artistic expression,[13] radio and television broadcasting,[14] protection of witnesses from incriminating themselves,[15] the expression in written form (such as leaflets),[16] the displaying of vestimentary symbols of religious or political groups,[17] and the expression of criticism or satire.[18] Freedom of expression is indeed a right that all EU citizens are entitled to, however this right is neither an absolute right nor a non-derogable right, such as right to life, prohibition of torture, prohibition of slavery, right for no punishment without law; these rights are not subjected to derogation even in time of emergency pursuant to Article 15 of the Convention, meaning that no interference is allowed and there is no right to balance these rights with public safety interests.[19] However, the derogation from freedom of expression is possible in some conditions.[20] Moreover, it should be balanced with other rights and freedoms in a way that it neither infringes other rights[21] and freedoms nor violates media pluralism.[22] According to Article 10 paragraph 2 of the Convention, this freedom may be restricted on several occasions. When considering how to balance different rights it is essential to pay attention to the case-law.

2.1. Forms of expression

Freedom of expression may be restricted pursuant to Article 10 paragraph 2 of the Convention, if there is a threat to public safety, national security, public health,

[10] DJAJIĆ, S. Freedom of expression, strong language and public servants. *Zbornik radova Pravnog fakulteta Novi Sad*. 2021, vol. 55, no. 3, pp. 803–827.

[11] Stevens v. United Kingdom, no. 11674/85, ECtHR, 1986.

[12] Leander v. Sweden, no. 9248/81, ECtHR, 1987.

[13] Müller and Others v. Switzerland, no. 10737/84, ECtHR, 1988.

[14] Groppera Radio AG and Others v Switzerland, no. 10890/84, ECtHR, 1990.

[15] K. v. Austria, no. 47/1992/392/470, ECtHR, 1993.

[16] Chorherr v. Austria, no. 13308/87, ECtHR, 1993.

[17] Vajnai v. Hungary, no. 33629/06, ECtHR, 2008.

[18] Eon v. France, no. 26118/10, ECtHR, 2013.

[19] TOULA, C. M. Freedom of Expression. *The Southern communication journal*. 2020, vol. 85, no. 3, pp. 203–204.

[20] GUNATILLEKE, G. Justifying Limitations on the Freedom of Expression. *Human Rights Review*. 2021, vol. 22, no. 1, pp. 1–18.

[21] RIDDIHOUGH, G., PURNELL, B., TRAVIS, J. Freedom of Expression. *Science (American Association for the Advancement of Science)*. 2008, vol. 319, no. 5871, p. 1781. DOI: 10.1126/science.319.5871.1781

[22] DYER, A. Freedom of Expression and the Advocacy of Violence: Which Test Should the European Court of Human Rights Adopt? *Netherlands quarterly of human rights*. 2015, vol 33, no. 1, pp. 78–107.

or morals. Furthermore, this freedom may be restricted when overlapping with other rights and freedoms, such as right to privacy, which is also mentioned most frequently. In some circumstances even restrictions of Article 10 paragraph 2 of the Convention shall be reconsidered, like derogation from freedom of expression in case of overlapping with someone's right for protection of reputation which is a part of right to privacy protected by Article 8 of the Convention. In *Frankowicz v. Poland,*[23] the Court found that expressing critical opinion about the medical treatment of the patient by another doctor shall not be considered as violation of one's reputation, since restriction of freedom of expression in this particular case could prevent doctors from providing patients with an objective opinion about their health and the treatment received, and thereby undermine the very purpose of the medical profession, namely the goal of protecting life and health of patients.[24] Such restrictions shall be considered and decided by the court based either on proportionality or on balancing approach.[25] The categories that the court uses are mainly: forms of expression that fall outside the scope of Article 10 (hate speech, Holocaust denial and incitement to violence)[26] and other forms that should be considered separately (value judgements, statements of fact, insulting speech and expressing opinion). Given that artistic expressions are forms of expression protected by the Convention, it is important to clarify that if hate speech, Holocaust denial or incitement to violence is represented in artistic works, such expression falls outside the scope of protection.[27] Distinction between statement of facts and value judgement is crucial in understanding which forms of expression benefit the protection. Whereas description of fact is easily proved right or wrong, the value judgements can only express the attitude towards the subject matter,[28] which can be either negative or positive. While balancing rights courts come across value judgements that cannot be factually justified, because they are based on one's opinion. In *Morice v. France*[29] the Court found that demanding the proof for value judgements itself violates freedom of expression. However, there should be some degree of "factual basis". "The necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances".[30] In *Feldec v. Slovakia* the Court

[23] Frankowicz v. Poland, no. 53025/99, ECtHR, 2008.
[24] Frankowicz v. Poland, no. 53025/99, § 51, ECtHR, 2008.
[25] COUNCIL OF EUROPE: EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression*,* 2021, pp. 24–26.
[26] PÉGORIER, C. Speech and Harm: Genocide Denial, Hate Speech and Freedom of Expression. International Criminal Law Review. 2018, vol. **18, no. 1, pp.** 97–126.
[27] Leroy v. France, no. 36109/03, ECtHR, 2018.
[28] Lingens v. Austria, no. 9815/82, ECtHR, 1986.
[29] Morice v. France, no. 29369/10, ECtHR, 2015.
[30] Feldek v. Slovakia, no. 29032/95, ECtHR, 2001.

decided that applicant's statement about other person's fascist past in a political context had a factual basis, since it was based on existing facts, which had been publicly accessible. Though, if value judgement lacks the factual basis, the court while balancing freedom of expression and right to protection of reputation will decide in favor of the latter.[31] Despite that fact in *Flux v. Moldova,*[32] statement of fact expressed by the press without sufficient factual basis was found to fall within the scope of Article 10 of the Convention even though the reputation of political party suffered significantly as a consequence of applicant's actions. This happened due to the fact that information had been obtained through responsible journalistic research. In such cases, the court pays attention to the proportionality of interference as well, defining whether it is necessary in a democratic society, and whether contribution of such measure is important to the general public.[33] The Court has commented that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation",[34] which raises a question of how in context of fake news, which may consist of an inverted fact, the spread of disinformation by press on legal grounds can be avoided. In *Shtekel v. Ukraine*[35] the Court found that growing importance of Internet may pose even a higher risk on protection of freedom of expression or balancing it with other rights than press.

The general principles for balancing freedom of expression derive from cases *Perinçek v. Switzerland,*[36] *Von Hannover v. Germany,*[37] and *Axel Springer AG v. Germany.*[38] When balancing freedom of expression and right to privacy it is necessary to bear in mind that they both deserve equal respect, the compliance of striking balance and taking appropriate measures is within the discretion of the Contracting States. "The margin of appreciation, however, goes hand in hand with European supervision, embracing both the legislation and the

[31] SMET, S. Freedom of Expression and the Right to Reputation: Human Rights in Conflict. *American University International Law Review*. 2011, vol. 26, no. 1, pp. 183–236.

[32] Flux v. Moldova, no. 31001/03, ECtHR, 2007.

[33] FLAUSS, J. The European Court of Human Rights and Freedom of Expression. *Indiana Law Journal*. 2009, vol. 84, no. 3, pp. 809–849.

[34] Flux v. Moldova, no. 31001/03, § 45, ECtHR, 2007.

[35] Shtekel v. Ukraine, no. 33014/05, ECtHR, 2011. More on freedom of media in Ukraine, please see: SHUMILO, O., KERIKMÄE, T., CHOCHIA, A. Restrictions of Russian Internet Resources in Ukraine: National Security, Censorship or Both? *Baltic Journal of European Studies*. 2019, vol. 9, no. 3, pp. 82−95. DOI: 10.1515/bjes-2019-0023; NYMAN-METCALF, K. Post-Conflict Reconstruction of Trust in Media. In: SAYAPIN, S., TSYBULENKO, E. (ed.). *The Use of Force against Ukraine and International Law.* The Hague: Springer. 2018, pp. 425−445. DOI: 10.1007/978-94-6265-222-4_20

[36] Perinçek v. Switzerland, no. 27510/08, ECtHR, 2015.

[37] Von Hannover v. Germany, no. 59320/00, ECtHR, 2004.

[38] Axel Springer v. Germany, no. 39954/08, ECtHR, 2012.

decisions applying it, even those given by independent courts. In exercising its supervisory function, the Court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions are compatible with the provisions of the Convention relied on".[39] Furthermore, decisions of the national courts have to be in line with case-law and any deviation shall be due to the significant reasons. The protection of different forms of expression, even the offensive and insulting ones (excluding hate speech, holocaust denial and incitement to violence), is a necessity not only within the framework of freedom of expression, but also freedom of information and media pluralism.[40] According to *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria,*[41] the access to information is an integral part of the freedom of expression.

2.2. Proportionality and balancing approach

Deriving from wording of Article 10 paragraph 2 of the Convention, the restrictions are possible, yet not mandatory. The interference with freedom of expression shall be justified and therefore courts make assessment on case-by-case basis guided by the three-part test.[42] Three conditions shall be fulfilled in order to consider justified interference with the freedom of expression[43] or the rights and freedoms prescribed in Articles 8,9, and 11 of the Convention, as reasonable. Such interference must be prescribed by the law, aimed at protecting interests or values prescribed in Article 10 paragraph 2 of the Convention and the interference must be necessary for preserving democratic society.[44] It is a role of court to interpret which interference is prescribed by the law. According to case-law such law must be foreseeable to some degree (paragraph 99 of *Magyar v. Hungary*[45] *and* paragraph 135 of *Perinçek v. Switzerland)* and accessible (paragraph 36 of *Karademirci and Others v. Turkey)*.[46] The foreseeability of consequences

[39] Perinçek v. Switzerland, no. 27510/08, § 198, ECtHR, 2015.

[40] Lingens v. Austria, no. 9815/82, § 41, ECtHR, 1986.

[41] Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria, no. 39534/07, ECtHR, 2013.

[42] BYCHAWSKA-SINIARSKA, D. *Protecting the Right to Freedom of Expression Under the European Convention of Human Rights: A Handbook for Legal Practitioners*. Strasbourg: Council of Europe. 2017.

[43] LANZA, E. National case law on freedom of expression. *Inter-American Commission on Human Rights, OAS*. 2017, pp. 1–95.

[44] MCGOLDRICK, D. The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective. *Human Rights Law Review*. 2013, vol. 13, no. 1, pp. 125–151.

[45] Magyar v. Hungary, no. 73593/10, ECtHR, 2014.

[46] Karademirci and Others v. Turkey, nos. 37096/97 and 37101/97, ECtHR, 2005.

may consist of uncertainty, mostly it depends on the context. The accessibility criteria can be met if the legislation is published in a medium such as an official gazette. However, the law must not only be foreseeable and accessible, but also quality of law should be considered,[47] which means that measures should be taken only if they are "necessary in a democratic society".[48] The legal basis for any interference must be established in written form in international or domestic law. Legitimate aim is specified in Article 10 paragraph 2 of the Convention, interference with the freedom of expression should only be carried out for the purpose of "national security, territorial integrity or public safety". The "necessity" has been determined through *Observer and The Guardian v. United Kingdom*:[49] "the adjective 'necessary' within the meaning of Article 10(2) of the Convention is not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable,' but it implies the existence of a pressing social need." Moreover, according to *Stoll v. Switzerland*[50] "the interference shall be proportionate to the legitimate aim pursued" and "the reasons adduced by the national authorities to justify it are 'relevant and sufficient'". The measures applied shall be considered both necessary in democratic society as well as proportionate if such measures are least restrictive and "there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned" as derives from paragraph 99 of the *Glor v. Switzerland.*[51] As a further consideration of pressing social need, it is clear that this factor is not always relevant according to case-law.

Interference shall not be carried out when concerning any form of criticism, written, verbal or in form of images, describing one's opinion even a critical one shall fall within the scope of Convention. In *Vereinigung Bildender Künstler v. Austria,*[52] during the exhibition "The century of artistic freedom" in 1998, a painting "Apocalypse" created by artist Otto Mühl was shown to public. The painting depicted important political and public figures at that time in the nudity with some sexual context. A former general secretary of the Austrian Freedom Party, Mr. Walter Meischberger considered this picture degrading to his dignity, and he filed a claim against Vereinigung Bildender Künstler Wiener Secession association in accordance with Section 78 of the Copyright Act, since part of

[47] SLOOT, B. The Quality of Law: How the European Court of Human Rights gradually became a European Constitutional Court for privacy cases. *JIPITEC*. 2020, vol. 11, no. 2, pp. 160–185.

[48] Big Brother Watch and Others v. the United Kingdom, nos. 58170/13, 62322/14 and 24969/15, ECtHR, 2013, 2014, 2015.

[49] Observer and The Guardian v. United Kingdom, no. 13585/88, ECtHR, 1991.

[50] Stoll v. Switzerland, no. 69698/01, ECtHR, 2007.

[51] Glor v. Switzerland, no. 13444/04, ECtHR, 2009.

[52] Vereinigung Bildender Künstler v. Austria, no. 68354/01, ECtHR, 2007.

the painting used elements of photos cut from newspapers. Court prohibited further use of the painting in association's exhibition, this decision was met with an appeal by the association, claiming that their freedom of expression was violated. The court has examined whether interference and measures taken were justified in accordance with Article 10 paragraph 2 and the three-part test. The legal basis has been established in domestic copyright law; therefore, interference was prescribed by law. The protection of morals, right to reputation and individual rights shall be considered as legitimate aim in certain circumstances. The matter of proportionality and necessity is controversial though; the painting has been partly damaged during the exhibition, the part where Mr Meischberger was illustrated was covered with red paint and at a time when he claimed about violation of his rights, the exhibition had already been closed. "The injunction prohibiting any further exhibition of the painting, concerned not only the applicant association but also the painter himself and any other third person wishing to exhibit the painting and were equivalent to the deletion of the painting from the collective memory".[53] Such removal without limits in time or space indeed constitutes a disproportional measure to the aim pursued. Therefore, satirical statements, images or artistic expressions must be protected by Article 10 of the Convention and censorship should not discourage others from expressing their critical opinion.

2.2.1. Justified interference with the freedom of expression of the media

Some restriction and interference with the freedom of expression shall be applied to press as well, in such circumstances, when it is "severely" violating someone's right to privacy[54] or if journalists do not act in good faith and do not check the reliability of the content. Such limitation of liability derives from the fact that, the press plays role of a "public watchdog", which includes function of coverage of socially important events.[55] The protection of right to reputation is a part of the right to respect for private life and therefore is protected by Article 8 of the Convention. According to *Axel Springer v. Germany* the freedom of expression may be restricted if there is a severe interference with privacy. In present case the German newspaper has published articles where it claimed that Mr X had been convicted of illegal drug possession. In its reasoning the Court referred to the case *Sidabras and Džiautas v. Lithuania*[56] that protection to the right of

[53] Vereinigung Bildender Künstler v. Austria, no. 68354/01, § 25, ECtHR, 2007.
[54] Axel Springer v. Germany, no. 39954/08, ECtHR, 2012.
[55] Bladet Tromsø and Stensaas v. Norway, no. 21980/93, § 59, ECtHR, 1999.
[56] Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00, ECtHR, 2004.

reputation shall not be considered violated if the consequences of one's actions were foreseeable to lead to loss of reputation, especially when a person committed a crime. Pursuant to abovementioned facts and the fact that publication of the articles had not resulted in serious consequences for Mr X, the attack to his privacy shall not be considered severe. However, even if the journalist is acting in good faith, the interference with one's right to private life may be considered disproportionate and not necessary in a democratic society.[57]

The increased influence of bloggers in social media platforms make it crucial considering their role in informing or deceiving public. Bloggers should be treated the same as regular press, since with the development of technologies, social media have taken root and the role of blogger can be assimilated to the role of modern "public watchdog".[58] When blogger is acting in good faith and expressing opinion in the political context as in *Rebechenko v. Russia,*[59] his/her opinion should be protected by freedom of expression. It is important to note that offensive content that incites violence is subject to the restriction to freedom of expression. However, in *Savva Terentyev v. Russia*[60] the Court decided that measures taken (imprisonment for one year) for publishing insulting content are not necessary in democratic society as well as relevant and sufficient. The applicant's freedom of expression has been violated as measures taken were disproportionate to the aim pursued. Furthermore, through interpretation of the case it was decided that applicant is not a well-known blogger[61] or an influential figure.[62]

Freedom of expression is a key right but not absolute, it is possible to limit it in certain circumstance like derogation from freedom of expression in case of overlapping with other rights and freedoms and under certain conditions prescribed by law. It is possible to regulate fake news but the question is how and if it is a good idea, which is further discussed in Section 3.

[57] Bladet Tromsø and Stensaas v. Norway, no. 21980/93, ECtHR, 1999.

[58] *VORHOOF, D. European court of human rights: Rebechenko v. Russia.* Human Rights Centre of Ghent University and Legal Human Academy, 2019, vol. 6, no. 1, pp. 1–3.

[59] Rebechenko v. Russia, no. 10257/17, ECtHR, 2019.

[60] Savva Terentyev v. Russia, no. 10692/09, ECtHR, 2018.

[61] Magyar v. Hungary, no. 73593/10, § 168, ECtHR, 2014.

[62] Osmani and Others v. the former Yugoslav Republic of Macedonia, no. 50841/99, § 75, ECtHR, 2001.

3. Regulation And Definition Of Fake News

3.1. Definition Of Fake News

What does fake news mean? There is no definition provided by any form of legislation. There is a difficulty in defining fake news by dictionaries[63] as well because it consists of two distinct words that must have a meaning of "false" "material reported in a newspaper or news".[64] The problem is the confusion that "fake" brings in context of news, which shall be considered as facts. Fake facts are just lies, but fake news is not "only" lies. The most problematic is that fake news may not be lies at all, but inverted facts, or "facts with nuances",[65] like using exaggerated and deceptive headlines that are meant to attract the audience[66] with the purpose to generate income from online advertising (hereinafter click-bait headlines). Such manipulation with words may mislead or bring to wrong conclusions. European Democracy Action Plan defines such important terms as disinformation and misinformation, which fake news consists of. While misinformation is defined as "false or misleading content shared without harmful intent", disinformation requires an intention to mislead, and as a consequence cause harm or lead to economic or political gain. EU seeks to combat disinformation and the misinformation that consequently harms the public. Fake news should not be confused with journalistic errors or completely made-up stories.[67] The errors made by press shall be protected by the Convention if the journalist had been acting in good faith and on occasion of responsible journalism. Made-up stories shall be considered as fake news if they are presented in way that pretend to be truth.[68] Intention is the key characteristic in understanding the disinformation and fake news, however motives are difficult to prove.

In the US, there have been attempts made to define fake news by several researchers and journalists.[69] The definition should have been narrow and not

[63] MOLINA, M., SUNDAR, S. S., LE, T., LEE, D. "Fake News" Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content. *American Behavioral Scientis*. 2019, vol. 65, no 2, pp. 180–212.

[64] DÍAZ, J. B., NICOLAS-SANS, R. COVID-19 and Fake News. *Encyclopedia 2021.* 2021, vol. 1, no. 4, pp. 1175–1181.

[65] GELFERT, A. Fake News: A Definition. *Informal Logic*. 2020, vol. 38, no. 1, pp. 84–117.

[66] JEGANATHAN, K., SZYMKOWIAK, A. Social Media Content Headlines and Their Impact on Attracting Attention. *Journal of Marketing and Consumer Behaviour in Emerging Markets*. 2020, vol. 1, no. 10, pp. 49–59. DOI:10.7172/2449-6634.jmcbem.2020.1.3

[67] SARDO, A. Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights. *Canadian Journal of Law & Jurisprudence.* 2020, vol. 33, no. 2, pp. 435–460.

[68] DENTITH, M. R. The Problem of Fake News. *Public Reason.* 2017, vol. 8, no. 1, pp. 65–79.

[69] PARK, A., YOUM, K. H. Fake news from a legal perspective: The United States and South Korea compared. *Southern Journal of International law*. 2018, vol. 25, no. 1, pp. 100–119 [online].

ambiguous at the same time, however it appeared that making up such definition may violate the First Amendment that protects freedom of speech. The problem of defining fake news is closely connected to the fact that regulation may lead to interference with the exercise of freedom of speech.[70] Such overlapping leads to the fact that the US government lacks intention to restrict freedom of speech in the context of fake news as there is a lack of understanding as to its meaning.[71] The lack of common definition in US and EU could lead to occurrence of more legal issues considering the social media platforms such as Facebook, Twitter and Instagram, which are based in US. In case of being regulated, fake news should be treated equally in key jurisdictions to minimize the capability of VPN users to take advantage of less harsh regulation.

As it was stipulated in Sub-section 1.1 there are 2 categories of forms of expression, those that fall outside the scope of protection of Article 10 of the Convention and those that should be considered by courts on case-by-case basis. Since fake news appear to be both misinformation and disinformation, any content which is not meant to mislead or harm people should not be considered as disinformation and in case of controversies should be decided through court interpretation. In case of dissemination of illegal content through hyperlink it was decided in *Magyar* case that person sharing it does not have a control over the website, therefore measures should be in conformity with three-part test as well. Nevertheless, despite the fact that there is no existing definition of fake news as well as it is not regulated, because such definition could interfere with the freedom of expression or lead to over-censorship of the content,[72] the absence of definition harms other fundamental rights and freedoms of humankind as well as affects the public health in connection with disseminated disinformation in the context of COVID-19. The absence of definition may lead to problems using balancing approach, because understanding of context is not sufficient to interpret the EU principles.

Available at: https://rss.swlaw.edu/sites/default/files/2019-04/7.%20Ahran%20Park%3B%20Kyu%20Ho%20Youm%2C%20Fake%20News%20from%20a%20Legal%20Perspective%20-%20The%20United%20States%20and%20South%20Korea%20Compared.pdf

[70] MANZI, D. C. Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News. *Fordham Law Review.* 2019, vol. 87, no. 6, pp. 2623–2651.

[71] NAPOLI, P. M. What if More Speech is No Longer the Answer. *Federal Communications Law Journal.* 2018, vol. 70, no. 1, pp. 55–104 [online]. Available at: http://www.fclj.org/volumes/volume-70-2017-2018/issue-1/

[72] JANSEN, S.; MARTIN, B. The Streisand Effect and Censorship Backfire. *International Journal of Communication.* 2016, vol. 9, pp. 656–671 [online]. Available at: https://ijoc.org/index.php/ijoc/article/view/2498/1321

3.2. Existing regulation on fake news

So far there have been measures initiated on both, the EU and national levels. In 2018 the Communication on Tackling online disinformation[73] (hereinafter Communication) and Action Plan against Disinformation[74] were adopted and Elections Package, which consists of recommendations, guidelines as well as amendments and regulation with measures for securing free and fair elections, proposed by the former president of the European Commission, Jean-Claude Juncker. It is clearly seen from the EU approach that it is not fake news itself that imposes threat to the democratic society, but the disinformation and resulting from it distrust of information and institutions. In accordance with the definition provided in the Communication, disinformation is an information that has been created with an intention to mislead general public and/or get financial benefit from deceiving. Though, intention is not easily identifiable, it is clear that not all fake news shall be considered as disinformation. "Reporting errors, satire, parody, and partisan news and commentary" are excluded from the scope of the Disinformation. The Communication proposes measures to combat disinformation, which include using modern technologies such as Artificial Intelligence (hereinafter AI), fact-checking, strengthening media literacy, cyber-security measures against interference with elections, and press role.[75] It is important to notice that countering disinformation after it is being released is useful, but it cannot be the only measure taken as consequences of dissemination of fake news are quite complex.[76] Fake news affects humans in a way that it creates distrust feeling towards the government.[77] European Digital Media Observatory has worked out systems to check facts, by which it combats disinformation as well as having positive impact on media literacy. The fact-checking researchers show an incredible result of fighting disinformation, it is justified by the fact that the number of fake news that reach the traditional media is not

[73] Communication on Tackling online disinformation: a European Approach COM (2018) 236 final.

[74] Action Plan against Disinformation JOIN (2018) 36 final.

[75] ANDRAŠKO, J., MESARČÍK, M., HAMUĽÁK, O. The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework. *AI & Society*. 2021, vol. 36, no. 2, pp 623−636. DOI: 10.1007/s00146-020-01125-5; NYMAN-METCALF, K. Digitalisation and beyond: Media freedom in a new reality. In: KOLTAY, A. (ed.*). Media Freedom and Regulation in the New Media World.* Hungary: Wolters Kluwer. 2014, pp. 65−83.

[76] RICHTER, A. Fake News and Freedom of the Media. *Journal of International Media & Entertainment Law,* 2019, vol. 8, no. 2, pp. 1–34 [online]. Available at: https://www.academia.edu/38682259/Fake_News_and_Freedom_of_the_Media

[77] PENNYCOOK, G., RAND, D. G. The Psychology of Fake News. *Trends in Cognitive Sciences*. 2021, vol. 25, no. 5, pp. 388–402.

significant.[78] The EU Code of conduct on countering illegal hate speech online has been joined by Facebook, Microsoft, Twitter, YouTube, Instagram, LinkedIn, Jeuxvideo.com, Snapchat, TikTok and Dailymotion. The Commission has supported Code of Practice on Disinformation (hereinafter Code of Practice), the initiative of High-level Expert Group, to strengthen the trustworthiness and transparency of the content on the internet and counter disinformation all over the EU on a self-regulatory basis. The Code of Practice has been signed by different platforms such as Facebook, Google, Twitter, and taking part in tackling disinformation is voluntary. According to Assessment of The Code of Practice[79] released in 2020, online platforms that are signatories to the Code of Practice increase their own accountability by taking measures against disinformation and monitoring the content. The Communication and the Code of Practice propose to use AI systems to tackle and combat disinformation effectively. However, it should be born in mind that leaving filtering and moderation role for AI systems, that may misunderstand the context is not a sufficient measure. Over-censorship is indeed an issue, moderating content considers work of AI systems or algorithms but leaving such an important role on non-humans raises the warning of whether they are aware of what content is fake and which is true. According to report released by Cambridge Consultants[80] some changes may lead to strengthening AI system's filtering role; AI system may proceed with pre-moderation process taken place before the publication is made and after that if system accepts the content which does not consist of any obvious potentially harmful material, the human should do additional content moderation. In turn, a person can make changes to the AI system and "educate" (machine learning process) to identify possible inconsistencies with further content processed. Consequently, the system can prioritize the processed content that a person needs to work with. Therefore, there is a likelihood of an effective cooperation between human and machine in moderation process. Pursuant to research held by Harvard Kennedy School, moderation and removal of content is not the only option available. In India WhatsApp disinformation has led to real harm to integrity of some people. The research has shown that limiting the number of times the content can be shared can stop the spread of disinformation without violation of freedom of expression.[81]

[78] GUTIÉRREZ, C., COBA-GUTIÉRREZ, L. M., GÓMEZ-DÍAZ, J. A. Fake news about COVID-19: a comparative analysis of six Ibero-American countries. *Revista Latina De Comunicacion Social.* 2020, no. 78, pp. 237–264.

[79] SWD (2020) 180 Final – Assessment of the Code of Practice on Disinformation

[80] OFCOM. Use of AI in online content moderation. *Cambridge Consultants*, 2019, vol. 5 [online]. Available at: https://www.readkong.com/page/use-of-ai-in-online-content-moderation-2282845

[81] KAZEMI, A., GARIMELLA, K., SHAHI, G. K., GAFFNEY, D., HALE, S. A. Research note: Tiplines to uncover misinformation on encrypted platforms: A case study of the 2019 Indian

European Commission Guidance on Strengthening the Code of Practice on Disinformation has covered an importance of providing access to reliable information during the time of crisis as well as initiated the COVID-19 monitoring and reporting programme, which ensures accountability in tackling disinformation. European Democracy Action Plan has defined disinformation as "false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm"; the audience plays significant role in disseminating fake news,[82] but its awareness of the fact that content is false is doubtful. The more Internet users give social feedback (likes, shares, comments, and accesses to the content), the more it becomes likely that the content will be accessed by others,[83] by doing so it draws attention to such content and causes the spread of fake news. Other users that disseminate disinformation are called "trolls",[84] in other words users are getting paid for actively promoting some content. Moreover, people tend to react more actively on fake news rather that real news.[85] It shows more necessity in bringing digital media literacy in life of Internet users, which could help them to understand whether the content is fake or true and how to distinguish between them, where to check the facts, and on what sources to look for reliable information. Some social media platforms like Twitter made warning of the fact that the information a user accessed is a "heated" or "intense"[86] conversation which may raise one's need to check facts. Proposal on the transparency and targeting of political advertising seeks to complement existing EU legislation on fighting disinformation.

Most of the EU Member States have initiated laws that oblige removal of illegal content, such as child abuse material, terrorism, hate crimes, copyright and intellectual property infringements and national security.[87] The idea of blocking and removal of illegal content has itself a good purpose, however if not formulated accurately such legal acts may lead to unlawful interference with

general election on WhatsApp. *Harvard Kennedy School Misinformation Review*. 2022, vol. 3, no. 1, pp. 1–17.

82 LEWIS, S. C., WESTLUND, O. Actors, Actants, Audiences, and Activities in Cross-Media News Work. *Digital Journalism*. 2015, vol. 3, no. 1, pp. 19–37 [online]. Available at: https://www.tandfonline.com/doi/full/10.1080/21670811.2014.927986

83 TANDOC, E. C., LIM, Z. W., LING, R. Defining 'Fake News': A Typology of Scholarly Definitions. *Digital Journalism*. 2018, vol. 6, no. 2, pp. 137–153. DOI:10.1080/21670811.2017.1360143

84 WATTS, C. *Messing with the Enemy. Surviving in a Social Media World of Hackers, Terrorists, Russians, and Fake News*, US: Harper. 2018.

85 VOSOUGHI, S., ROY, D., ARAL, S. The Spread of True and False News Online. *Science*. 2018, vol. 359, no. 6380, pp. 1146–1151.

86 The Guardian, Twitter trials warnings about 'intense' conversations, 2021.

87 SWISS INSTITUTE OF COMPARATIVE LAW. *Comparative Study on blocking, filtering and take-down of illegal internet content.* Strasbourg: Council of Europe, 2017, vol. 16.

freedom of expression. In 2017, Germany passed a legislation German Act to Improve Enforcement of the Law in Social Networks (hereinafter the Network Enforcement Act). The purpose of the Network Enforcement Act is to combat hate speech, dissemination of fake news online and to look for such a content that may lead to incitement to violence or other crimes both online and offline. The scope of application is described in Article 1 of the Network Enforcement Act, pursuant to which the following act shall apply to social network providers that have 2 million registered users on the territory of Germany. It is also stipulated which content shall be considered unlawful; it derives from Criminal Code of Germany.[88] However, some restrictions, coming from Criminal Code of Germany are controversial as they may violate the freedom of expression, one of such restriction is prohibition of giving critical opinion about religion in general, not taking into consideration any specific religious group in particular. The content shall only be considered as hate speech when there is a direct threat to physical integrity of an individual or group of individuals according to the decision taken in *Delfi AS v. Estonia*[89] *(*hereinafter *Delfi* case) in the context of defining hate speech, when users of Estonian news forum were posting humiliating comments. Network Enforcement Act places an obligation on providers of social network to remove or block access to the manifestly unlawful content within 24 hours or 7-day-period after receiving complaint if the content is unlawful. If not removed or blocked, the social network provider may be sanctioned for up to 50 million euros. Imposing such high fines may lead to over censoring of content without sufficiently delving into whether the content is actually illegal.

In Estonia service providers are not bound to monitor the illegal content transmitted by users in accordance with Article 15 of the Directive on electronic commerce[90] (hereinafter E-Commerce Directive). An information society service provider can benefit from limited liability over the content if has no knowledge of illegal activity or in case of awareness have "expeditiously" removed the information or access to it. There is an uncertainty to what shall be considered as expeditiously removed content after the host receives the notice to take it down, there is no information on how much time it requires. In accordance with recital 48 of the E-Commerce Directive, Member States may require hosts of information to take "duties of care" in order to "detect and prevent certain types of illegal activities" imposed by public and criminal law. The host cannot

[88] Articles 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b, 184d, 185, 186, 187, 241 and 269.

[89] Delfi AS v. Estonia, no. 64569/09, ECtHR, 2015.

[90] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

exempt from liability pursuant to Article 14 of the E-Commerce Directive if he played an active role instead of a mere technical, automatic, and passive nature.[91] According to Audio-visual Media Services Directive[92] video-sharing platform service generated by users for non-economic purpose are exempted from liability as well.[93] If a private user posts insulting audio-visual content on YouTube "for the purposes of sharing and exchange within communities of interest", not for economic purposes, the removal of access to YouTube itself or this information in particular violates freedom of expression; such measure is not proportionate to the legitimate aim pursued, according to *Cengiz and others v Turkey.*[94] Pursuant to *Delfi* case, hosts may be held liable for illegal content published by third parties on their online platforms, if they fail to take measures to remove or block an illegal content consisting of hate speech expeditiously after the notice to take it down, as it does not violate Article 10 of the Convention. Additionally, case has identified criteria to assess whether social network provider shall remove third party's comments. Following criteria has been identified with a purpose to strike a balance between freedom of expression and right to reputation of a person: "the context and content of comments, the liability of authors of the comment, the measures taken by the applicant and the conduct of the aggrieved person, the consequences for aggrieved person". As a consequence of *Delfi* case, most of websites have established codes of conduct to elaborate their own rules and recommendations which allow them to take down content that does not fit their policies.

France has proposed a law regulating the dissemination of disinformation about political parties during and/or 3 months before the elections in the country. However, the "Law to combat false information" and later changed into "Law against manipulation of information" has received a lot of controversy. After the appeal of more than 60 members of Senate and Prime Minister of France in 2018 the Constitutional Council released the decision, where it examined the legality of the proposal. Constitutional Council found that the law is compatible with French Constitution, however the measures to combat manipulation of information should be in conformity with freedom of expression.[95] This legal act proposes several approaches of combating manipulation of information, which

[91] Court decision, 12.07.2011, L'Oréal SA, C-324/09, ECLI:EU:C:2011:474. Delfi AS v. Estonia, no. 64569/09, ECtHR, 2015.

[92] Directive 2010/13/EU of the European Parliament.

[93] P. 21 of Directive 2010/13/EU of the European Parliament.

[94] Cengiz and others v Turkey, no. 48226/10, ECtHR, 2015.

[95] COUZIGOU, I. The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression. *Election Law Journal.* 2021, vol. 20, no. 1, pp. 98–115.

includes strengthening media literacy and increasing the level of trust in online platforms using third parties such as Conseil Supérieur de l'Audiovisuel, which combat disinformation controlled or influenced by a foreign state.[96] Taking into consideration different legislations, they display a lack of harmonization within EU. National legislations take different approaches to combat fake news and illegal content itself, when taking into account the principle of mutual recognition what is illegal in one EU Member State shall be illegal in another one. However, as it has been mentioned in the current Section, what is considered as illegal content in Germany will not necessarily be illegal in Estonia. Existing regulation shows some necessity in cooperation and co-regulation.[97]

During the Russian invasion to Ukraine in 2022, the enormous amount of fake news and propaganda have been used.[98] Social media is overflooded with fake news, which is being spread on social media platforms such as Twitter,[99] Instagram,[100] TikTok.[101] Algorithms of social media platforms promote content, based on interactions and its popularity[102]. Bots play significant role in disseminating fake news as they spread information until it becomes viral; algorithms that control the activity of bots are manipulated by humans.[103] Internet users may unintentionally spread disinformation as well, for the reason that they simply do not have knowledge on how to check metadata of pictures and videos. COVID-19 has shown that during times of crisis tackling disinformation becomes essential as in addition to an economic and public health crisis, starts an information crisis,[104]

[96] GUILLAUME, M. Combating the manipulation of information – a French case. *Hybrid CoE Strategic Analysis 16,* 2019 [online]. Available at: https://www.hybridcoe.fi/wp-content/uploads/2020/07/HybridCoE_SA_16_manipulation-of-information_.pdf

[97] MARSDEN, C., MEYER, T., BROWN, I. Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation? *Computers Law & Security Review.* 2020, vol. 36, pp. 1–18.

[98] TSYBULENKO, E., PLATONOVA, A. Violations of Freedom of Expression and Freedom of Religion by the Russian Federation as the Occupying Power in Crimea. Baltic Journal of European Studies. 2019, vol. 9, no. 3, pp. 134−147. DOI: 10.1515/bjes-2019-0026; MÖLDER, H., SAZONOV, V., CHOCHIA, A., KERIKMÄE, T. The Russian Federation in the Global Knowledge Warfare: Influence Operations in Europe and Its Neighborhood. Springer, 2021. DOI: 10.1007/978-3-030-73955-3

[99] Euronews, The Disinformation War: The falsehoods about the Ukraine invasion and how to stop them spreading, 2022.

[100] BBC news, Ukraine invasion: Misleading claims continue to go viral, 2022.

[101] Media matters, TikTok is facilitating the spread of misinformation surrounding the Russian invasion of Ukraine, 2022.

[102] NORSTRÖM, L., ISLIND, A. S., LUNDH SNIS, U. M. Algorithmic Work: The Impact of Algorithms on Work with Social Media. *ECIS 2020 Research Papers*. 2020, vol. 185, pp. 1–17.

[103] CHAKRABORTY, T. Dynamics of Fake News Diffusion. In: CHAKRABORTY, T., LONG, C., SANTHOSH, K. G. (ed.). *Data Science for Fake News*. Switzerland: Springer. 2021, pp. 101–127.

[104] DÍAZ, J. B., NICOLAS-SANS, R. COVID-19 and Fake News. Encyclopedia 2021, 2021, vol. 1, no. 4, pp. 1175–1181.

but highly difficult.[105] Different measures can be taken on national or international level to keep information from manipulation like enabling fact-checkers or bringing awareness to public by providing trustworthy information on national official websites. In Russia the government proposes a legislation which envisages imprisonment for up to 15 years for dissemination of fake news about the actions of Russian troops.[106] Russian Federal Law on Information, Information Technology and Protection of Information establishes general principles of liability for dissemination of fake news and defines fake news as "false reports about acts of terrorism and other unreliable socially significant information disseminated under the guise of reliable messages that poses a threat of harm to the life and (or) health of citizens, property, a threat of mass disruption of public order and (or) public safety". However, fake news is defined in broad sense which enables the state to decide in favor of illegitimacy of content, making it unforeseeable and unpredictable for people to acknowledge whether the content they post online is an unreliable information or not. Such a strict measure in context of existing legislation defining fake news may cause violation of right to access information.

4. Conclusion

Fake news is nothing new, it has been there even in 1938,[107] the broadcasting of The War of the Worlds written by Herbert George Wells on radio had been highly discussed in press, claiming that the story about alien invasion to Earth had led to panic of listeners. However, the facts were exaggerated and eventually it appeared that press had been manipulating readers to maintain press's dominance of the **news** market, to cause distrust towards radio. The story has also raised the concern about media literacy of the general population, which is still a non-solved problem of the society; there is no definition or regulation proposed on the matter. Nowadays, fake news is being combated through different tools, by self-regulated social network platforms, nevertheless the impact of fake news on society in general can be reduced by ensuring media literacy and strengthening journalism's role. Initially the journalists had a role of the watchdogs, whose

[105] HARRISON, R. Tackling Disinformation in Times of Crisis: The European Commission's Response to the Covid-19 Infodemic and the Feasibility of a Consumer-centric Solution. *Utrecht Law Review*. 2021, vol. 17, no. 3, pp. 18–33 [online]. Available at: https://www.utrechtlawreview.org/articles/10.36633/ulr.675/

[106] Esquire, The Russia Duma proposed to punish for up to 15 years for fakes about the actions of the Russian army, 2022.

[107] NTAHONSIGAYE, M. K. Fake News Hysteria: How an analysis of Orson Welles' War of the Worlds broadcast can inform the issue of "fake news". *Major Papers*. 2018, vol. 61.

main purpose was to educate and defend the public; the process of putting information on public domain has been disintermediated, which has indeed led to lack of veracity. Social media platforms and bloggers have to rethink their role and position as modern watchdogs and take more responsibility of fact-checking process of content before publishing.

However, detecting fake news is problematic. Algorithmic approach to filtering is not accurate enough and needs improvements. There is a risk of over-censorship, because systems cannot understand the context of the content, therefore there is a significant need in cooperation with human on several stages of the content moderation. Over-censorship may lead to violation of both freedom of expression and the right to access information. Moreover, there is no common definition of fake news, which makes it difficult to remove the content on self-regulatory basis. Filtering is not the only option to reduce harm posed by fake news, though. There are other ways found to stop dissemination of disinformation without violating freedom of expression; social media platforms can adopt the experience gained by WhatsApp.

Current national legislation in different countries discussed in the paper shows the lack of harmonization within the EU, it happens for several reasons; one of these reasons is the fact, that no definition to fake news have been made. In order to fight disinformation more effectively it should be clearly defined to which extend the freedom of expression should be limited when fake news is concerned. There is indeed a risk of over-censorship in case of defining and further regulation of fake news on one side and threat to other fundamental rights and freedoms if not defined on the other side. However, considering the balancing approach explained in Sub-section 1.2, fake news might be considered as a distinguished form of expression as long as not all content consisting of fake news should be considered as disinformation; cases of violation of freedom of expression in context of fake news could be decided on case-by-case basis which requires a common definition to fake news. Strict fines and sanctions prescribed by law will inevitably lead to over-blocking of content, therefore the actors liable for the content moderation should work in cooperation with both national authorities and on EU level, to invent new ways to combat disinformation and improve the transparency.

The problem is not fake news itself but the disinformation and what it leads to and potential violent impact it might have on society. Therefore, such complicated problem requires different ways of action: proposing a common definition and its further use in balancing approach in the ECtHR, strengthening the role of press, as well as rethinking the role of social media platforms and its users, and increasing media literacy. Some kind of regulation on liability is inevitable, as long as there are legislations on national level and they lack harmonization, EU

have to propose a regulation with minimal definition of fake news that will not lead to severe intervention with the freedom of expression. Technology needs to be adapted to the circumstances that fit the needs of global society.

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European Union's New Pact on Migration and Asylum: Enhancing the Legal Protection of Refugees and Asylum Seekers or Restoring the Old Paradigm?

Danijela Čanji*

Summary: In this article, I seek to examine how the legal and political changes introduced by the European Union's New Pact on Migration and Asylum enhance the legal protection of refugees and asylum seekers fleeing to the EU territory across the central Mediterranean migration route. Empirically drawing on the discourse of the European Commission representatives and the discourse around the new Pact on Migration and Asylum, I will engage in analyzing the EU's human-focused narrative about migration management that the Pact promotes. The emphasis is put on how the dominant legal categories, in particular the category of *refugee*, are (re)constructed and the purposes such re-articulation has for the rights of the people on the move. Situating the study into critical legal theoretical framework, my aim is to demonstrate that although the EU's new narrative acknowledges migrants' vulnerable position, persons in need of international protection are simultaneously put into the discursive frame of irregularity – the same discourse the EU is vehemently fighting against. Hence, due to the conceptual ambivalence of the legal identities, under the new Pact, the persons legally entitled to protection will find it more difficult to claim their right to safe asylum in the EU.

Keywords: the New Pact on Migration and Asylum, the EU, refugee protection, the central Mediterranean migration route

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1. Introduction

The European Union's (the EU's) New Pact on Migration and Asylum (the Pact) launched by the European Commission on 23 September 2020 has gained a considerable attention among both legal and political science scholars. Officially announced in 2019, the Pact has been listed, inter alia, as the flagship initiative of the elected College of Commissioners (2019-2024) working under the leadership of the Commission's President Ursula von der Leyen.[1] Consisting of both legislative and non-legislative instruments, the Pact has come as the product of extensive debates between the representatives of the Commission, the European Parliament, Member States and other relevant stakeholders.[2] Although the proposals contained in the Pact hinge upon the reform of the Common European Asylum System (CEAS) the EU embarked on in 2016 and 2018, the newly introduced package reportedly constitutes a "fresh start" on migration and asylum management.[3]

The contemporary reform towards "truly" European system is presented to be designed to harmonize asylum, reception and return systems and hereby institute a sustainable framework to migration governance in line with the principles of solidarity and fair sharing of responsibility as laid down in Article 80 of the Treaty on the Functioning of the EU (TFEU).[4] The current rhetoric of the Commission has been accompanied by claims stressing that the EU purportedly "withdrawn and drawn a line" under the Dublin system which suggests the Pact comes as a remedy for the previous failures to cope with the large number of arrivals that were managed on an ad hoc basis.[5] However, despite the declarations of the ultimate revocation of the Dublin regime and the plans the EU announced for the establishment of a common, humanitarian and sustainable approach towards

1 EUROPEAN COMMISSION. Directorate-General for Communication, Leyen, U., *A Union that strives for more: my agenda for Europe: political guidelines for the next European Commission 2019–2024*, Publications Office, 2019. Available at: https://data.europa.eu/doi/10.2775/753401

2 EUROPEAN COMMISSION. New Pact on Migration and Asylum: A Fresh Start on Migration in Europe, 2020. Available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-mi-g-ra-tion-and-asylum_en

3 EUROPEAN COMMISSION. Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, 2020. Available at: https://eur-lex.europa.eu/legal-content/EN-/TXT-/?uri=COM%3A2020%3A609%3AFIN

4 EUROPEAN COMMISSION. New Pact on Migration and Asylum: A Fresh Start on Migration in Europe, 2020. Available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-mi-g-ra-tion-and-asylum_en

5 EUROPEAN COMMISSION. *Speech by Vice-President Schinas on the New Pact on Migration and Asylum* [online]. Available at: https://ec.europa.eu/commission/pressco-rner/detail/en/SPEEC-H_2-0_1736

migration and asylum, analysts point to the gap between the discourse articulated on the political level and the one that informs the legislative and non-legislative instruments put forward by the EU.[6] On a closer inspection, the human security considerations that are raised as the guiding principles to the new approach are starkly contrasted with the EU's endeavour to further strengthen the partnerships with third countries on migration and its external border dimension. Eventually, the concerns are being raised that this reality will boil down to a lack of adequate protection mechanisms for those who are heading to the EU while fleeing violence and persecution in their countries of origin or habitual residence.

This article aims to contribute to the debate about the European Commission's enterprise that involves the creation of a new, sustainable framework on migration and asylum. The primary goal of the article is to answer the question of how the legal and political changes introduced by the new Pact enhance the legal protection of refugees and asylum seekers fleeing to Europe via the central Mediterranean route. The approach adopted in the article makes use of the arguments promoted by the critical approach to law whereas from the methodological point of view, I employ the narrative analysis as a special form of qualitative discourse research method.

Putting the emphasis on discursive factors that have shaped the formation of the new measures on migration and asylum, in this article, the narrative analysis is oriented to the analysis of the instruments that the Commission proposed under the Pact[7] on 23 September 2020 as well as the discourse coming from the relevant political actors within the Commission both prior and after the package was launched. Examination of the political rhetoric and legislative changes that accompany the development of the new narrative has a potential to reveal peculiar obstacles that confront the refugee protection regime in the EU context. It is argued that the new narrative the Commission strives to institutionalize has rendered the legal categories of a "refugee" and an "asylum seeker" in the ambiguous positions. The conflictual relationship between positions that are vested on these legal categories is manifested in the fact that besides being portrayed as victims of human rights abuses, persons in need of international protection are simultaneously represented as a part of the irregularity/illegality discourse that the EU vehemently opposes and seeks to abolish. On this account, the EU

[6] NOVOTNÝ, V. The New Pact on Migration: A Set of Innovative Proposals with an Uncertain Outcome. *Wilfried Martens Centre for European Studies*, 2020.

[7] We have to take into consideration that the initiatives that will make up the new legal architecture are about to be introduced by the Commission and will embrace the following elements: an Action Plan on Integration and Inclusion, a Strategy on the future of Schengen, a Strategy on voluntary returns and reintegration, an operational strategy on returns, an EU Action Plan against Migrant Smuggling and a Skills and Talent package.

compromises the rights of those in need of international protection and impedes their access to the territory where their claims shall be examined and further safeguards guaranteed.

By lying the focus on the implications that the provisions of the Pact create for persons that are fleeing to Europe via the central Mediterranean route, this paper seeks to examine what kind of legal solutions the Pact sets out in relation to the management of the migratory flows in an area that represents "one of the deadliest and yet most surveilled seas"[8]. Given that the search and rescue aspect have been particularly emphasized by the crafters of the Pact, I believe that understanding of the situation in the Mediterranean adds the important knowledge to our general understanding of the nature of the legal and political solutions the EU envisages for the conduct of maritime search and rescue operations and saving the lives of refugees and migrants at the Mediterranean Sea.

The paper is structured as follows. In the first section, I offer a brief overview of the adopted theoretical and methodological framework. Then, I look at the framing of the Pact on the political level as well as on the formulations of the Pact's provisions with special prominence given to the search and rescue element. The third section is devoted to the analysis of the implications of the new approach on the rights of refugees destined to the EU territory which is followed by the conclusion and the discussion of the main findings.

2. Critical legal theory and narrative analysis

In this paper, I adopt the critical approach to law situated in the framework of the Critical Legal Studies (CLS) that originally emerged in the early 1970s as a strand of critical theory.[9] From the ontological perspective, this trend in legal scholarship has drawn the intellectual inspiration from legal realism[10] that – despite being oriented in the traditional legal analysis paradigm – sheds light on the biases in legal decisions and strives to "unmask" ways in which judgments are informed by hidden value.[11] Similarly to legal realists, CLS adherents reject the notion that law is a neutral set of rules that can be implemented in an objective

[8] MARTIN, M. *Prioritising Border Control over Human Lives: Violations of the Rights of Migrants and Refugees at Sea* [online]. Available at: https://euromedrights.org/publication/prioritising-border-control-over-human-lives-vio-lations-of-the-rights-of-migrants-and-refugees-at-sea/

[9] HUNT, A. The Theory of Critical Legal Studies. *Oxford Journal of Legal Studies.* 1986, vol. 6, no. 1, pp. 1–45.

[10] STANDEN, A. Jeffrey, Critical Legal Studies as an Anti-Positivist Phenomenon. *Virginia Law Review*. 1986, vol. 72, no. 5, pp. 983–998.

[11] WISE, V. Of Lizards, Intersubjective Zap, and Trashing: Critical Legal Studies and the Librarian. *Legal Reference Services Quarterly,* vol. 8, no. 1–2, 7–27.

manner aiming thus to "debunk" the formalist legal philosophy.[12] Yet, in contrast to legal realism, CLS does away with positivist epistemology, and rejects the premise about the feasibility of reaching just outcomes, that is, the conduct of the legal procedure without prejudice.[13] Critical legal scholars posit that judgment cannot be the outcome of a purely legal reasoning, i.e. the product of "objective application of legal expertise".[14] In this respect, one of the central tenets that informs the CLS thinking is the belief that political judgments pervade all legal doctrines and systems mirroring the hegemonic position of the makers and shapers of law[15]. That being so, CLS challenges the practice of separating the law and politics, the fact and value[16] while suggesting that law shall be viewed as "politics by other means".[17]

Generally speaking, being "critical" in the CLS discipline refers to "querying mainstream, classical legal thought, especially of the variety that views law as a structured, coherent whole that is typically accessed via the application of long-established, logical legal rules and norms".[18] On this basis, what underlies the theorizing of the CLS is the view that the examination of the nature of legal discourse shall be carried out as a way to problematize legal concepts and doctrines.[19] More specifically, the proponents of the CLS contend that the actions of legal agents are defined by political and socio-cultural influences and the process of challenging the legitimacy of dominant legal norms entails inquiring into these conditions for the sake of exposing the hidden structures i.e. relations of power.[20] In this way, the critical methods of CLS refrain from essentialism and seeks to uncover the limits of the hegemonic (legal) discourses with a view to bring about change in favor of those who are disempowered by dominant articulations.[21]

In the paper, I utilize the key premises that inform the critical program in law not limiting the assumption of inseparability of law and politics to legal

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12 Ibid.

13 GORDON, W. R. Unfreezing Legal Reality: Critical Approaches to Law. *Florida State University Law Review*. 1987, vol. 15, no. 2, pp. 195–220.

14 KAIRYS, D. *The Politics of Law: A Progressive Critique*. New York: Pantheon Books, 1982, pp. 1–752.

15 INNISS, B. L. 'Other Spaces' in Legal Pedagogy. *Harvard Journal of Racial and Ethnic Justice*. 2011, vol. 28, Cleveland-Marshall Legal Studies Paper No. 11–231, 67–90.

16 STANDEN, A. J. Critical Legal Studies as an Anti-Positivist Phenomenon. *Virginia Law Review*. 1986, vol. 72, no. 5, pp. 983–998.

17 Ibid.

18 INNISS, B. L. 'Other Spaces' in Legal Pedagogy. *Harvard Journal of Racial and Ethnic Justice*. 2011, vol. 28, Cleveland-Marshall Legal Studies Paper No. 11–231, 67–90.

19 Ibid.

20 Ibid.

21 STANDEN, A. J. Critical Legal Studies as an Anti-Positivist Phenomenon. *Virginia Law Review.* 1986, vol. 72, no. 5, pp. 983–998.

judgments but rather applying it to the international legal architecture as a whole with the special emphasis on the EU's refugee protection regime developed under the Common European Asylum System (CEAS). I make particular use of the notion of deconstruction[22] which refers to uncovering the elements that are structurally silenced within the established hegemonic legal discourses also known as "metanarratives". As I am interested in how narrating legal provisions in particular way can improve or undermine the position of group of people on the move, I find it essential to concentrate on the analysis of the narrative regarding the management of migration flows the European Commission offered in an attempt to institutionalize the new discourse. Below, I reflect on the narrative as a concept and as a methodological tool to be employed in the analysis.

As a starting point, I take the view that narratives stand for the sense-making practices through which actors discursively articulate knowledge about certain objects and social relations in the form of a story that gives meaning to the social environment in which they operate.[23] Narratives are thus the means through which subjects create their identities and political behaviour.[24] As a research method, narrative analysis focused on the collection of written and oral narratives is based on "uncovering ways in which a story is constructed, for whom, and for what purpose".[25] In this way, narrative analysis concerns critical gathering of stories focusing on the meanings that actors attribute to their renderings. According to Molly Paterson and Kristen Renwick Monroe, narrative stands out from other modes of representation as it first and foremost necessitates agency whereas actors – guided by particular goals – are positioned in the story as subject who (re)produce the behavior in accordance with the role they are ascribed with. In addition, given that the narrators maintain the freedom to decide how the story is to be recounted, what matters in the analysis are not only spoken responses but also elements of the story that are silenced.[26] Moreover, by looking at how events are recounted, the speaker's self-definition is disclosed and on this basis, the story "explains and justifies why the life went a particular way, not just causally but, at some level, morally". [27] Finally, it must be noted that instead of looking for any causalities between actor's articulations and the respective behaviour,

[22] WARD, I. *An Introduction to Critical Legal Theory*. London: Cavendish Publishing, 1998, 1–225.

[23] PATTERSON, M., RENWICK, M. K. Narrative in Political Science. *Annual Review of Political Science.* 1999, vol. 1, no. 1, pp. 315–331.

[24] SOMERS, R. M. The Narrative Constitution of Identity: A Relational and Network Approach, *Theory and Society*. 1994, vol. 23, no. 5, pp. 605–649.

[25] SUBOTIĆ, J. Stories States Tell: Identity, Narrative, and Human Rights in the Balkans. *Slavic Review*. 2013, vol. 72, no. 2, pp. 306–326.

[26] PATTERSON, M., MONROE, R. K. Narrative in Political Science. *Annual Review of Political Science. 1999,* vol. 1, no. 1, pp. 315–331.

[27] Ibid.

in this paper, I adopt the view that narratives do not demonstrate explanations of action in the sense of linear causality, but rather that they "exhibit" explanations instituting certain "cognitive boundaries" that either enable or constrain the behaviour of political actors.[28] Along these lines, narratives are seen social constructs that are fluid i.e. they are constantly being (de)constructed by various actors who "create them for specific political purposes and can also deconstruct them for alternative political goals".[29]

3. Unpacking the EU's "New" Migration and Asylum Package

This section looks at the framing of the Pact on the political level as well as on the narrative formulations of the Pact's provisions with special prominence given to the search and rescue element. This part builds on the findings of the rights-based scholars and legal practitioners who reflected on the ambiguous nature of the proposed package of legislative instruments.

By and large, the new Pact has been predominantly composed of three main elements that the Commission's vice-president, Margaritis Schinas metaphorically compared to floors of a house.[30] What constitutes the central component of it is the external dimension of migration governance that relates to the EU's conclusion of a tailor-made and beneficial partnerships with countries of origin and transit as well as to its aspiration to strengthen the capacity of third countries to manage migration on their own. The second floor of the house concerns management of external borders at land and sea based on a common system of returns informed by the cooperation of recently developed EU Return Coordinator with the European Border and Coast Guard (Frontex) – whose competence for the implementation of the European integrated border management has been recently expanded establishing shared responsibility with other Member States' competent authorities.[31] Finally, the third floor relates to

[28] SUBOTIĆ, J. Narrative, Ontological Security, and Foreign Policy Change. *Foreign Policy Analysis*. 2016, vol. 12, no. 4, pp. 610–627.

[29] SUBOTIĆ, J. Stories States Tell: Identity, Narrative, and Human Rights in the Balkans. *Slavic Review*. 2013, vol. 72, no. 2, pp. 306–326.

[30] EUROPEAN COMMISSION. *Speech by Vice-President Schinas on the New Pact on Migration and Asylum* [online]. Available at: https://ec.europa.eu/commission/pressco-rner/detail/en/SPEEC-H_2-0_1736

[31] EUROPEAN COMMISSION. Regulation on the European Border and Coast Guard and repealing Regulations 1052/2013/EC and 2016/1624/EC, 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?u-ri=CELEX:32019R1896

the new balance between solidarity and responsibility that has been established under new solidarity mechanism.[32]

For the most part, on the EU level, the actors who took part in crafting of the package of proposals attempted to "normalize" the phenomenon of migration and depict it as something that is inevitable and enriching for the European society.[33] In her first State of the Union address, President of the European Commission, Ursula von der Leyen, presented the new measures that have laid the foundations of a "human and humane" model of migration governance. By virtue of this, the Commission President recognized the specificity of rescue operations at sea insisting that saving the lives at sea will "no longer be optional" and a more prominent role will be given to "applicants rather than applications".[34] In a similar vein, since her appointment as the European Commissioner for Home Affairs, Ilva Johansson vehemently campaigned for desecuritization of refugees and migrants heading towards the EU and stressed that efforts should be made to ensure that international protection is accessible for those who need it.[35]

Nevertheless, as a part of the humanitarian considerations that dominate the political discourse on the new Pact, the Commission articulated another domain as being constitutive of the "threat" against which the EU and the Member States shall jointly fight against. This threat has been formed out of the irregular flows enabled by human smugglers and traffickers in human beings who act against the rights of refugees and migrants and as such against the values and interest of the EU itself. In this respect, the EU positioned itself as an area of protection whereas the fight against such criminal networks and stemming illegal border crossings has been portrayed as giving the major impetus for the formation of the newly proposed measures.

One of the novel instruments the Commission set forth has made the case for linking the asylum and return border procedure to create "truly" European framework for handling the asylum applications more efficiently.[36] This amendment

[32] EUROPEAN COMMISSION. *Speech by Vice-President Schinas on the New Pact on Migration and Asylum* [online]. Available at: https://ec.europa.eu/commission/pressco-rner/detail/en/SPEEC-H_2-0_1736

[33] EUROPEAN COMMISSION. Press statement by President von der Leyen on the New Pact on Migration and Asylum [online]. Available: https://ec.europa.eu/commission/presscorn-er/detail/-en/statement_20_1727

[34] State of the Union Address by President von der Leyen at the European Parliament Plenary [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655

[35] Ylva Johansson's answers to the European Parliament questionnaire [online]. Available at: https://ec.europa.eu/-commission/commissioners/2019-2024/johansson_en

[36] EUROPEAN COMMISSION. Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 2020. Available at: https://eur-lex.europa.eu/legal-content/-EN/TXT/?uri=COM:2020:611:FIN

along with a new regulation that introduces screening of migrants at the external borders shall guarantee that before people have been granted permission to enter the EU territory, they shall undergo identity, health and security checks based on which they are directed to appropriate procedure i.e. asylum, return or the refusal of entry.[37] The proposals for fusion of asylum and border procedure that will be preceded by a mandatory screening allegedly reflect an evidence-based approach to policy-making given that such provisions have been introduced against the backdrop of challenges of the current system documented since 2016 (such as issuance of the abusive claims for asylum or requests made at the external border by applicants coming from third countries with a low recognition rate).[38] However, many observers argue that among the provisions concerning the new advanced pre-entry phase, there are also less clear points, namely the ones that specify the locations for the conduct of the border procedure. Specifically, as regards the procedure for carrying out return, Article 41a of the amended proposal revising the Asylum Procedures Regulation stipulates that member states dealing with the applicants subject to a return procedure can keep them "at or in proximity to the external border or transit zones".[39] Such clause allows Member States to process the (rejected) applications at a different location where the asylum application was initially made as well as to set up their facilities at or in the proximity of the external border in the first place. In this way, the above-named instruments also provide for the recourse to measures for detention of illegally staying third-country nationals in an extra-territorial manner. Much criticism has been expressed by NGOs as regards to stipulations on the possible detention practices and the possibility to carry out screening without migrants having entered the EU territory.[40] Moreover, according to some analysts, the accommodation of applicants subject to return and asylum border procedure in locations at or in proximity to the external border or transit zones may create "fiction of non-entry" which is a legal tool already utilized by some Member States.[41] In this vein, the new approach, it

[37] EUROPEAN COMMISSION. Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:612:FIN

[38] Migrants arriving from countries with recognition rates lower than 20%.

[39] EUROPEAN COMMISSION. Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 2020. Available at: https://eur-lex.europa.eu/legal-content/-EN/TXT/?uri=COM:2020:611:FIN

[40] HUMAN RIGHTS WATCH. *The Pact on Migration and Asylum* [online], https://www.-hr-w.org/news/2020/10/08/pact-migration-and-asylum

[41] NOVOTNÝ, V. The New Pact on Migration: A Set of Innovative Proposals with an Uncertain Outcome. *Wilfried Martens Centre for European Studies*, 2020.

seems, does not completely abandon the hotspot logic that proved to be leading to unlawful confinement of people in the wake of the 2015 humanitarian crisis[42].

In addition, it is pertinent to consider that the Pact further promises to reconcile Member State's competing interests in managing high numbers of arrivals at the EU frontiers and alleviate pressure from Member States that face disproportionate amount of burden. In this respect, the Commission generated the notion of *mandatory solidarity* which denotes that those EU Member States hostile to participating in relocation of migrants can engage in *return sponsorship* and hereby assist with the migrant deportation and their re-integration in the countries of origin or another hosting communities that would constitute a "safe territory". In doing so, the Commission's vice-president, Margaritis Schinas claims solidarity will eventually become a norm and provide for effectiveness in dealing with large numbers of arrivals.[43]

As a matter of fact, one can call to mind that the first country of entry principle is what the EU introduced itself by the Dublin while the international legal standards namely the 1951 Refugee Convention do not require states to apply refugee status in the first country in which the vulnerable persons arrive.[44] Although the Commission purportedly abolished the Dublin regime[45], many argue that in practice not much has changed.[46] The primary responsibility for deciding on the asylum claim remain in those countries that migrants enter the first. Even though the compulsory solidarity can be triggered in the case countries are facing migratory pressure or in the context of disembarkation of people rescued at sea, the fact that the first country of entry principle endures is especially alarming given the ongoing reluctance of the southern European Member States to launch rescue operations at sea in the first place[47]. In a similar vein, the Pact is silent on whether the compulsory screening exercises are also to be the sole competence of the frontline

[42] EUROPEAN UNIVERSITY INSTITUTE, *The EU pact on migration and asylum in light of the United Nations global compact on refugees: international experiences on containment and mobility and their impacts on trust and rights*, Andrew Geddes, A. (ed.), Sergio Carrera, S. (ed.). European University Institute, 2021. Available at: https://data.europa.eu/doi/10.2870/541854

[43] EUROPEAN COMMISSION. Speech by Vice-President Schinas on the New Pact on Migration and Asylum [online]. Available at: https://ec.europa.eu/commission/pressco-rner/detail/en/SPEEC-H_2-0_1736

[44] GILBERT, G. Why Europe Does Not Have a Refugee Crisis. *International Journal of Refugee Law*. 2015, vol. 27, no. 4, pp. 531–535.

[45] Ibid.

[46] KIRIŞCI, K., ERDOĞAN, M. M., EMINOĞLU, N. *The EU's "New Pact on Migration and Asylum" is missing a true foundation* [online]. Available at: https://www.brooki-ngs.edu/b-log/order-from-chaos/2020/11/06/the-eus-new-pact-on-migration-and-asylum-is-missing-a-true-foundation/

[47] MORENO LAX, V., PAPASTAVRIDIS, E. Boat Refugees and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights. *International Refugee Law Series*, volume 7. Leiden: Boston: Brill/NIjhoff, 2017, 1–461.

member states – a point raised even inside the EU institutions.[48] Importantly, when looking at the implications of fostered border procedure along with the "immediate protection regime" devised for the asylum seekers of a particular kind, we need to recognize that such re-conceptualization of the category of asylum seekers needs to be rethought with the special attention devoted to the understanding of such practice may lead to fragmentation of the asylum seeker category[49].

With a view to demonstrate that it has learnt from the past failures in respect of managing the migration crises, the Commission introduced specific provisions concerning asylum and return procedures in crises situations including the crises related to the seaborne migration. Given that the practice has shown that NGOs and individuals carrying out humanitarian search and rescue to save people in distress have been judicially investigated and prosecuted,[50] for the purpose of providing greater clarity of the points on non-penalization of humanitarian activities, the Commission adopted the new guidance on Facilitators Directive. It affirmed that facilitation in the form of humanitarian assistance carried out by NGOs or any other non-state actors that uphold the relevant legal framework cannot be criminalized and "amounts to a breach of international law, and therefore is not permitted by EU law".[51] In like manner, a new Recommendation on Search and Rescue operations by private vessels[52] has been proposed that addresses the use of private vessels for search and rescue and aims to encourage increased cooperation between Member States.

While majority of the proposed measures deal with how to stem arrivals of migrants that travel irregularly rather than specifying measures that would save the migrants who find themselves in the situation of distress, the Commission highlights its coordinative role and inability to dictate disembarkation points[53].

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48 LAZARO, A. (2020). *European Union's proposed new migration pact generates dissatisfaction on all sides.* Euronews [online]. Available at: https://www.euronews.com/2020/09/26/eu-migration-pact-will-institutionalise-xenophobia-claims-mediterranean-rescue-group

49 MOUZOURAKIS, M. More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status. *European Law Journal*, vol. 26, no. 3–4, pp. 171–180.

50 VOSYLIŪTĖ L., CONTE, C. Crackdown on NGOs and Volunteers Helping Refugees and Other Migrants. *The Research Social Platform on Migration and Asylum*, 2019, 1–52.

51 EUROPEAN COMMISSION. Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020XC1001(01)

52 EUROPEAN COMMISSION. Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, 2020. Available at: https://eur-lex.europa.eu/legal-content-/ga/-TX-T/?-u-ri=CELEX:32020H1365

53 Ylva Johansson's answers to the European Parliament questionnaire [online]. Available at: https://ec.e-uropa.-eu/commission/commissioners/2019-2024/johansson_en

As such, the Pact is focused "neither on the protection of seaborne migrants and refugees nor on the elimination of the structural factors that push them to take the sea to reach safety in the first place".[54]

4. The EU's Migration and Asylum Pact: a Step towards a Common Rights-Based Policy or an Attempt of Selling False Hope?

In this section, I seek to exhibit inconsistencies in the European Commission's narrative about proposed migration management approach by looking at the implications of the Pact's provisions for the rights of people on the move who are fleeing violence and striving to reach the EU shores via the journey across the central Mediterranean.

It must be noted that the Commission's narrative acknowledges that among persons who are taking to the Mediterranean and heading towards the EU territory, there are people who are the victims of human rights violations that are facing risk of persecution and fundamental rights abuse in their countries of origin or habitual residence. In other words, the EU recognizes its legal obligations towards people who are in need of international protection and clearly positions itself as a safe territory and a place of protection. Against this background, each of the proposed initiatives expressly calls on the respect of the *non-refoulement principle* and the full implementation of international protection standards in all actions the EU takes.

However, while displaying the vulnerabilities to which migrants coming to the EU are likely to be exposed to, the narrative the Commission has constructed through its package of measures invested the potential refugees and asylum seekers with ambivalent positions. More specifically, by labelling the fight against unauthorized arrivals as the crucial element for achieving the fair and orderly migration, the EU has depicted refugees and asylum seekers as victims of organized crime while simultaneously embedding these legal categories into the larger frame of discourse on irregularity. Firstly, by stressing that people in need of international protection may fall victim to the criminal networks of human smugglers and traffickers that operate at the Mediterranean Sea,[55] the

[54] MORENO LAX, V., PAPASTAVRIDIS, E. Boat Refugees and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights. *International Refugee Law Series*, volume 7. Leiden: Boston: Brill/NIjhoff, 2017, 1–461.

[55] EUROPEAN COMMISSION. *Speech by Vice-President Schinas on the New Pact on Migration and Asylum* [online]. Available at: https://ec.europa.eu/commission/pressco-rner/detail/en/SPEEC-H_2-0_1736

Commission has made the reduction of unauthorized movement as the legitimate goal. In the second place, the EU has recognized that the mixed nature of migratory flows while consistently classifying these flows as essentially irregular. This practice of silencing the fact that among people who are attempting the journey across the Mediterranean are both people who are forcible and voluntarily displaced is not something new.[56] What is more, the Pact's provisions are alleged to address the management of irregular migration while the Union has pledged to work on the promotion and creation of the legal channels for migrants, mostly through the development of partnerships with third states. Yet paradoxically, the Commissioner Johansson kept reiterating that the "legal pathways are not for everybody" and that the distinction between those eligible and not eligible to stay in the EU has to be made.[57] The latter part of Commissioner's argument would be valid if people who travel by irregular means would have a chance to lodge asylum application in the first place. In this way, the EU acts as an arbiter for deciding on whether the rights of individuals will be circumvented or upheld based on the attribute of irregularity it itself assigned to large scale movements heading to its territory. Additionally, the fact that the potential beneficiaries of the international protection are denied access to it by virtue of arriving to Europe through irregular means stands in contravention to the 1951 Refugee Convention itself i.e. there is no legal ground for punishing refugees for reaching the place of safety illegally, each case of exerting such disciplinary measures amounts to violation of non-refoulement principle. Although the previous EU discourse exhibited similar contradictions.[58]

Moreover, another contentious issues is the EU's commitment to portray strengthening the cooperation on migration with third states as something in the interest of migrants themselves. In the past, the EU has consistently put the conclusion of agreements with third countries at the top of the political agenda. This, however, meant not only a formal transfer of responsibility on them for care and protection of asylum seekers[59] but also the increased instances of push-pack operations on sea i.e. the application of measures to prevent migrant boats reach EU territorial waters by sending people back to

[56] See: MORENO LAX, V., PAPASTAVRIDIS E. Boat Refugees and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights. *International Refugee Law Series*, volume 7. Leiden: Boston: Brill/NIjhoff, 2017, 1–461.

[57] CEPS THINK TANK, *Webinar: The EU Pact on Migration and Asylum: International Partnerships in light of the UN GCR.* Available at: https://www.youtube.co-m/watch?v=65M-J9r-qv-T08

[58] GILBERT, G. Why Europe Does Not Have a Refugee Crisis. *International Journal of Refugee Law*. 2015, vol. 27, no. 4, pp. 531–535.

[59] HAMOOD, S. EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants? *Journal of Refugee Studies.* 2008, vol. 21, no. 1, pp. 19–42.

their points of departure.[60] There have been reports of push-backs carried out by the authorities of individual Member States[61], commercial vessels as well as ones conducted by the Frontex to the third states.[62] As a further matter, the push-back operations have been complemented by the financial support the EU used to allocate for states hosting large refugee populations as a part of migration cooperation agreements. The push-back practices were condemned in judgment *Hirsi Jamaa and Others v. Italy* by the European Court of Human Rights based on a complaint lodged by migrants from Eritrea and Ethiopia, victims of such operation in 2009 carried out by a cooperation of Italian and Libyan coast guard authorities.[63] At that point, the ECtHR specified that national authorities in the EU Member States shall remain steadfast in their efforts to apply the principle of non-refoulement on the high seas. The ECtHR further iterated that in the case of migrant interception in the high seas, people found in distress fall under the jurisdiction of the state where the intercepting vessel is registered and shall be the beneficiaries of the same rights as any person under that state's jurisdiction. On the other hand, the judgment highlighted that after migrant interception in EU territorial waters, the disembarkation of those rescued to a "place of safety" is inevitable, that is, migrants have to be brought to the EU territory in application of the right to a fair remedy and the principle of non-refoulement.[64]

One of the central problems of such approach is that some of the third countries take little or no regard to human rights of migrants and refugees residing on their territories, it is justifiable not to deem these countries as "safe territories" for migrant disembarkation. In particular, in the context of the North African states, the EU has been criticized for its cooperation with countries such as Libya that largely prioritize strengthening the border controls instead of human rights principles.[65] In fact, such cooperation amounts to a vicious cycle where the restrictive border policies "relegate refugees and asylum seekers to the status

[60] EUROPEAN PARLIAMENT. Directorate General for External Policies of the Union. Migrants in the Mediterranean: Protecting human rights. LU: Publications Office, 2015. Available at: https://data-.europa.e-u/do-i/10.2861/342397

[61] EUROPEAN PARLIAMENT. Directorate General for External Policies of the Union. EU external migration policy and the protection of human rights: In depth analysis. LU: Publications Office, 2020. Available at: https://d-ata.eur-opa-.eu/doi/10.2861/07288

[62] COSTELLO, C., MANN, I. Border Justice: Migration and Accountability for Human Rights Violations. *German Law Journal*. 2020, vol. 21, no 3, pp. 311–334.

[63] *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012. Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-109231"]}

[64] Ibid.

[65] COSTELLO, C., MANN, I. Border Justice: Migration and Accountability for Human Rights Violations. *German Law Journal*. 2020, vol. 21, no 3, pp. 311–334.

of illegals leaving them with little choice but to take dangerous routes and place their lives in the hands of smugglers"[66] while at the same time reproducing the dominant narrative of irregularity.

Moreover, in the countries such as Libya, detention practices are widespread and the human rights violations such as rape, torture, hunger, or forced labor occurring in the detention facilities are largely documented[67]. While condemning the abusive conditions migrants face in detention centers and pledging to urge for the Libyan authorities to close them, the EU concurrently engages in training of the Libyan Boarder and Coast Guard whose activities put the rights of migrants at sea in jeopardy by bringing people intercepted at sea back to the detention centers. Whilst the Commission justifies the conduct of such training exercises by human rights concerns arguing that saving the lives of migrants at sea and dismantling the smuggling networks lies at the heart of such cooperation[68] by engaging in these actions, the EU further disregards the fact that the cooperation on asylum should be established only among entities with "comparable protection standards"[69], a criterion which Libya as not being a party to Refugee convention does not fulfil. On top of that, entering into agreements with states that do not comply with the international standards and knowingly assisting the transfer of migrants to environments where they are about to be abused stands in contravention to Article 3 (5) of TEU that stipulates promotion of the EU's fundamental values in all its external actions as well as the observance of international standards.

Finally, notwithstanding the European Commission's strong disapproval of push-backs and its proclamations about improving monitoring measures in each Member State with maritime borders, in the new Pact, the Commission failed to account for how its own structures namely, the Frontex are going to be held accountable for the documented human rights violations. While addressing the human rights impact of Frontex's cooperation with non-EU countries, the Commission stressed that it has no competence to indicate points of disembarkations shedding the light to the applicability of international legal framework

[66] MORRISON, J., CROSLAND, B. The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy? 2001, *Working Paper 39.*

[67] HUMAN RIGHTS WATCH. *EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya* [online]. Available at: https://www.hrw.org/n-ews/2020/04/28/eu-time-review-and-remedy-cooperation-policies-facilitating-abuse-refugees-and

[68] Ylva Johansson's answers to the European Parliament questionnaire [online]. Available at: https://ec.europa.eu/c-ommission/commissioners/2019-2024/johansson_en

[69] MORENO LAX, V., PAPASTAVRIDIS E. Boat Refugees and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights. *International Refugee Law Series*, volume 7. Leiden: Boston: Brill/NIjhoff, 2017, 1–461.

in this respect. Indeed, according to the international law of the sea, states are obliged to provide assistance to people or vessels in distress at sea. This principle is contained in the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea (SOLAS) as well as in the International Convention on Maritime Search and Rescue (SAR). Yet, another complication arises given that not all EU Member States signed the 2004 amended versions of both the Convention on Safety of Life at Sea (SOLAS), 1974 and the Convention on Maritime Search and Rescue at Sea (SAR), 1979 i.e. not all states are confined to the same obligations.[70] This reality leaves the concepts of "distress" and "safe third country" amenable to interpretation of individual member states.[71]

5. Conclusions

The analysis of the narrative surrounding the new legislative package proposed by the Commission has shown the presence of the ambiguous discourse on the legal category of a *refugee and asylum seeker*. At first glance, policy debates in the EU have framed the development of the Pact as a component of the EU's commitment to a comprehensive response to humanitarian crises that since 2015 prompted large number of people to undertake the journey through the Mediterranean and seek sanctuary in Europe. On a closer inspection, we could observe a considerable mismatch between political rhetoric and content of the Commission's proposals. At the EU level, it has been argued that the sustainable rights-based solution can be achieved only if the Union makes compromises without "compromising on its principles"[72], but, nevertheless, as I argue, the Commission has done the exact opposite compromising on its values.

In addition, we can argue that the Commission attempts to institutionalize two separate narratives on migration – the one which relates to the irregular migration flows and the other one concerning the legal migration. One could observe that the EU identifies the absence of the legal pathways to EU territory which ultimately lead migrants and refugees to risk their lives by crossing the Mediterranean, but, in spite of that it posits that the Member States will always

[70] MARTIN, M. *Prioritising Border Control over Human Lives: Violations of the Rights of Migrants and Refugees at Sea* [online]. Available at: https://euromedrights.org/publication/prioritising-border-control-over-human-lives-violations-of-the-rights-of-migrants-and-refugees-at-sea/

[71] Ibid.

[72] EUROPEAN COMMISSION. Press statement by President von der Leyen on the New Pact on Migration and Asylum [online]. Available: https://ec.europa.eu/commission/presscorn-er/detail/-en/statement_20_1727

possess a discretion over regulating the legal migration, a field that in the words of Commission's vice president Schinas "deserves its own narrative divorced from discussions on irregular migration".[73] This implies that when talking about the creation of channels for legal entry, the EU discourse does not refer to channels that would enable people trapped in the war-torn countries in Africa to escape and find shelter in Europe but rather it refers to reinforcing the already well-established labor migration whereby the Union could maintain the competition of its labor markets and tackle the demographic challenges.

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Mending Lacunas in the EU's GDPR and Proposed Artificial Intelligence Regulation

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Summary: The European Union (EU) is leading in the regulation of data privacy and artificial intelligence through the General Data Protection Regulation (GDPR), the proposed European Commission (EC) regulation, and the proposed European Parliament (EP) regulations concerning Artificial Intelligence (AI). The EU also regulates AI through ethical aspects and Intellectual Property Rights as well as the Council of Europe's conclusions concerning the use of sandboxes regulations and experimentation clauses. This article highlights the EU's missed opportunities to create synergies between the GDPR and the proposed AI regulations, given that in several instances they deal with issues that must be regulated from an AI perspective, while simultaneously ensuring data protection of EU citizens. In particular, the EU's ad hoc approach to AI regulation creates lacunas because of its failure to fully integrate the essential components of AI data and algorithm within a regulatory framework.

Keywords: artificial intelligence, data, GDPR, privacy, strict liability

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1. Introduction

The European Union (EU) is one of the most important players in the field of artificial intelligence (AI) and data privacy. In the last few years, the various organs of the EU have adopted numerous documents and mechanisms, binding and non-binding, addressing both data protection and AI.[1] The EU aims to as-

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[1] See generally, REDING, V. The Upcoming Data Protection Reform for the European Union. *International Data Privacy Law.* 2011, vol. 1, no. 1, pp. 3; LOENEN, B., KULK, S., PLOEGER, H. Data Protection Legislation: A Very Hungry Caterpillar: The Case of Mapping

sume a global role while simultaneously protecting its citizens from any potential risks.[2] To that end, one can notice the ambitious but cautious approach embraced by the EU when addressing the various aspects of AI and data development, regulation, and use. This approach has resulted in the adoption of several recent regulations and proposals tackling AI and data privacy in the EU that in turn have been the subject of vigorous scholarly debate.[3]

The EU in the data domain adopted the General Data Protection Regulation (GDPR) in 2016, aiming to update rules for the protection of data privacy throughout the EU.[4] The GDPR replaced the Data Protection Directive (DPD),[5] which governed data privacy since 1995.[6] In simple terms, the GDPR's objective is to grant EU citizens more control over their personal data and the way this data is being used, making the citizen's consent a cornerstone on the basis of which companies can collect and process personal data.[7] Since its adoption, the GDPR has been either hailed as a model for future data protection regulations to be adopted in the EU and globally, or as a regulation suffering from numerous shortcomings requiring its amendment.[8]

Data in the European Union. *Government Information Quarterly*. 2016, vol. 33, no. 2, pp. 338; HILDEBRANDT, M. The Artificial Intelligence of European Union Law. *German Law Journal*. 2020, vol. 21, no. 1, pp. 74.

2 See generally, VEALE, M. A Critical Take on the Policy Recommendations of the EU High-Level Expert Group on Artificial Intelligence. *European Journal of Risk Regulation*. 2020, vol. 11, no. 1, pp. 1; PURTOVA, N. The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law. *Law, Innovation and Technology*. 2018, vol. 10, no. 1, pp. 40.

3 See generally, VESNIC-ALUJEVIC, L., NASCIMENTO, S., PÓLVORA, A. Societal and Ethical Impacts of Artificial Intelligence: Critical Notes on European Policy Frameworks. *Telecommunications Policy*, 2020, vol. 44, no. 6:101961, pp. 1; KOSTA, E. *Consent in European Data Protection Law*. Leiden: Martinus Nijhoff Publishers, 2013; READING, V. The European Data Protection Framework for the Twenty-First Century. *International Data Privacy Law*, 2012, vol. 4, no. 3, pp. 119; KOOPS, B.-J. The Trouble with European Data Protection Law. *International Data Privacy Law*. 2014, vol. 4, no. 4, pp. 250.

4 FEFER, R. F. *EU Data Protection Rules and U.S. Implications* [online]. Available at: https://fas.org/sgp/crs/row/IF10896.pdf

5 VOSS, W. G. European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting. *The Business Lawyer*. 2017, vol. 72, no. 1, pp. 221.

6 European Commission, *Fundamental Rights* [online]. Available at: https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en

7 SHEIKH, S. *Understanding the Role of Artificial Intelligence and Its Future Social Impact.* Hershey: IGI Global, 2020, pp. 269.

8 See generally, VOIGT, P., VON DEM BUSSCHE, A. *The EU General Data Protection Regulation (GDPR): A Practical Guide.* Cham: Springer, 2017; BHAIMIA, S. The General Data Protection Regulation: the Next Generation of EU Data Protection. *Legal Information Management*. 2018, vol. 18, no. 1, pp. 21–28.; TIKKINEN-PIRI, C., ROHUNEN, A., MARKKULA, J. EU General Data Protection Regulation: Changes and Implications for Personal Data Collecting Companies. *Computer Law & Security Review*. 2018, vol. 34, no. 1, pp. 134;

In the AI field, EU institutions have issued various documents outlining their main priorities. These priorities include (1) boosting the technological and industrial capacity of the Union and the dissemination of AI in the various economic sectors; (2) preparing for the various expected changes resulting from AI – mainly socio and economic ones; and (3) the development of suitable ethical and legal rules.[9] The EU adopted a coordinated approach to benefit from opportunities emerging from AI while addressing existing challenges. The goal is to lead the way in AI based on EU values and strengths that led, for instance, to the launch of an EU initiative on AI in 2017.[10] The combined efforts of the various institutions led to the recent adoption of several propositions for EU regulations concerning harmonised rules on AI civil liability by the European Commission, and AI ethical aspects and Intellectual Property Rights (IPRs) by the European Parliament (EP).

The analysis in this Article will highlight the EU's missed opportunities to create synergies between the GDPR and the proposed AI regulations, given that in several instances they deal with issues that must be regulated from an AI perspective, while simultaneously ensuring data protection of EU citizens. In particular, this paper argues that the EU's *ad hoc* approach to AI regulation creates lacunas because of its failure to connect the essential components of AI data and algorithm within a regulatory framework.

The paper begins in Part II by providing the necessary background on the EU's General Data Protection Regulation (GDPR).[11] Part II provides a background on the brief history, the types of data covered, and protected rights under the GDPR. The background on the GDPR is necessary for a discussion on the extent of the GDPR's application to AI. Part III provides a brief overview of the proposed AI regulations by the EC, EP and the EU Council. It will examine the proposed EC proposal concerning the harmonised rules on artificial intelligence, EP regulations concerning civil liability, ethical aspects, and IPRs. Part IV discusses the gaps in the GDPR for regulating AI, and the gaps in the proposed AI regulations.

For purposes of this paper, AI is defined "as a suite of autonomous self-learning and adaptively predictive technologies that enhances the ability to perform

HOOFNAGLE, C. J., VAN DER SLOOT, B., BORGESIUS, F. Z. The European Union General Data Protection Regulation: What It is and What It Means. *Information & Communications Technology Law*. 2019, vol. 28, no. 1, pp. 65.

9 OECD, *Artificial Intelligence in Society*. Paris: OECD Publishing, 2019, pp. 138.

10 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 {SWD(2018) 137 final}.

11 See Commission Regulation 2016/679 of Apr. 27, 2016, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O. J. (L 119) 87 [online]. Available at: https://op.europa.eu/s/omni [GDPR].

tasks".[12] This definition is not far from the definition of AI systems in the EP's Resolution on the civil liability regime for artificial intelligence, which defines an AI system under Article 3(a) as "either software-based or embedded in hardware devices, and that displays behaviour simulating intelligence by, inter alia, collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals."[13] The definition of AI used in this paper is essentially that of machine learning AI,[14] rather than the type of AI that is considered as strong AI[15] or true AI, which some predict could happen when AI achieves singularity[16] or human-level intelligence.[17]

2. EU's GDPR

Before discussing the applicability of the GDPR[18] to AI, this Section provides a necessary brief overview of the GDPR. It begins with a brief history of the

[12] TRUBY, J., BROWN, R., DAHDAL, A. Banking on AI: Mandating a Proactive Approach to AI Regulation in the Financial Sector. *Law and Financial Markets Review*. 2020, vol. 14, no. 2, pp. 110. The High Level Expert Group on AI (AI HLEG) arguable provides the broadest definition of AI when it defines an AI system as follows: software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions. European Commission, *AI-HLEG, High-Level Expert Group on Artificial Intelligence*. *A definition of AI: Main capabilities and Scientific Disciplines* [online]. Available at: https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines

[13] European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), Art. 3(a) [online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html

[14] BROWN, R. Property Ownership and the Legal Personhood of Artificial Intelligence. *Information & Communications Technology Law*. 2021, vol. 30, no. 2, pp. 208 (stating that what people call AI today is actually machine learning).

[15] Ibid., p. 208; SEARLE, J. R. Minds, Brains, and Programs. *Behavioral and Brain Sciences*. 1980, vol. 3, no. 3, pp. 417 (first coining the terms weak AI and strong AI).

[16] GOOD, I. J. Speculations Concerning the First Ultra Intelligent Machine. In: ALT, F., Rubinoff, M. (eds.). *Advances in Computers*. New York: Academic Press, 1965, vol 6.

[17] PRESCOTT, T. J. The AI Singularity and Runaway Human Intelligence. In: LEPORA, N., MURA, A., KRAPP, H. (eds.). *Biomimetic and Biohybrid Systems.* Heidelberg: Springer-Verlag, 2013, vol. 8064, pp. 438. (arguing that "AI should be measured against the collective intelligence of the global community of human minds brought together and enhanced be smart technologies that include AI").

[18] See GDPR., op. cit., p. 87.

GDPR, and its precursor, the Data Protection Directive (DPD).[19] Further, this Section identifies the key provisions of the GDPR, including the types of data covered within its scope, entities covered, and the various individual rights protection provided by the GDPR. Finally, this Section discusses the extraterritorial reach of the GDPR for organizations and businesses located outside of the EU.

2.1. Brief History of the GDPR

Prior to the GDPR, the EU protected data privacy under the DPD,[20] a directive passed by the EP that took effect in 1995.[21] The DPD regulated the processing of digital personal data and its free movement within the EU.[22] Over the next decade since the enactment of the DPD, the EU recognized the new challenges brought by technological developments, including the widespread use of big data, and the need for further protections.[23] Further, the DPD did not create one uniform data protection law across the EU, but rather created twenty-eight different data protection laws among the EU member states.

The GDPR, proposed in 2012, aims to harmonize data protection laws in the EU as a regulation, rather than as a directive such as the DPD. The GDPR has a wider territorial scope, and is enforceable across all EU member states and even outside the EU.[24] In addition, the GDPR aims to keep pace with evolving technology, and offers greater protection to digital transactions of EU citizens.[25]

In 2016, the EU Parliament approved the GDPR's final text, and it took effect in 2018 after a two-year transition period, ultimately supplanting the DPD.[26] Compared to the DPD, the GDPR creates additional rights to EU data subjects, imposes obligations to controllers and processors of data, and creates supervisory authorities with specific enforcement powers.[27]

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19 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995.

20 Ibid.

21 PETERSEN, K. GDPR: What (and Why) You Need to Know About EU Data Protection Law. *AUG Utah Bar Journal*. 2018, vol. 31, no. 4, pp. 12; MEDDIN, E. The Cost of Ensuring Privacy: How the General Data Protection Regulation Acts as a Barrier to Trade in Violation of Articles XVI and XVII of the General Agreement On Trade in Services. *American University International Law Review*. 2020, vol. 35, no. 4, pp. 997.

22 Ibid.

23 MONAJEMI, M. Privacy Regulation in the Age of Biometrics that Deal with a New World Order of Information. *University of Miami International & Comparative Law Review*. 2018, vol. 25, no. 2, pp. 371. MEDDIN, E., op. cit., p. 997.

24 PETERSEN, K., op. cit., p. 12; MEDDIN, E., op. cit., p. 997.

25 Ibid; MONAJEMI, M., op. cit., p. 371.

26 Ibid., p. 12.

27 MONAJEMI, M., op. cit., p. 371.

2.2. Types of Data Covered under the GDPR

To better understand the GDPR, it is important to delineate to whom the GDPR applies, what types of data it protects, and to what extent the GDPR protects personal data.

2.2.1. Controller or Processor

The GDPR covers two groups of people with separate and distinct roles: controllers and processors.[28] The GDPR defines a controller as a person,[29] who "alone or jointly with others, determines the purpose and means of processing data".[30] A processor, on the other hand, is a person who "processes personal data on behalf of a data controller."[31] The word "processing" is defined broadly to include operations "performed on personal data or on sets of personal data".[32] The examples given include, among others, collecting, organizing, recording, storage, use, erasure or destruction of personal data, regardless of whether it was done by persons or automated means.[33] The GDPR deems controllers as the principal, while the processor as the agent.[34] In this regard, the burden of showing compliance is placed upon the controller.[35] The GDPR, therefore, requires controllers to "implement appropriate technical and organisational measures" and policies to ensure and demonstrate compliance with the GDPR.[36]

2.2.2. Personal Data and Special Category Data

The GDPR, as a layered regime, also divides the types of data it covers into two categories: personal data and special category data.[37] Article 4(1) defines personal data as "any information relating to an identified or identifiable natural person ('data subject')".[38] Further, whether a person is identifiable is broadly defined to include direct or indirect reference to the "name, an identification

[28] Ibid., p. 371; MEDDIN, E., op. cit., p. 997.
[29] The GDPR more specifically refers to "a natural or legal person, public authority, agency, or other body". GDPR., Art. 4(7–8).
[30] GDPR., Art. 4(7); MEDDIN, E., op. cit., p. 371.
[31] Ibid., Art. 4(8); MONAJEMI, M., op. cit., p. 371; MEDDIN, E., op. cit., p. 997.
[32] Ibid., Art. 4(2).
[33] Ibid., Art. 4(2), Art. 5, and Art. 9; MONAJEMI, M., op. cit., p. 371.
[34] MONAJEMI, M., op. cit., p. 371.
[35] GDPR., Art. 5(2).
[36] Ibid., Art. 24(1–2); MEDDIN, E., op. cit., p. 997.
[37] Ibid., Art. 4(1); MONAJEMI, M., op. cit., p. 371; ZARSKY, T. Z. Incompatible: The GDPR in the Age of Big Data. *Seton Hall Law Review*. 2017, vol. 47, no. 2, pp. 996.
[38] Ibid., Art. 4(1).

number, location data, an online identifier" or other factors that specifically identify a person's "physical, physiological, genetic, mental, economic, cultural or social identity."[39] According to this definition, the GDPR covers web data like IP addresses and user names.[40]

Following the approach of the DPD, the GDPR creates a special category of data under Article 9 that includes the following: race, ethnic origin, political views, religious or philosophical beliefs, trade union membership, genetic data, biometric data, health data, and data concerning a natural person's sex life or sexual orientation.[41] Special category data requires more stringent protection than personal data.[42] In essence, processing of special category data is plainly prohibited save for a few exceptions.[43] The exceptions include the processing of data that is consented to, already made public by the person, and other specific exceptions covering the need to exercise a legal right, public health, and substantial public interest.[44] Another specific exception that is pertinent to this paper is the exception for purely internal use by a non-profit organization.[45]

2.2.3. Purpose and Necessity of Data

The processing of personal data under the GDPR must also follow two requirements that shape the scope of the data being processed: the purpose and the necessity. Processing of personal data must be done according to a "specified, explicit, and legitimate" purpose.[46] Personal data cannot be processed if the processing contravenes or is "incompatible" with the originally specified purpose.[47]

Additionally, the processing of data must adhere to the data minimization principle, which requires that the data be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed".[48] In short, data must only be processed when necessary. The data minimization principle applies to both the scope, duration, and types of data being processed.[49]

[39] Ibid., Art. 4(1); MEDDIN, E., op. cit., p. 997.
[40] MONAJEMI, M., op. cit., p. 371.
[41] GDPR., art 9(1); MEDDIN, E., op. cit., p. 997; ZARSKY, T. Z., op. cit., p. 996.
[42] Ibid., Art. 9; MONAJEMI, M., op. cit., p. 371.
[43] Ibid., Art. 9(1).
[44] Ibid., Art. 9(2); ZARSKY, T. Z., op. cit., p. 996.
[45] Ibid., Art. 9(2); MEDDIN, E., op. cit., p. 997.
[46] Ibid., Art. 5(1)(b); ZARSKY, T. Z., op. cit., p. 996.
[47] Ibid.
[48] Ibid., Art. 5(1)(c); ZARSKY, T. Z., op. cit., p. 996.
[49] ZARSKY, T. Z., op. cit., p. 996.

2.3. Protected Rights under the GDPR

In addition to the rights covered by the DPD, the GDPR introduces new concepts of rights with regards to personal data.[50] Among the individual personal data rights covered by the GDPR are (1) the right to consent and the right to withdraw consent, (2) the right to erasure, (3) the right to rectification and restriction, (4) the right to object, (5) the right to right to access, and (6) the right to portability.[51]

2.3.1. Right to Consent and Right to Withdraw Consent

One of the most important rights protected under the GDPR is the need to obtain consent prior to the processing of personal data.[52] Notably, the GDPR requires an "opt-in" rather than an "opt-out" consent.[53] An "opt-in" consent places the burden on the company to establish that the person has consented, as stated in Article 7(1).[54] "Opt-out" consent, on the other hand, allows companies to assume consent unless the person opts-out.[55] The GDPR does not allow opt-out consent because it requires written consent to use clear and plain language,[56] that the consent be freely given,[57] that the person can withdraw the consent,[58] and places the burden on the controller to demonstrate that person consented.[59] Article 4(11) more specifically defines consent as a "freely given, specific, informed and unambiguous indication" that the person agrees to the processing of the personal data.

A corollary to the right to consent is the right to withdraw the consent. According to the preamble, "Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment".[60] Therefore, the GDPR gives a person the right to

[50] See European Data Protection Supervisor, *The History of the General Data Protection Regulation* [online]. Available at: https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en [hereinafter History of GDPR].

[51] Ibid.

[52] GDPR., Art. 7; MEDDIN, E., op. cit., p. 997; MONAJEMI, M., op. cit., p. 371.

[53] Ibid.

[54] Ibid., Art. 7(1).

[55] MEDDIN, E., op. cit., p. 997 (stating that "opt-in consent is a more affirmative manner of obtaining consent; no longer able to rely on a subject's silence or on pre-checked boxes that are not easily seen, known as opt-out consent, companies must actively seek and receive consent.")

[56] GDPR., Art. 7(2).

[57] Ibid., Art. 7(4).

[58] Ibid., Art. 7(3).

[59] Ibid., Art. 7(1); MEDDIN, E., op. cit., p. 997.

[60] Ibid., preamble, par. 42.

withdraw consent "at any time", and making it as easy to give and withdraw consent under Article 7(3).[61]

2.3.2. Right of Erasure or the Right to be Forgotten

The GDPR also give a person the right to be forgotten through the right of erasure.[62] Under Article 17, a person has the right to ask the controller to erase personal data affecting him or her without undue delay.[63] The right to erasure applies primarily in situations that do not comply with the GDPR when the processing is no longer necessary for the purpose, the person withdraws consent, the person object to the processing, unlawful processing, and for legal compliance.[64]

2.3.3. Right to Rectification and Restriction

The GDPR also gives persons the right to rectify and restrict the processing of personal data. Under Article 16, persons can ask the controller to rectify inaccurate personal data without undue delay.[65] This right also includes the right to have incomplete data completed.

A similar right is the right for a person to ask the controller to restrict the processing of personal data under Article 18 when the data's accuracy is contested, the processing is unlawful but the person objects to erasure, when the data is no longer necessary for the purpose, and when the person has objected to the processing.[66]

2.3.4. Right to Access

The GDPR also gives persons the right to access their personal data under Article 15, which gives persons the right to ask controllers to confirm whether their data is being processed.[67] If so, the person has the right to access and get a copy

[61] Ibid., Art. 7(3); MONAJEMI, M., op. cit., p. 371 (noting that an organization may be able to argue a "compelling legitimate ground" though it has the burden of showing specified and legitimate reason, and public authorities cannot rely on this argument).

[62] See European Data Protection Supervisor., op. cit. Before the GDPR, the Court of Justice of the European Union (CJEU) in a 2104 decision held that Google was "obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person." *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD)*, Mario Costeja González, ECLI:EU:C:2014:131/12, par. 88 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131

[63] GDPR., Art. 17.

[64] Ibid., Art. 17 (a–f); MONAJEMI, M., op. cit., p. 371.

[65] Ibid., Art. 16.

[66] Ibid., Art. 18.

[67] Ibid., Art. 15.

of the personal data, including information about the purpose of the processing; categories of data; recipients; period of storage; right to restrict, rectify, and erase data; right o complaint; source of the data; and use of automation.[68]

2.3.5. Right to Portability

One of the novel rights introduced by the GDPR is the right to portability under Article 20.[69] The right of portability, in essence, gives the person the right to receive a copy of the personal data provided to a controller and have that data transferred to another controller.[70] The right of portability, according to De Hert, actually consists of three distinct rights: the right to receive a copy of the data, (2) the right to transmit the data to another controller, and (3) the right to have the data transmitted directly from one controller to another.[71]

2.4. Extraterritorial Reach

Another salient feature of the GDPR is its broad extraterritorial reach. The GDPR, as a regulation rather than a directive, applies to all EU member states. Further, the GDPR applies to persons and activities located outside of the EU in three circumstances. First, the GDPR applies to controllers and processors located in EU member states whose processing of personal data takes place outside of the EU.[72]

Second, the GDPR applies to controllers or processors located outside of the EU when processing the personal data of persons who are located in the EU whenever the processing activities relates to (1) the offering of good and service, and (2) monitoring of behavior that takes place in the EU.[73] The GDPR will only apply, however, if it is foreseeable that the processing activities will be directed towards an EU member state.[74]

Third, the GDPR applies to controllers and processors not located in the EU, but EU Member State law applies under international law.[75] The practical effect

[68] Ibid., Art. 15 (a–h); MONAJEMI, M., op. cit., p. 371; DE HERT, P., PAPAKONSTANTINOU, V. The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services. *Computer Law & Security Review*. 2018, vol. 34, no. 2, pp. 193.

[69] Ibid., Art. 20; DE HERT, P., et al., op. cit., p. 193.

[70] Ibid., Art. 20.

[71] DE HERT, P., et al., op. cit., p. 193.

[72] GDPR., Art. 3(1).

[73] Ibid., Art. 3(2); MONAJEMI, M., op. cit., p. 371. In this scenario, an EU representative must be appointed. MEDDIN, E., op. cit., p. 997.

[74] MONAJEMI, M., op. cit., p. 371.

[75] GDPR., Art. 3(3).

of the GDPR is that every entity located anywhere in the world with a digital presence in the EU will fall under the GDPR's scope.[76] This is especially true when the subject of the data is from the EU.[77]

3. EU Proposed AI Regulations

Several documents have been adopted recently by the EC, EP and the Council of the EU advocating for the adoption of specific AI regulations. The EC adopted a proposal in April 2021 laying down harmonised rules on artificial intelligence.[78] The EP adopted three documents in October 2020 which are: the framework of ethical aspects of artificial Intelligence, robotics and related technologies;[79] civil liability regime for artificial intelligence,[80] and intellectual property rights for the development of artificial intelligence technologies.[81] The Council adopted in November 2020, the conclusions on Regulatory sandboxes and experimentation clauses as tools for an innovation-friendly, future-proof and resilient regulatory framework that masters disruptive challenges in the digital age.[82] All these documents will be examined briefly in this Section.

3.1. Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts

The European Commission's Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial

[76] MEDDIN, E., op. cit., p. 997.

[77] MONAJEMI, M., op. cit., p. 371.

[78] European Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (2021/0106) (COD) COM (2021) 206 Final.

[79] European Parliament, Framework of ethical aspects of artificial intelligence, robotics and related Technologies. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)).

[80] European Parliament Resolution., Art. 3(A).

[81] European Parliament, Intellectual property rights for the development of artificial intelligence Technologies. European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)).

[82] Council of the European Union, Council Conclusions on Regulatory sandboxes and experimentation clauses as tools for an innovation-friendly, future-proof and resilient regulatory framework that masters disruptive challenges in the digital age, Brussels, Nov. 16, 2020.

Intelligence ("EC Proposal") focuses on laying down "harmonised rules for the placing on the market, the putting into service and the use of artificial intelligence systems ('AI systems') in the Union"[83] as well as prohibiting specific AI practices and establishing certain requirements related to high-risk AI systems and their operators.[84] It also aims to ensure the adoption of harmonised rules related to transparency for AI systems interacting with "natural persons, emotion recognition systems and biometric categorisation systems, and AI systems used to generate or manipulate image, audio or video content";[85] and laying down rules applicable to market monitoring and surveillance.[86]

The proposal covers providers of AI systems even when they are located in third countries as long as the AI system product or output is used in the EU. It also covers users of the AI systems. Specific categories are not covered within the proposal such as military use of these systems.[87] The proposal prohibits specific AI practices when such practices exploit for instance the vulnerability of specific group of persons having age, physical or mental disability.[88]

The proposal lays down detailed rules applicable to high-risk AI systems. These rules are related to the classification of these high-risk AI systems; requirements including the establishment of a risk management system, technical documentation, transparency and provision of information to users, human oversight…[89] It also lays down the obligations of providers and users of high-risk AI systems and other parties including product manufacturers, authorised representatives, importers, distributors and any third party.[90]

The proposal includes specific procedural provisions related to the notification of the authorities and other bodies,[91] related to standards, conformity assessment, certificates, registration.[92] It also covers transparency obligations for certain AI systems and measures in support of innovation.[93] Likewise, specific governance provisions related to the European artificial intelligence board, national competent authorities,[94] EU database for stand-alone high-risk AI systems and post-market monitoring, information sharing, market surveillance are

[83] European Commission Proposal., op. cit., Art. 1(a).
[84] Ibid., Art. 1 (a) (b).
[85] Ibid., Art. 1(c).
[86] Ibid., Art. 1(d).
[87] Ibid., Art. 2.
[88] Ibid., Art. 5.
[89] Ibid., Art. 6–15.
[90] Ibid., Art. 16–29.
[91] Ibid., Art. 30–39.
[92] Ibid., Art. 40–51.
[93] Ibid., Art. 52–55.
[94] Ibid. Art. 56–59.

stipulated.[95] Finally, the proposal allows the establishment of a code of conducts, imposes penalties and rules for delegation of power and committee procedure.[96]

These are the main provisions of this proposal which aim at achieving the following objectives: "1) ensure that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values; 2) ensure legal certainty to facilitate investment and innovation in AI; 3) enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems and 4) facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation".[97]

3.2. Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies

This framework establishes legal principles that must be respected, and which include inter alia human dignity, autonomy and safety[98] as well as "social inclusion, democracy, plurality, solidarity, fairness, equality and cooperation".[99] The framework imposes specific regulations for high-risk AI technologies emphasizing the need to comply with its ethical principles when developing, deploying or using these technologies.[100] It also adopts a human-centric and human-made approach to AI explicitly stating that the development of high risk AI technologies must always remain under human oversight and allowing humans to regain control when needed for various purposes such as changing these technologies.[101]

The framework also emphasises the importance of complying with safety, transparency and accountability provisions. These include for instance developing, deploying and using these technologies while considering the potential safety and security risks by adopting safeguards that comprise a fall-back plan and action,[102] and by emphasising on transparency and traceability by documenting the various elements, processes and phases.[103]

The framework explicitly states that high risk AI technologies must be unbiased and must not create discrimination based on a long list of topics that

[95] Ibid., Art. 60–68.
[96] Ibid., Art. 69–74.
[97] Ibid., p. 3.
[98] European Parliament Framework, Art. 5(1).
[99] Ibid., Art. 5 (3).
[100] Ibid., Art. 6 (2).
[101] Ibid., Art. 7 (1) (2).
[102] Ibid., Art. 8(1) b.
[103] Ibid., Art. 8(2).

include "race, gender, sexual orientation, pregnancy, disability, physical or genetic features, age…"[104] A high-risk AI technology also according to this framework is not supposed to influence elections or promote misinformation. Rather, the framework must protect the rights of workers, encourage high quality education as well as digital literacy, ensure equal opportunities to avoid increasing gender pay gap and comply with IPR rules.[105]

High-risk AI technologies must also consider the environment in their activities as national authorities will evaluate the environmental impact of these activities. Other national or European bodies may perform this task when the law states that. The objective of the environmental assessment in both cases is tackling various environmental issues and problems such as natural resources management, climate change, environmental pollution, energy consumption…[106]

Other rights that must be protected in accordance with the framework include the respect for privacy and protection of personal data particularly the "use and gathering of biometric data for remote identification purposes in public areas, as biometric or facial recognition"[107] and the right to redress according to which an injury or harm caused to natural and legal persons as a result high-risk AI technologies can be redressed by those persons.[108]

These are the main rights protected under the framework where the rest of the provisions are procedural (risk assessment; compliance assessment; European certificate of ethical compliance) and institutional (governance standards and implementation guidance; supervisory authorities; reporting of breaches and protection of reporting persons; coordination at Union level; Exercise of delegation).[109]

3.3. Civil Liability Regime for Artificial Intelligence

The regime makes a distinction between high-risk AI-systems and other AI-systems. The framework imposes on the operator strict liability for high-risk AI-systems in case of damage or harm caused by a "physical or virtual activity, device or process driven by that AI-system".[110] The European Commission is authorized in this context to include new types of high-risk AI-systems in the scope of this framework as well as delete and change existing high-risk AI-systems.[111]

[104] Ibid., Art. 9(1).
[105] Ibid., Art. 10.
[106] Ibid., Art. 11.
[107] Ibid., Art. 12.
[108] Ibid., Art. 13.
[109] Ibid., Art. 14–21.
[110] European Parliament Resolution., Art. 4(1).
[111] Ibid., Art. 4(2) a, b, c.

Operators in accordance with this framework cannot be exonerated from liability even if they acted with due diligence or if an "autonomous activity, device or process driven by their AI-system" was the cause of damage or harm,[112] but shall not assume responsibility in case of force majeure.[113] In this context, the frontend operator has a responsibility to purchase liability insurance while the backend operator must purchase business liability or product liability insurance covering its services. Existing compulsory insurance or voluntary corporate insurance funds of the frontend operator and the backend operator are considered sufficient if they cover the amount of compensation mentioned in this regulation.[114] Finally, and given the primacy of EU law over national laws, this liability regime will have primacy over national liability regimes in case of conflict concerning "strict liability classification of AI-systems".[115]

The fault-based liability for other AI-systems is mentioned in Article 8 of the framework.[116] In this case, the operator is exonerated from liability if 1) despite taking all the measures for avoiding the activation of AI-system, he did not know that this system was activated; 2) he observed due diligence by performing specific actions mentioned in the framework such as ensuring the selection of a suitable AI-system for the task, monitoring the work and constantly updating these systems. Similarly, to high-risk AI-systems and other AI-systems, the autonomous nature of the activity, device or process cannot be used as a justification for exonerating the operator from liability while force majeure allows him to escape such liability.[117] The operator must even pay compensation when a third party causes the damage in case its untraceable or impecunious,[118] while the producer of an AI-system must cooperate with the operator or the affected person for the identification of the liabilities.[119]

The rest of the provisions of this framework set the necessary rules in the context of strict and fault-based liability such as the rule of compensation and so on.

3.4. Intellectual Property Rights for the Development of Artificial Intelligence Technologies

The EP in this document did not include a draft regulation regarding IPRs in the context of AI. Rather, it stressed the importance of addressing the interplay

[112] Ibid., Art. 4(3).
[113] Ibid.
[114] Ibid., Art. 4(4).
[115] Ibid., Art. 4(5).
[116] Ibid., Art. 8(1).
[117] Ibid., Art. 8(2).
[118] Ibid., Art. 8(3).
[119] Ibid., Art. 8(4).

between IPRs and AI. This is mainly because AI technologies may negatively affect IPRs by complicating the ability to trace IPRs and IPRs application affecting and even preventing the remuneration of human creators that made original work powering AI technologies.[120] Another reason for addressing this interplay is the need for an effective IPR system tailored to the digital age in the general framework of EU's global leadership in AI enabling the introduction of new products on the market and the protection of the Union's patent system.[121]

The EP explicitly stresses the importance of protecting IPRs associated with AI technologies in a multidimensional manner and the need to create legal certainty and trust to promote investments in this field and ensure consumers use of AI technologies in the long term.[122] To that end, it considers the need to continuously reflect on the interaction between AI and IPRs[123] where the focus should be on the implication of each sector and type of IPR on AI technologies. In this context, several factors must be considered mainly "the degree of human intervention, the autonomy of AI, the importance of the role and the origin of the data and copyright-protected material used…".[124]

For instance, among the suggestions, the EP recommended the focus on the way AI technologies would affect existing regulatory framework associated with various IPR issues such as patent law, copyright, trademark, the protection of databases and computer programs...[125] It also for instance calls the commission to explore the idea of testing products while avoiding risks for IPR holders and trade secrets.[126]

The EP made a distinction between "AI-assisted human creations and AI-generated creations".[127] The latter creates new legal challenges related to issues such as "ownership, inventorship and appropriate remuneration".[128] A distinction was made between IPRs used for the creation of AI technologies and IPRs that may be granted for new creations made by AI technologies. The EP stressed the applicability of existing IPR framework when AI is used only to assist an author who is seeking to create something new.[129] Additionally, the EP stressed that AI can be used for IPR enforcement under the condition that a human review and guarantee the transparency of the decisions.[130]

[120] European Parliament, Intellectual property rights., D, p. 3.
[121] Ibid., E, p. 3.
[122] Ibid., 6, p. 5.
[123] Ibid., 7, p. 5.
[124] Ibid., 9, p. 5.
[125] Ibid., 10, p. 6.
[126] Ibid., 12, p. 6.
[127] Ibid.
[128] Ibid.
[129] Ibid., 14, p. 7.
[130] Ibid., 17, p. 8.

These were some of the examples of the many recommendations, statements and recognitions made by the EP in this document highlighting the seriousness granted to the interplay between IPRs and AI while calling the commission to adopt rules that consider all the variables mentioned in this document.

3.5. Council Conclusions on Regulatory Sandboxes and Experimentation Clauses as Tools for an Innovation-Friendly, Future-Proof and Resilient Regulatory Framework that masters Disruptive Challenges in the Digital Age

Through these conclusions, the Council is advocating for the use of regulatory sandboxes and experimentation clauses. It justifies the use of experimentation clauses by highlighting the need for an "agile, innovation-friendly, future-proof, evidence-based and resilient regulatory framework". Such a system will create several benefits such as fostering competitiveness and growth in addition to the technological sovereignty and leadership of Europe in the digital age.[131] It also justifies the use of sandbox regulations by stating that this legal mechanism is already used in various sectors such as finance, health and energy where these sectors often include the use of emerging technologies like AI and blockchain.[132]

In fact, the Council in a series of paragraphs within the document advocated for the use of regulatory sandboxes and experimentation clauses showing the importance given to these mechanisms. For instance, the Council acknowledges that experimentation clauses provide flexibility to the regulatory authorities allowing the testing of innovative technologies, products and services.[133] It also highlighted the benefits of regulatory sandboxes mainly granting the regulators the needed knowledge to regulate innovations at an early stage which is extremely important given the uncertainties and challenges surrounding the new digital technologies.[134]

Nevertheless, the council imposed certain requirements on the use of regulatory sandboxes and experimentation clauses mainly the need to respect important principles primarily subsidiarity, proportionality and the precautionary principle.[135]

In this context, the Council in this document made several recommendations to the Commission regarding regulatory sandboxes and experimentation clauses. For instance, regarding experimentation clauses, the Council calls

[131] Council of the European Union, op. cit., 4, p. 3.
[132] Ibid., 5, p. 3.
[133] Ibid., 9, p. 5.
[134] Ibid., 10, p. 5.
[135] Ibid., 12, p. 5.

the Commission to use experimentation clauses when drafting and reviewing laws in each case and evaluate such use later on.[136] It also calls the Commission to disclose the experimentation clauses that exist within EU law[137] and to provide a list of laws and policies where new experimentation clauses can be applied.[138] Concerning regulatory sandboxes, the Council calls the Commission to exchange information and good practices with member states regarding regulatory sandboxes[139] for various purposes such as establishing an idea of the use of this legal mechanism within the EU[140] and "identifying experiences regarding the legal basis, implementation and evaluation of regulatory sandboxes".[141]

4. AI Data and Algorithm: Lacunas in the EU's GDPR and the AI Regulations

This paper argues that the EU could make its approach to AI regulation more robust by explicitly connecting the regulation of AI data under the GDPR and the proposed AI regulations to create a more meaningfully comprehensive set of AI regulations. Instead, the EU's *ad hoc* approach to AI leaves lacunas that create uncertainties in both mitigating risks and fostering innovation. In particular, this Section explores to what extent the GDPR has failed to regulate AI, and in return how the proposed AI regulations fail to make an explicit attempt to bind to the GDPR.

4.1. Lacunas in Regulation of AI Data

The EU currently regulates data protection under the comprehensive and jurisdictionally extensive regime of the GDPR, as discussed above. While some provisions of the GDRP are relevant to AI, the GDPR does not explicitly refer to AI.[142] Further, the GDPR has been criticized as incompatible with the realities

[136] Ibid., 13 (a), p. 5.
[137] Ibid., 13 (e), p. 6.
[138] Ibid., 13 (f), p. 6.
[139] Ibid., 14, p. 6.
[140] Ibid., 14 (a), p. 6.
[141] Ibid., 14 (b), p. 6.
[142] See SARTOR, G. *The Impact of the General Data Protection Regulation (GDPR) on Artificial Intelligence'* (2020) European Parliamentary Research Service, Panel for the Future of Science and Technology (June 2020) 6 [online]. Available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf>

of big data, which is a necessary component of AI.[143] It is, therefore, important to explore the extent to which the GDPR regulates AI and big data.

Not only does the GDPR not mention AI, but the new ways in which AI processes data in neural networks, challenges the assumptions behind the GDPR.[144] The data protection principles embodied in the GDPR like categories of sensitive data, purpose and necessity (purpose limitations, data minimization), and limits on automated decision-making run counter with the use of data in AI.[145] More specifically, there are a number of issues raised by AI's use of data that remain uncertain and should be addressed by the GDPR or through the proposed AI regulations.[146] These issues include (1) the application of the GDPR's purpose and necessity requirements (purpose limitation and data minimisation); (2) GDPR's coverage of re-identified and inferred data, including in the right to erasure; (3) automated decision-making and profiling in AI; (4) the requirements for specific consent, and (5) the right to know information on automated decision-making and logic used.

First, controllers of big data used by AI will find it hard to comply with the GDPR's purpose and necessity requirements. Commentators like Zarsky have noted that the GDPR is adverse to the prevailing use and practice of big data, and stifles the potential for big data analytics.[147] This is specifically true with regards to the purpose and necessity requirements of the GDPR. Big data often requires the use of methods and usage patterns that may be unforeseeable.[148] Monitoring whether the use of big data analytics complies with the GDPR's purpose and necessity requirements would by expensive, difficult, and perhaps impossible.[149] One can imagine such impossibility when black box algorithms are involved, which some argue should be replaced with explainable algorithms.[150] Under the GDPR, controller and processors of big data would need to inform data subjects of the specific of these unforeseen forms of processing activities.[151]

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143 ZARSKY, T. Z., op. cit., p. 996; ROUVROY, A. *Of Data and Men: Fundamental Rights and Freedoms in a World of Big Data* (2016) 11 [online]. Available at: https://rm.coe.int/CoERM-PublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a6020

144 SARTOR, G., op. cit., p. 6.

145 Ibid. Sartor argues that it is still possible to reconcile the GDPR's aim of protecting data privacy and AI.

146 Ibid (Sartor stating that "a number of AI-related data protections issues are not explicitly answered in the GDPR, which may lead to uncertainties and costs, and may needlessly hamper the development of AI applications").

147 ZARSKY, T. Z., op. cit., p. 996; ROUVROY, A., op. cit., p. 11.

148 ZARSKY, T. Z., op. cit., p. 996.

149 Ibid.

150 ADADI, A., BERRADA, M. Peeking Inside the Black-Box: A Survey on Explainable Artificial Intelligence (XAI). *IEEE Access*, 2018, vol. 6, pp. 52138.

151 ZARSKY, T. Z., op. cit., p. 996.

Second, AI raises issues concerning the "re-identification of new personal data from existing de-identified data" through automated or non-automated inference,[152] which may not fall under the GDPR. The GDPR is not explicit in its coverage of AI-inferred data.[153] The GDPR provisions on the rights to erasure, for example, does not explicitly mention AI-based processing, including the erasure of AI-inferred data, which remains unclear.[154]

Third, the GDPR, in a number of provisions, explicitly regulates automated decision-making and profiling, both of which Sartor sees as essential in AI.[155] The GDPR gives data subjects the right not to be subject to a decision based solely on automated decision-making, including profiling. Profiling personal data, however, is necessary in training sets. Applying the GDPR's prohibition on profiling to AI's profiling of training sets would make it difficult and costly to train AI. Sartor argues that a distinction should be made between the use of profiling in training and decision-making, the latter being subject to GDPR rules in processing of new data, even when AI inferred or re-identified.[156]

Article 22(2) of the GDPR, however, allows the data subject to waive the right not to be subject to automated decision-making based on contract and consent. Article 22(2) is an example of an exception that is swallowing the rule since a vast number of consumers are trading their data in exchange for free or convenient digital services, a phenomenon that Zuboff terms "surveillance capitalism."[157] Additionally, Sartor does not foresee a use of AI that does not rely on profiling, but that instead creates individualized profiles. Others argue that the GDPR would essentially allow and potentially encourage the creation of individualized consumer behaviour digital twins that they call 'digital thought clones'.[158]

Fourth, the specific consent requirement under Article 4(11) of the GDPR is difficult to employ in the context of AI's use and processing of big data. Scholars like Sartor view consent as almost always insufficient for AI under the GDPR as a practical matter, and that AI's use of data would have to be justified under Article 6(1)(f), when the processing is "necessary for the purposes of legitimate

[152] SARTOR, G., op. cit., p. 88.

[153] Ibid. Sartor argues that re-identified data should fall within the scope of the GDPR. He also suggest possibly distinguishing between inferences used for decision-making and inferences used for inconsequential activities like computational rather than decision-making.

[154] Ibid., p. 89.

[155] Ibid., p. 88.

[156] Ibid., p. 95.

[157] ZUBOFF, S. *You are Now Remotely Controlled* [online]. Available at: https://www.nytimes.com/2020/01/24/opinion/sunday/surveillance-capitalism.html TRUBY, J., BROWN, R. Human Digital Thought Clones: The Holy Grail of Artificial Intelligence for Big Data. *Information & Communications Technology Law*. 2021, vol. 30, no. 2, pp. 140.

[158] Ibid.

interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject."[159] It is unlikely, however, that an AI's use of data would become more legitimate than privacy, which in itself is a fundamental right. Article 6(1)(f), in practice, would like only apply to data not already covered by the GDPR because it is not personal data.

Finally, Articles 13(2)(f), 14(2)(g), and 15(1)(h) of the GDPR require a controller to inform or give access to a data subject of a list of information, and of most relevance to AI is information on the use of automated-decision-making, including the logic used and consequences. According to Sartor, what logic and consequence means, and whether a controller must disclose such information at an individualized level, remains uncertain concerning AI. Additionally, it remains unclear how a programmer could explain the consequence of a black-box neural network's processing of data.

According to Sartor, the GDPR should be more explicit on "what standards should apply to AI processing of personal data, particularly to ensure the acceptability, fairness and reasonability of decisions on individuals."[160]

4.2. Lacunas in the Regulation of AI

While the GDPR regulates the use of data, its data-specific scope makes it untenable for meaningfully regulating the algorithm that in turn regulates the use of data. It is, therefore, no surprise that the GDPR makes no mention of algorithm. Still, the GDPR's regulation of data privacy, inevitably implicates algorithms, albeit in a limited sense. First, it gives a data subject the right to not be subject to decisions based solely on automated decision-making. Second, it gives a data subject the right to know if automated decision-making is used and the logic and consequence of such use. Finally, Article 25 requires controllers to implement data protection principles in the design, which in turn implicates the training of algorithms. The above tangential regulations of algorithm, however, remain substantially lacking because they do not directly affect how an algorithm ought to be designed.

Perhaps, the most significant component of the GDPR in this regard is Article 35(1), which subjects high-risk processing operations, especially those that are large scale and likely to be the case with AI, to mandatory data protection assessment. While the provision is promising and follows a human-centred approach, the term "high-risk" in the GDPR has a limited scope to the rights and freedoms

[159] SARTOR, G., op. cit., p. 88.
[160] Ibid., p. 95.

of natural persons. In contrast, the term high risk carries a different meaning under the civil liability regime for AI. In Article 3(c), the term "high risk" is defined more broadly as "a significant potential…to cause harm or damage to one or more persons in a manner that is random and goes beyond what can reasonably be expected".[161] This creates a double liability for processors of AI data that does not exist for non-AI data, since there are instances when the high risk is in both the processing and the harm. The AI regulation should, therefore, consider those instances when the high-risk exists in both the data and the algorithm.

The EP's civil liability regime regulation only mentions the GDPR in two instances. First, the regulation mentions the GDPR with regards to the designation of an AI-liability representative akin to the GDPR.[162] Second, the regulations requires compliance with the GDPR and other data protection laws whenever the operator uses data generated by the AI system to prove contributory negligence. The use of AI generated data is interesting since it remains unclear under the GDPR whether all AI generated data, specifically inferred or re-identified data, is even covered by the GDPR.[163] According to Sartor, it remains uncertain whether AI-inferred or re-identified personal data even falls under the GDPR.[164] Further, since the GDPR's regulation of AI, and inferred data in particular, remains unclear, it also remains uncertain whether the GDPR would govern such a situation. The issue here, it seems, is the lack of an explicit connection between the GDPR and AI civil liability regulation. Yet, the bigger issue is the failure to regulate the algorithm itself.

The more recent EC Proposal is an improvement on the EP's civil liability regime. Under the Explanatory Memorandum, it addresses the issue of harmonisation with the GDPR, and states that the EC Proposal aims to complement the GDPR "with a set of harmonised rules applicable to the design, development and use of certain high-risk AI systems and restrictions on certain uses of remote biometric identification systems."[165] It also states that the EC Proposal aims to complement laws on non-discrimination, including the design and quality of data used. In other words, the EC Proposal attempts to harmonise the algorithm regulation with the data regulation. It requires "high quality data" for high-risk AI,[166] and recognises the risks posed by divergent national rules and the need for a Union level regulation of AI due to the characteristics of big data.[167]

[161] European Parliament Resolution., Art. 3(c).
[162] Ibid., Preamble 19.
[163] See SARTOR, G., op. cit., p. 88.
[164] Ibid., p. 95.
[165] European Commission Proposal., op. cit., Explanatory Memorandum, Section 1.2.
[166] Ibid., Explanatory Memorandum, Section 2.3 and Preamble Section 44.
[167] Ibid., Explanatory Memorandum, Section 2.2.

The preamble to the EC Proposal in Section 44 states more specifically the role of data in AI and sets a high bar for the quality of data sets being "sufficiently relevant, representative and free of errors" for training, validation and testing.[168] When aimed at avoiding discrimination, Section 44 of the preamble explains the need for an exception to the more stringently regulated special category data under the GDPR.[169] It states that "providers should be able to process also special categories of personal data, as a matter of substantial public interest, in order to ensure the bias monitoring, detection and correction in relation to high-risk AI systems." This is then embodied in Article 10)(5) of the EC Proposal, which states that "To the extent that it is strictly necessary for the purposes of ensuring bias monitoring, detection and correction in relation to the high-risk AI systems, the providers of such systems may process special categories of personal data… subject to appropriate safeguards for the fundamental rights and freedoms of natural persons…"[170]

However, the EC Proposal creates a large exception to Article 9 of the GDPR that would allow the collection of special category data under the substantial public interest exception. It would be applicable for every use of high-risk AI since it would be for "bias monitoring, detection and correction", an ongoing process within the high-risk AI. In other words, the EC Proposal could potentially eliminate the special category protection of personal data when used in high-risk AI systems so long as the purpose for the collection and use is for bias monitoring, detection, and correction.

While the language of Article 10(5) tries to limit the application of this exception to strict necessity, it becomes questionable whether this exception could be subject to abuse when it does not occur due to an exceptional event but will likely be applied to a regular ongoing process of bias monitoring and detection. In practice, a special category data would have to be collected, and its use allowed, under the Article 10(5) exception for constant bias monitoring and detection without the consent of the data owner. In other words, high-risk AI providers could collect and use data on race for the purported reason of monitoring bias or discrimination based on race.

A question then is how the fundamental rights and freedoms of natural persons would be safeguarded under the broad use of the substantial public interest exception of Article 10(5). Article 10(5) states that safeguards may include "technical limitations on the re-use and use of state-of-the-art security and privacy-preserving measures, such as pseudonymisation, or encryption where anonymisation

[168] Ibid., Preamble Section 44.
[169] Ibid., Preamble Section 44.
[170] Ibid., Art. 10(5).

may significantly affect the purpose pursued."[171] In other words, the use of special category data may need to be pseudonymised and may need to have added security. Additionally, Article 17 requires a quality management system for high-risk AI that applies to the management, collection, analysis, labelling, storage, filtration, mining, aggregation, retention and any other operation of data.[172]

However, what remains unclear under Article 10(5) whether persons are allowed to exercise their rights to withdraw consent, the right to erasure, the right to rectification and restriction, the right to object, and the right to access under the GDPR. Article 9(2)(g) of the GDPR allows for the substantial public interest exception but also requires that such an exception shall respect the essence of the right to data protection. Under Article 64, market surveillance authorities are given access to the data and documentation of training, validation and testing datasets and to assess conformity with Title III, Chapter 2, which includes Article 10.[173] This could mean that persons could also be given access to the special category data collected and used for purposes of bias monitoring and detection under Article 10(5). If the substantial public interest exception under Article 10(5) can be done without consent, as it seems to do, then it is treated like the public health/public interest exception of the GDPR that could be accomplished without consent. Since there are different types and uses of AI, however, Article 10(5) should also require AI providers to justify why consent is unnecessary and to explain the risk of bias weighed against the risk of data privacy violation. Article 10(5) should not allow a blanket termination of consent for a purported reason of bias monitoring and detection without weighing the risk of bias in a specific AI application.

In addition, while Articles 40–43 of the GDPR, which encourages the use of codes of conduct and certifications, applies to the application of data protection principle, it does not explicitly refer to AI. For example, it could more explicitly refer to codes of conduct for writing algorithm and use of training sets for AI. It could also include as part of its code of conduct and certification, the prohibition on the use of personal data in algorithms that are designed for manipulative or behaviour influencing purposes, which should at least be disclosed and transparent to data subjects. Some scholars, for example, warn against the normalized use of a digital thought clone.[174] A digital thought clone is made possible because of unregulated (1) design of behaviour manipulative algorithms and (2) data. However, it is not sufficient to regulate data to protect the principles of data privacy because an algorithm designed to manipulate behaviour could still comply with

[171] Ibid., Art. 10(5).
[172] Ibid., Art. 17 (1)(f).
[173] Ibid., Art. 64 and Art. 10(5).
[174] TRUBY, J., BROWN, R., op. cit., p. 140.

data protection principles, yet manipulate the ultimate freedom of all – choice. It is also important to regulate the algorithm and those who design the algorithm. As Sartor states, the GDPR should be more clear on "what applications are to be barred unconditionally, and which may instead be admitted only under specific circumstances".[175] This is especially so because the GDPR "does not take the broader social impacts of mass processing into account".[176]

Moreover, that the committee draft report and the European Parliament's resolution on the civil liability of AI focuses on adopting a high risk/low risk classification of AI's liability risks stands in disconnect from risks that may arise from AI's data use. The use of data by an AI may be difficult to categorize into high risk or low risk. For example, the high risk aspects of AI may not come from the fault of the deployer or programmer, but from an AI's unforeseen or unknown inference of the data. This is especially concerning with regards to black-box neural networks. Article 4(3) of the EP's civil liability regime, however, states that "Operators of high-risk AI-systems shall not be able to exonerate themselves from liability by arguing that they acted with due diligence or that the harm or damage was caused by an autonomous activity, device or process driven by their AI-system".[177] Applying a strict liability standard to such neural networks, while arguably beneficial for a civil liability regime, would create a chilling effect on innovative AI that requires the use of neural networks or that would require the use of an AI that programmers do not fully understand.

The EP's references to human-centred AI in the EP's Framework of ethical aspects of artificial intelligence, robotics and related technologies[178] is perhaps the most promising feature of the EU civil liability regime for AI. The EP Framework addresses human oversight, and prohibits known issues with AI such as discrimination, bias, and uses that would compromise human dignity. AI regulation, however, must go further and directly regulate both the data and the algorithm. For instance, the EP resolution must address explicitly the failure in the design phase, which includes the training of the algorithm, where such biases and discrimination usually arise.

Finally, an AI regulatory framework should include the regulation of the people writing the algorithms and training the algorithms with data. Regulating the profession of programming[179] is as important as regulating the medical and legal profession. It would also set into practice and create a culture of ethical programming. Yet, it is also important to not only think of ethics in terms of

[175] SARTOR, G., op. cit., p. 95.
[176] Ibid., p. 95.
[177] European Parliament Resolution., Art. 4(3).
[178] Ibid.
[179] TRUBY, J., BROWN, R., op. cit., p. 140.

algorithm programming, AI deployment, and the intended use behind AI, but also in terms of data. This is especially true when data privacy is now seen as a fundamental human right. In this regard, there must be regulation of the profession as to what constitutes ethical uses of data for AI.[180] Questions arise here concerning the use of data to create mindclones for digital immortality or the creation of digital thought clones for consumer behaviour tracking. It also raises issues with regards to the use of data on black-box algorithms. Should data be used in AI algorithms that the programmer does not fully understand?

5. Conclusion

Despite the novelty of the regulations examined in this Article be it the GDPR or the various proposals from the EC, EP and the European Council for the establishment of new AI regulations, the discussion concerning the interplay between various regulatory frameworks is one of the traditional and most important topics examined in the legal sphere in particular in the international context. Indeed, there is a huge literature addressing the fragmentation of the law especially international law across various regulatory frameworks due to various factors mainly the increasing technicalities of each field, the technological developments and the need for expertise.[181] At the same time, there is a need to address fragmentation especially when various legal fields develop in parallel while addressing similar issues from a different legal perspective. This is the case for instance in this Article where data protection law and AI rules of the EU are being developed

[180] TRUBY, J. Governing Artificial Intelligence to benefit the UN Sustainable Development Goals. *Sustainable Development*. 2020, vol. 28, no. 4, pp. 946–959.

[181] See generally, KOSKENNIEMI, M., LEINO, P. Fragmentation of International Law? Postmodern Anxieties. *Leiden Journal of International Law*. 2002, vol. 15, no. 3, pp. 553. HAFNER, G. Pros and Cons Ensuing from Fragmentation of International Law. *Michigan Journal of International Law*. 2004, vol 25, no. 4, pp. 849; WELLENS, K. Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap. *Michigan Journal of International Law.* 2004, vol. 25, no. 4, pp. 1159; SIMMA, B. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*. 2009, vol. 20, no. 2, pp. 265; GOURGOURINIS, A. General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System. *European Journal of International Law*. 2011, vol. 22, no. 4 , pp. 993; STARK, B. International Law from the Bottom Up: Fragmentation and Transformation. *University of Pennsylvania Journal of International Law*. 2013, vol. 34, no. 4, pp. 687; BROUDE, T. Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law. *Temple International & Comparative Law Journal*. 2013, vol. 27, no. 2, pp. 279; MEGIDDO, T. Beyond Fragmentation: On International Laws Integrationist Forces. *The Yale Journal of International Law*, vol. 44, no. 1, pp. 115.

in parallel even though and as highlighted in the analysis, both are addressing similar issues requiring the creation of synergies and the harmonization of the rules within the legal frameworks that are being developed.

In that sense, the authors in a way examined an old problem applied to new regulations attempting this time to bring new suggestions to solve it. Indeed, after the analysis of the lacunas in the regulation of AI Data and the lacunas in the regulation of AI, the authors proceeded to provide suggestions on how to address these lacunas by providing concrete suggestions to that end. These suggestions focused on the inclusion of specific texts and provisions within both the GDPR and the proposed AI regulations to address the shortcomings as well as the creation of a much-needed synergy between these regulatory frameworks that are developing in parallel but are interdependent. The authors hope from the analysis and the suggestions made that not only these recommendations are taken into account but that rather also the future regulations to be adopted concerning data protection and AI at the EU level as well as the international level to consider the need to create synergies between these two legal fields given their interdependence.

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The GDPR and the DGA Proposal: are They in Controversial Relationship?

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Summary: At the end of 2020, the European Commission published a new European data strategy, which aims to create a new legal framework to promote the development of a single European data market. In the scope of the new strategy the European Commission has already proposed the Data Governance Act proposal (hereinafter – the "DGA"), which aims to strengthen the mechanism to facilitate data exchange. The proposal of the new legislative act has raised the question about the right balance between it and the existing EU legislative acts, which were adopted in the key of personal data protection, especially with the General Data Protection Regulation (hereinafter – the "GDPR"). We argue that there are a number of inconsistencies between the DGA proposal and the GDPR that may prevent the full implementation of mechanisms that allow achieving the EU's intended goals in this field within the framework of the new European strategy. The interaction of the DGA with the GDPR is characterized by conflict of laws and legal uncertainty, which can jeopardize the achievement of the objectives of the DGA itself and can reduce the level of personal data protection in the EU, compared to the GDPR. Besides, the examination of the relevant case-law of the Court of Justice of the European Union (hereinafter – the "CJEU" or the "Court") regarding the implementation of the GDPR identifies approaches that prevent the opening of data exchange as the DGA proposal requires.

Keywords: GDPR, data exchange, data protection, CJEU, new European strategy

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1. Introduction

At the end of 2020, the European Commission published a new European data strategy, which aims to create a new legal framework to promote the development of a single European data market. As part of the new European strategy, the EU is already submitting proposals for new laws. Along with the Digital Services Act[1] (hereinafter – the "DSA") and the Digital Markets Act[2] (hereinafter – the "DMA"), the European Commission has proposed the Data Governance Act project, which aims to strengthen the governance mechanism to facilitate data exchange, and introduce new tools and mechanisms to implement the European data strategy. The DGA defines a special set of principles for managing the provision of data exchange services (Article 11), organizes a compliance system for exporting data outside the EU (Article 30), and introduces rights that should ensure the implementation of "data altruism" (Article 19). Even a cursory analysis of these projects shows an attempt by the EU to become an active player in promoting the monetization of personal data. This is a radical shift in the EU's focus from protecting privacy to promoting data sharing. However, this shift strictly raises the question of the correct balance between the new laws that will be adopted based on the new strategy and the existing EU laws that have been adopted or interpreted by the CJEU in the context of data protection of the person. Of particular importance is the problem of coordinating the GDPR and the DGA,[3] as indicated in the joint opinion of the EDPB and EDP.[4] The most important concern is the possibility of maintaining the level of protection of personal data and the problem of further application of the GDPR as the most

[1] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final [online]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN

[2] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final [online]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1.

[4] EDPB-EDPS Joint Opinion 03/2021 on the Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act). (2021), p. 14.

influential legal instrument that has provided individuals with enhanced protection of information confidentiality.[5]

As stated in the Explanatory memorandum to the DGA proposal: "(...) the interplay with the legislation on personal data is particularly important. With the General Data Protection Regulation (GDPR) and e-Privacy Directive, the EU has put in place a solid and trusted legal framework for the protection of personal data and a standard for the world".[6] Although the DGA will not modify existing data protection rules, however, the goal set for this document by the European Commission can be achieved only if there is insufficient mutual coordination of these acts, and in particular with the GDPR.

The objective of this paper is to analyze the DGA proposal and the GDPR to identify possible inconsistencies between these legislative acts that may prevent the full implementation of mechanisms that allow achieving the intended EU goals. In addition, we will examine the relevant case law of the EU Court of Justice regarding the GDPR to identify approaches that prevent the opening of data exchange.

To achieve the research objectives, the researchers use several approaches to meet the complex issues of the paper. As a starting point (working with the set of relevant data/documents) we will utilize the analytical approach (the desktop research) in order to identify, systematize and mutually compare the provisions of the DGA and GDPR, key case-law of CJEU, its impact and interpretations. The researchers also use deductive approach while testing the hypotheses against the assembled data; inductive method while formulating the models of interpretation; comparative method, while comparing the provisions of appropriate legislative acts and judicial cases; synthesis, while working on the conclusions; prediction in evaluation and extrapolation of the future developments.

The research will try to find the answers for the following questions:

1. Are there any inconsistencies between the DGA and the GDPR, and the relevant case law of the CJEU, and if so, which are the main ones?
2. Will the DGA strengthen individuals' control over their personal information, compared to the GDPR?

[5] See also KOCHARYAN, H., VARDANYAN, L., HAMUĽÁK, O., KERIKMÄE, T. Critical Views on the Right to Be Forgotten After the Entry Into Force of the GDPR: Is it Able to Effectively Ensure Our Privacy? International and Comparative Law Review. 2021, vol. 21, no. 2, pp.96–115. https://doi.org/10.2478/iclr-2021-0015

[6] Proposal for a Regulation of the European Parliament and of the Council on on European data governance (Data Governance Act) COM/2020/767 final [nline]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0767

2. Regulation of data exchange before the adoption of the new European strategy

In the area of data exchange regulation, the EU's legislative activity is quite modest. This is primarily the Directive (EU) 2019/1024[7] and the RNPR.[8] But in comparison with the GDPR, these acts are somewhat secondary in the formation of the digital environment. Moreover, these acts do not detract from the value of the GDPR and do not enter into conflict with it.

The Directive (EU) 2019/1024 does not revoke the GDPR in accordance with Article 1 (paragraph 4). But it applies only to non-personal data and the level of protection of personal data remains unchanged. The main objective of the Directive (EU) 2019/1024 is to allow the free reuse of data held by national public sector authorities. Article 1 of the Directive sets out a set of minimum rules governing reuse and practical measures to facilitate reuse:

a) existing documents administered by the public sector authorities of the Member States;
b) existing documents belonging to certain state-owned enterprises; and
c) certain types of research data.

According to Article 12 of the Directive (EU) 2019/1024, it also restricts the ability of public sector bodies to enter into exclusive reuse agreements with private partners. However, the scope of the Directive is rather limited. It allows Member States to enact exclusion laws and generally does not apply to documents whose intellectual property rights are held by third parties.

According to Article 1 of the Regulation (EU) 2018/1807 aims to ensure the free flow of non-personal data. Article 4 prohibits Member States from introducing data localization requirements. Data should move freely, like goods, capital, services and labor. However, due to the breadth of the definition of personal data in Article 4 of the GDPR, almost any data can potentially become personal data. This means that Regulation (EU) 2018/1807 has limited application. The

[7] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector informationPE/28/2019/REV/1 [online]. Available at:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.172.01.0056.01.ENG

[8] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (Text with EEA relevance.)
PE/53/2018/REV/1 [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1807

above legal instruments are certainly not sufficient to ensure a free flow of data. It is the lack of effectiveness of existing tools for data exchange, as well as the consideration of data as a key asset for the European economy, that has led to the need for new regulation of this area.

3. Priority of the goal of protecting privacy in the GDPR in the case-law of the CJEU: will there be a review?

The CJEU plays a major role in personal data protection as their function is to interpret the EU law and thus also the EU legislation related to the personal data protection.[9] The shift in the EU's focus from protecting privacy to promoting data sharing means that it is possible to revise the approach developed in the EU's judicial practice to the interpretation of the GDPR with a key that provides a fundamental right to data protection. The Court will again face the difficult task of balancing the right to data protection and the free flow of data.

As is known the CJEU through its judicial practice has contributed to the transformation of the protection of personal data into a fundamental right, through the definition of the categorical apparatus used in the relevant legal acts,[10] obligations and responsibilities of the data processing parties, balancing data protection with other rights.[11] Many of the definitions used in the DGA, as in the GDPR, are broad and vague, thus giving the provisions a wide range of interpretation. There will be a clear need to clarify the basic definitions of the DGA.

In its judgments, in particular with regard to the laws governing the field of data protection, the Court has repeatedly emphasized, based on its case-law, that it considers the purpose and context to be the main principles of their interpretation.

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[9] PAVELEK, O., ZAJÍČKOVÁ, D. Personal Data Protection in the Decision-Making of the CJEU Before and After the Lisbon Treaty. *Baltic Journal of European Studies.* 2021, Sciendo, vol. 11(2), p. 167.

[10] Judgment of the Court of 6 November 2003.Criminal proceedings against Bodil Lindqvist. Case C-101/01.EU:C:2003:596; Judgment of the Court (Second Chamber) of 19 October 2016 Patrick Breyer v Bundesrepublik Deutschland Case C-582/14 EU:C:2016:779; Joint cases C-141/12 and C- 372/12; YS and M. and S. v Minister of Immigration, Integration and Asylum [2016], ECLI:EU:C:2014:2081.

[11] Judgment of the Court (Grand Chamber) of 6 October 2015 Maximillian Schrems v Data Protection Commissioner Case C-362/14 EU:C:2015:650; Judgment of the Court (Second Chamber) of 9 March 2017 Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni Case C-398/15; EU:C:2017:197, Judgment of the Court (Grand Chamber) of 5 June 2018 Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH. Case C-210/16. EU:C:2018:388.

In the judgement of the case of *Sergejs Buivids* (in paragraph 49) the Court states: "It must be observed, as a preliminary point, that, according to settled case-law of the Court, the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system which it establishes".[12] This also applies to the interpretation of the GDPR. But GDPR has a "Janusian" two-face goal: to ensure an equal level of protection of natural persons and the free flow of personal data throughout the EU and thus contribute to the functioning of the internal market. But the goal of promoting the formation of the internal market in the adopted hybrid model of the GDPR should still be considered secondary in the light of the case-law of the CJEU, as it gives priority to the goal of protecting the rights of individuals over the free flow of data.

In the cases of Schrems II,[13] *Wirtschaftsakademie*,[14] FashionID[15] and others the Court has already formed approaches for the predictability of subsequent enforcement and interpretation of the GDPR in the contest, namely, the purpose of protecting the rights of individuals. The Court's judgment in the case of *Google v. CNIL*[16] even allows for the further worldwide application of the right to be forgotten and is seen as an attempt to develop progressive case law to protect human rights in the digital age.[17] The enviable consistency of the CJEU interpretation in the context of the protection of the fundamental right to data protection should be pointed out. However, this predictability in a situation where the DGA will come into force can greatly hinder the enforcement of the DGA. The DGA has as its legal basis the article 114 of the TFEU. In accordance with this article, the EU must take measures to bring together the provisions established by law, regulation or administrative actions in the Member States

[12] Judgment of the Court (Second Chamber) of 14 February 2019. Sergejs Buivids v. Datu valsts inspekcija (C-345/17, EU:C:2019:131.

[13] Judgment of the Court (Grand Chamber) of 16 July 2020 Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems Case C-311/18 ECLI:EU:C:2020:559.

[14] Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH C-210/16, EU:C:2018:388.

[15] Judgment of the Court (Second Chamber) of 29 July 2019 Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV Request for a preliminary ruling from the Oberlandesgericht Düsseldorf Case C-40/17, ECLI:EU:C:2019:629.

[16] Judgment of the Court (Grand Chamber) of 24 September 2019 Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL).

[17] HAMUĽÁK, O., VARDANYAN, L., KOCHARYAN, H. The Global Reach of the Right to be Forgotten through the Lenses of the Court of Justice of the European Union. *Czech Yearbook of Public and Private International Law*. 2021, vol. 12, p. 211. See also HAMUĽÁK, O., KISS, L. N., GÁBRIŠ, T., KOCHARYAN, H. "This Content is not Available in your Country" A General Summary on Geo-Blocking in and Outside the European Union. *International and Comparative Law Review*. 2021, vol. 21, no. 1, pp. 153–183, https://doi.org/10.2478/iclr-2021-0006

that aim to establish and operate an internal market in the EU. At first glance, it may seem that this sets different goals for the GDPR and DGA. Maybe, but the GDPR enshrines individual rights, such as the right of access by the data subject (Article 15), the right to rectification (Article 16) and the right to erasure ("the right to be forgotten") (Article 17), which, together with the data protection rules, form a framework for protecting individual control over their data. The memorandum indicates that "Allowing personal data to be used with the help of a 'personal data-sharing intermediary', designed to help individuals exercise their rights under the General Data Protection Regulation (GDPR)".[18] It states: "Since personal data falls within the scope of some elements of the Regulation, the measures are designed in a way that fully complies with the data protection legislation, and actually increases in practice the control that natural persons have over the data they generate."[19]

The DGA is essentially supposed to create a human-centric approach for the digital single market and the data economy, by fostering data sharing mechanisms that benefit society and by allowing the sharing of public sector data for the common good. In this way, it should differ from DSA and DMA and approach the GDPR. Their identical protective approach for individuals can be observed in the mimesis of the GDPR in the DGA, as noted by Vagelis Papakonstantinou and Paul de Hert.[20] Especially when Article 2 of the DGA introduces a new unique set of terms: "data holders", "data users", "data" or "data sharing", which however correspond in many ways to "data subjects", "controllers", "personal data" and "processing" of the GDPR (Article 4). And it is quite easy to identify the "parallelism" of the DGA proposal text with the GDPR text. This suggests that it may also be aimed at promoting the fundamental right to data protection. Again, the same "two-faced" feature of the legal act, which transfers the weight of the choice of telos on the shoulders of the case-law of the CJEU. This is especially difficult in conditions where the DGA does not give an exact meaning and scope of itself.

After the entry into force of the DGA, the version currently proposed may also raise the question of reviewing this unambiguous choice of one goal by the Court out of the two proposed in the GDPR. In future, the Court will have to find a solution to reconcile the two almost mutually exclusive goals. The new policy

[18] *Explanatory memorandum of the proposed DGA* [online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0767

[19] Ibid.

[20] PAPAKONSTANTINOU, V., DE HERT, P. Post GDPR EU laws and their GDPR mimesis. DGA, DSA, DMA and the EU regulation of AI/ 1 April 2021 [online]. Available at: https://europeanlawblog.eu/2021/04/01/post-gdpr-eu-laws-and-their-gdpr-mimesis-dga-dsa-dma-and-the-eu-regulation-of-ai/

will require a delicate balance between unleashing the economic potential of data use while respecting personal data and other fundamental rights of EU citizens.

It is possible, of course, that a shift in the EU's focus from protecting privacy to promoting data sharing may force the CJEU to reconsider the human rights focus of the GDPR and revive its telos as a data market regulator. But this would mean crossing out the EU's already established judicial practice, which seems an unlikely scenario. In addition, such a change may have a negative impact on the level of privacy protection in the EU – a circumstance that the EU has always been proud of.

It should be noted that the text of the GDPR itself does not consider the protection of individuals as a restriction on the movement of personal data: "the free movement of personal data within the Union should not be restricted or prohibited for reasons related to the protection of individuals with respect to the processing of personal data" (Article 1). This provision may be one of the key loopholes for the Court to form an approach that approves the priority of data turnover over the protection of human rights in the digital sphere. But the task for the Court in any case will not be easy. Although the provisions of the GDPR concerning, for example, data security or data portability obligations directly contribute to the creation of data economy, the GDPR nevertheless restricts the processing of data and this is based on Article 5, on the principles of processing. According to the principle of purpose limitation, data may only be collected for certain, explicit and legitimate purposes, and may not be further processed in a manner inconsistent with the original purposes for which it was collected. In addition, the data minimization principle restricts processing to data that is adequate, up-to-date, and limited to what is necessary for the purposes of processing. These data protection principles are not easily reconciled with the idea of open data flows.

It seems that the appearance of a second human rights document regulating, among other things, the sphere that is already regulated by the provisions of the GDPR, should be aimed at improving the effectiveness and level of protection of personal data *inter alia* and the degree of control of the individual over their data, compared to the GDPR. But does the DGA increase the degree of protection that is provided through the implementation of the GDPR provisions? It appears that there is not, which will be shown in later in this paper.

And although it is impossible to understand its clear interaction with the GDPR from the text of the DGA proposal, it can already be stated that the judicial practice of the CJEU may also become an obstacle to the full application of the DGA and the achievement of its goals.

4. Introduction of the concept of "data altruism": there is no good without a hood

In Article 2(10) of the project of the DGA the term "data altruism" is defined as "(…) the consent by data subjects to process personal data pertaining to them, or permissions of other data holders to allow the use of their non-personal data without seeking a reward, for purposes of general interest, such as scientific research purposes or improving public services". From the definition from the very beginning, it can be concluded that data altruism is one of the specific models of consent to the processing and use of data, at least for data subjects. It is also clear that the drafters, through increased "data donation", wanted to prevent the commercialization of data exchange in the context of the expansion of the data market. At first glance, this is an expression of the EU's basic approach to the protection of personal data, and a continuation of the main meaning embedded in the GDPR and antitrust laws, through which the EU fights the commercial exploitation of private information.

But the picture changes if we point out the following. Firstly, the content of the legal definition of altruism is not disclosed in the DGA or in any other EU legislation. Secondly, the provision of Article 2 may also become a loophole for the commercialization of private information or the deception of data subjects in the field of personal data exchange, if it is considered in conjunction with Article 3 of the DGA, which makes it possible to reuse personal data without obtaining the consent of the data subject itself. The data obtained may then be commercialized by third parties without the knowledge of the individual providing the data. Third, regulation will further exacerbate the issue of the balance between respecting the fundamental right to protect personal data and sharing personal data for general "public interest" purposes. Fourth, according to the DGA, personal data can also be transferred and processed "altruistically" on the basis of an individual's consent, an area that is already regulated by the provisions of the GDPR with even stricter rules. In conditions where the provisions of the DGA do not provide for other additional rules that would increase the security of the processing of "altruistically" transferred personal data, this means that there is no duplication of the scope of competing data management regimes. In addition, the DGA may reduce the protection and guarantees provided for in the GDPR for personal data by creating *lex specialis* provisions that allow circumventing the strict provisions of the GDPR. This reduces the level of control of the individual over the use of personal information: the latter is known to be the main idea of the GDPR, which is considered an act that provides information self-determination of a person. The desire of the DGA to create an adequate mechanism by which

an individual can ensure that his/her data is used for the public good, and not just turned into a commodity for private profit, can only be called an aspiration.

5. A new model of consent?

The DGA introduces a single form of consent for altruism in relation to data. Article 22(3) states that: "When providing personal data, the European Data Altruism Consent Form must enable data subjects to give consent and withdraw consent to a specific data processing operation in accordance with the requirements (GDPR)". The advantages of this model include the possibility of harmonizing legislation in the EU Member States and facilitating the exchange of data within the EU. But the DGA does not specify, whether this consent mechanism should be considered as another requirement for the legitimate exchange of data and their processing of personal data, or should become an alternative model of consent – *lex specialis* – when the data is used for general interest purposes. It should be noted that in contrast to the DGA, the concept of consent established in the GDPR is clearly defined. So, Article 4(11) of the GDPR establishes that ""consent" of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

The EDPB also emphasizes the importance of detail in this matter: "If the controller has conflated several purposes for processing and has not attempted to seek separate consent for each purpose, there is a lack of freedom. This granularity is closely related to the need of consent to be specific".[21] In accordance with the GDPR, where Article 5(1)(b) establishes the principle of limiting the purpose of protecting data subjects, there are restrictions on the use of data by controllers. Personal data must be collected for specific, explicit and legitimate purposes and must not be further processed in a manner incompatible with them. Re-processing for other purposes is possible if the data subject again consents to it, as well as if the second purpose is compatible with the first. In this second case, a compatibility assessment must be carried out, requiring an assessment of very many circumstances, such as, for example, the context of the collection of personal data, the reasonable expectations of the data subjects regarding the reuse of the submitted data, the impact of the re-processing of the data on the data

[21] *Guidelines 05/2020 on consent under Regulation 2016/679 Version 1.1 Adopted on 4 May 2020* [online]. Available at: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf

subject itself, the safeguards adopted by the controller to ensure fair processing and to prevent any undue influence on the data subjects.[22] The DGA introduces a mechanism for reusing "protected public sector data". Moreover, such reuse is also possible in the case of personal data. Here again, one can see the overlap DGA with the GDPR, since the reuse of personal data is already regulated by the relevant provisions of the GDPR. The DGA allows data intermediaries to determine the purpose of data exchange and for personal data. However, this truncates to some extent the institution of consent. By allowing the reuse of personal data without clearly providing the same GDPR guarantees, the DGA weakens the protection provided by the GDPR. This is especially dangerous when one considers that the purpose of use may also be commercial, and according to article 6 public sector authorities may charge a fee for allowing the reuse of data. In addition, the DGA talks about consent in the context of altruism, but does not contain details, as does the GDPR, and increases the likelihood that in practice, when reused, the companies will have the opportunity to choose a model of the least detailed consent, as well as a goal different from the original, including commercial. Moreover, this may be acceptable for personal data. Therefore, we can agree with the view that the DGA does not properly take into account the need to ensure and guarantee the level of protection of personal data provided for by EU law and raises serious concerns from the point of view of fundamental rights.[23]

There is one more thing to be pointed out. Among the new definitions that the GDPR introduces, we would like to highlight the category of "permission of the data holder". At the same time, the DGA defines in Article 5 that ""data holder" means a legal person or data subject who, in accordance with applicable Union or national law, has the right to grant access to or to share certain personal or non-personal data under its control". Such a notion is problematic. First, it can be easily seen that a systematic interpretation of these rules can lead to a situation where the "permission" of the DGA and the "consent" of the GDPR become competing concepts. Besides, the joint opinion of EDPB and EDPS looks at the qualification of "permission" under art 6(1)(c) and (e) of the GDPR, which means that it would allow for the sharing/processing of data insofar as it constitutes a legal basis in the meaning of this article. But the concept of "permission" does not fulfil the criteria of Article 6(3) GDPR in order to qualify as a legal basis under Article 6(1)(c) and/or (e) of the GDPR.[24] Such inconsistency

[22] *Article 29 Data Protection Working Party, Opinion 03/2013 on Purpose limitation* [online]. Available at: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf

[23] Ibid 7.

[24] EDPB-EDPS Joint Opinion 03/2021 on the Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act). (2021), p. 14.

in the models of consent in human rights documents may reduce their potential to protect fundamental human rights. The purpose of data exchange should be clear from the beginning and data should only be collected to answer clear and pre-defined questions. In addition, data subjects should be able to dynamically consent to the collection/use of their data, as well as provide/withdraw consent as necessary. The role of a person should not be limited to consent to the use of their personal data. The initial consent may not be a sufficient condition for the subsequent exchange of data.

6. Problematic differentiation of personal and non-personal data

The correct definition of the relationship between personal and non-personal data is crucial for the application of EU legal instruments, as EU law involves the application of various legal acts to regulate the scope of personal data and non-personal data. The difference between personal data and non-personal data is also due to the material scope of the GDPR and the EU Regulation on the Free Flow of Non-Personal Data (hereinafter – the "RNPR"). The differentiation of personal and non-personal data was almost always problematic even before the DGA, for example, because of the extreme breadth of the concept of personal data specified in the GDPR, because of the "transitivity" of non-personal data to personal data, as indicated by the European Commission.[25] The researchers point out that a meaningful distinction between identifiable and unidentifiable information could not be more robust.[26] The same conclusion can be seen in the additional opinion of WP29: data is not identified, that is, anonymous, only when anonymization is irreversible.[27] The DGA has not resolved the issue of the ratio of personal and non-personal data. Moreover, the analysis of art 2(3) DGA shows that this difference is taken as the basis of DGA.[28] Based on this distinction, it

[25] European Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on the Regulation on a Framework for the Free Flow of Non-Personal Data in the European Union COM(2019) 250 Final' (2019), pp. 7, 10.

[26] NARAYANAN, A. and FELTEN, Ew. *No Silver Bullet: De-Identification Still Doesn't Work. 2014* [online]. Available at: https://freedom-to-tinker.com/2014/07/09/no-silver-bullet-de-identification-still-doesnt-work/; OHM, P. Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization. *UCLA Law Review*. 2010, Vol. 57, p. 1701 [online]. Available at: www.epic.org/privacy/reidentification/ohm_article.pdf

[27] Article 29 Working Party opinion 05/2014 on Anonymisation Techniques, 10 April 2014 (WP 216), pp. 3, 5–7.

[28] DGA, art 2(3).

often provides for different rules regarding personal data and personal data.[29] This is not a simple adoption of the legal approach already more or less established in EU law. This can be seen as the result of a growing awareness that data is a valuable resource, and the DGA, as the first EU legal instrument reflecting the EU's political trend towards a data economy, should seek to reflect the concept of data as things as deeply as possible, in order to unlock key innovations and promote economic growth within the EU. After all, as Charlotte Ducuing points out, with the recognition of different regulatory regimes for personal and non-personal data, the concept of "data as a thing".[30] Therefore, it is not logical to demand from the DGA an unambiguous solution to this problem. But the DGA does not just adopt the provisions that already exist in existing laws, but rather tries to redraw those provisions of the GDPR that are key, ideological for this document and for which this division between the regulation of personal and non-personal exists in EU law. For example, the DGA allows the reuse of data, including personal data, and at the same time allows, in accordance with article 6, public sector authorities to charge a fee for allowing the reuse of data, including personal data – a circumstance that was key for the adoption of the GDPR as a tool to prevent the commodification of personal data and protect privacy. But any new framework for data must take into account that data is not just an economic resource that needs to be turned into a commodity, and not an instrument of pressure against private players. It is inextricably linked with data subjects. And the DGA, which focuses on disclosing the economic value of data, ignores this fact. Meanwhile, in any case, data subjects should control their data, and it should not be considered simply as a resource for fueling "innovation".

It should be noted that it is difficult to determine when a part of the data will become personal and, therefore, when the regulatory regime should change.[31] This means that the DGA can contradict two legislative acts at once: the data can first be subject to the DGA in conjunction with the RNPR, and then be subject to the DGA in conjunction with the GDPR.

And there is one more thing. In nature, there are mixed data sets – these are data that consist of personal and non-personal data. They are not regulated as a single entity in EU law, but are regulated by different legislative acts – RNPR

[29] Articles 5(3), 5(11)-(13), 30 of the DGA.

[30] DUCUING, Ch. *The regulation of 'data': a new trend in the legislation of the European Union?* 06 April 2021 [online]. Available at: https://www.law.kuleuven.be/citip/blog/the-regulation-of-data-a-new-trend-in-the-legislation-of-the-european-union/

[31] GRAEF, I., GELLER, R., HUSOVEC, M., *Towards a Holistic Regulatory Approach for the European Data Economy: Why the Illusive Notion of Non-Personal Data Is Counterproductive to Data Innovation.* (September 27, 2018). TILEC Discussion Paper No. 2018-029 [online]. Available at: https://ssrn.com/abstract=3256189

and GDPR. The DGA also ignores the existence of the specified data category: it does not contain the concept of mixed data and does not provide guidance for the demarcation of data within a single data set. But ignoring the problem does not mean that it does not exist: the problem of the demarcation of personal and non-personal data within the same data set is still unresolved. The new European strategy is limited to a reference to the European RNPR Guidelines, without defining what a "mixed data set" means.[32] This link can be considered as "empty" because this concept is also absent in RNPR.[33] If the DGA is intended to regulate the data economy, it must necessarily contain strict legislative rules in this regard, especially when, as the European Commission points out, mixed datasets will make up the majority of data sets in the data economy.[34]

The absence of special rules in the DGA for mixed data does not mean that the DGA will not apply to this set. One can reason "by analogy": RNPR indicates that: "In the case of a data set composed of both personal and non-personal data, this Regulation applies to the non-personal data part of the data set. Where personal and non-personal data in a data set are inextricably linked, this Regulation shall not prejudice the application of Regulation (EU) 2016/679".[35] The data set is "inextricably linked" if their separation would be either impossible or considered by the controller to be economically inefficient or technically impracticable.[36] In the text, you can also find the provision that the DGA is without prejudice to GDPR. But what does it give the law enforcement officer to "change" one legal act to another, if the DGA does not contain any additional provisions regarding the use of non-personal or mixed data? Unfortunately, nothing. In addition, the provision under consideration from the very beginning makes it unclear whether the phrase "without prejudice" is solely a priority of the GDPR in the event of a conflict of its provisions with the DGA, if so, is the GDPR a priority in any situation of a conflict of the GDPR with the DGA? These are the questions to which the answer will not be found as a result of the analysis of the provisions of the DGA. The EDPB-EPDS joint opinion emphasizes that such a formulation of the DGA of the provision in question does little to avoid in practice a conflict

[32] European Commission, 'Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (2020), p. 6.

[33] European Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on the Regulation on a Framework for the Free Flow of Non-Personal Data in the European Union COM(2019) 250 Final' (2019), pp. 8–9.

[34] Ibid., p. 8.

[35] Article 2(2) of the RNPR.

[36] European Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on the Regulation on a Framework for the Free Flow of Non-Personal Data in the European Union COM (2019) 250 Final' (2019), pp. 9, 10.

between the GDPR and specific provisions of the DGA that may contradict the GDPR.[37] Note that fixing the unambiguous priority of the provisions of the GDPR in the event of a conflict is also not justified, since it will detract from the very meaning of the DGA and expand the already wide material scope of the GDPR, which will hinder the achievement of the goal that was set for the DGA. This is also problematic for achieving the goals of the DGA. The solution is development and legislative consolidation of conflict-of-laws rules regarding certain provisions and legal institutions.

7. The problem of the uncertainty of the concept of "common interest"

The DGA aims to establish a mechanism to encourage the development of the EU data space, where individuals and businesses should more effectively control the data they generate. At the heart of the DGA is the idea that access to data, and thus control over it will be facilitated by third-party "data sharing service providers". According to the DGA, these service providers must put in place procedures to ensure that data sharing preserves the public interest, including those related to data protection. If the protection of the public interest is an important duty for service providers, then the definition of what is the "public interest" becomes important both in terms of evaluating the proper performance of this duty, and in terms of implementing data exchange. Intermediaries thus have the opportunity to assess a particular interest as a public one, since the DGA does not define what is meant by a common interest and there are no legally established criteria for checking the presence or absence of such a "common interest". The only requirement in determining the "common interest" in this case may be the requirement of neutrality put forward in the DGA. But even this may not protect against practices that may be presented as having a public purpose, but in fact also have a commercial element, such as in the use of data as a result of the commercialization of research results.

In addition, it is somewhat problematic how data intermediaries will act when the public interests themselves will conflict. The next problem that arises from the ambiguity of the concept of public interest is related to the prohibition of an agreement or other practices related to the reuse of "protected data" held by public sector bodies that would grant exclusive rights or restrict the availability of data for reuse by entities that are not parties to such agreements. Having provided

[37] 'EDPB-EDPS Joint Opinion 03/2021 on the Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act)' (2021), pp. 6, 9.

for this provision, the DGA provides for a derogation, according to which the exclusive right to re-use data can be granted to the extent necessary to provide a service or product "in the general interest". This can create an exception that is too broad. Therefore, we suggest defining the concept of "common interest" or a list of criteria that must be met in order for a service or product to be considered "in the common interest" and can use this exception.

8. Conclusion

The paper shows that the EU legislation adopted before the new European Strategy did not sufficiently stimulate the creation of data market and extensive data exchange. This was also due to the CJEU's particularly sensitive attitude to the problem of protecting confidentiality and personal data, which is also indicated by the choice of the protection of personal data as the GDPR's telos. The shift in the EU's focus from protecting privacy to promoting data sharing, outlined in the new European Strategy, could seriously affect the CJEU's already established precedent practice. In order to reconcile the objectives of these two regimes, consistent work is needed, which may be carried out, among others, in the legal practice of the CJEU. Despite the desire through the DGA to adopt a human-centric approach for the digital single market, the risk of a collision between the DGA and the GDPR regimes may reduce the level of individual control over the use of personal data compared to the GDPR.

The paper also shows that the DGA's interaction with the GDPR is problematic and is characterized by a number of legal uncertainties that can jeopardize the achievement of the DGA's goals. These are the divergence of definitions between the GDPR and the DGA, the problematic demarcation of personal and non-personal data, which is not solved by the DGA, but is taken as the basis of regulation, the lack of a clear basis for the processing and reuse of personal data in accordance with the DGA, etc. A more precise legislative definition of the conceptual framework used, or the development and consolidation of appropriate criteria for evaluating broad legal categories, will be a significant step towards a clearer relationship between the GDPR and the DGA. The uncertainty of the legal concepts used in the DGA, such as "data altruism" or "common interest", and the problematic relationship of consent models, can reduce the protection and guarantees provided for in the GDPR for personal data and make it possible to circumvent the strict provisions of the GDPR, thereby weakening the guarantees for the implementation of the information self-determination of a person. As a recommendation in this case, it can be proposed to exclude the possibility of re-use of personal data from the scope of Article 3 of the DGA.

It remains to be seen whether Europe's vision of becoming a digital leader in the face of the potential conflicts that have arisen between the DGA and the GDPR can actually be achieved. But it is clear that Europe should become a digital leader while maintaining strong protection of rights and fundamental values and retreat from its leading role in the field of data protection.

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Judgment of the Court (Grand Chamber) of 5 June 2018. Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH. Case C-210/16, EU:C:2018:388.

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Streisand Effect in the Context of the Right to be Forgotten*

Martin Mach**

Summary: This article discusses the Streisand effect in Right to be forgotten. Since this is a highly undesirable phenomenon, the article seeks to answer questions that reveal its frequency and the chance of its manifestation, thus answering the questions of how common the Streisand effect in right to be forgotten is; and it seeks and analyzes the variables that affect the chance of the Streisand effect. To find answers, the article draws on court decisions and also uses the insights of authors working on similar topics. Thus, each variable is justified and shown in a specific real case. The article concludes with a look at the possible increase in the Streisand effect in the future.

Keywords: Right to be forgotten, Streisand effect, Data protection, Mario Costeja Gonzáles, European Court of Human Rights

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1. Introduction

Regulation 2016/679 of the European Parliament and of the Council (GDPR)[1] brought a significant change in the area of personal data protection in the form of the right to be forgotten. This is a right that allows individuals to defend themselves against a breach of their privacy by having personal information removed from Internet search results within the European Union. However, this relatively new right faces many challenges that only emerge in the practical implementation

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

of this right. One of the most problematic challenges for a right that is supposed to ensure the protection of an individual's privacy is an opposite phenomenon, where, on the contrary, the facts are publicized and thus become known to the general public. This has become popularly known as the Streisand effect, and it is a highly undesirable phenomenon in the context of the right to be forgotten. Probably the most famous judgment related to the right to be forgotten is Case C 131/12 *Google Spain v. AEPD and Mario Costeja González*[2] from 2014. Mario Costeja González, a Spanish lawyer, originally wanted two notices mentioning the auction of his property due to social security debts to be removed from the website of the *La Vanguardia* newspaper, or at least that these notices not be findable through a search engine. This case will be mentioned several times in the present paper as it is a case that initially had a significantly low potential for the manifestation of the Streisand effect, but one of the variables mentioned in the paper made this case the most famous one in the context of the right to be forgotten. A similar situation where confidential information has come into the public domain through a lawsuit is the case *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, which is also discussed by Hovspep Kocharyan and team of authors.[3] Of course, the Streisand effect has manifested in several cases, such as the decisions of the European Court of Human Rights *Fuchsman v. Germany*[4] and *Węgrzynowski and Smolczewski v. Poland*, or the dismissal of the action filed by brothers Wolfgang Werlé and Manfred Lauber. These well-known cases may thus have a negative impact on the requesters themselves in exercising their right to be forgotten, as they might fear greater publicity for a fact which they are, on the contrary, trying to hide. This is a distinct negative phenomenon associated with the right to be forgotten. In this paper, the author will focus on and analyse the variables that affect the chances of the Streisand effect occurring and will present them using the judgments of the Court of Justice of the European Union and the European Court of Human Rights. For the purpose of this paper, the Streisand effect is defined as a phenomenon where information is disseminated to a larger number of recipients due to an active approach taken by the requester. A passive approach, or accidental dissemination of information to a larger number of recipients, is not considered by this article to be an example of the Streisand effect precisely because of the absence of an active approach by the requester.

[2] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C131/12, ECLI:EU:C:2014:317.

[3] KOCHARYAN, H., VARDANYAN, L., HAMUĽÁK, O., KERIKMÄE, T. Critical Views on the Right to be Forgotten after the Entry into Force of the GDPR: Is it Able to Effectively Ensure our Privacy? *International and Comparative Law Review*. 2021, vol. 21, no. 2, pp. 96–115, DOI: 10.2478/iclr-2021-0015

[4] *Fuchsmann v Germany*, App no. 71233/13, European Court of Human Rights.

2. Streisand effect in the context of the right to be forgotten

When the American actress and singer Barbara Streisand, after whom the Streisand effect is named, tried to have a photo of her residence, including the designation of the house, removed from a publicly accessible database on the grounds of invasion of privacy, she on the contrary achieved great publicity for the photo of her house and her efforts to have it removed. This led to huge interest in the photo of her house, as evidenced by the fact that before the lawsuit against the photographer Kenneth Adelman,[5] the photo had only four downloads, two of which were by Streisand's attorneys, but after the lawsuit there were more than 420,000 downloads.[6] Moreover, the actress lost the case and had to pay $177,000 in attorney fees to Kenneth Adelman. This move also had a detrimental impact on her public relations, as she had been considerably popular among the public up to this point. This could serve as a deterrent example for requesters seeking to exercise their right to be forgotten.

For this paper, it is also important to mention an international study that sought to track down requesters who requested removal of 283 articles on the grounds of the right to be forgotten.[7] Of that number, they were able to find 80 requesters who had requested the removal of 103 articles out of the 283 mentioned above. Therefore, the right to be forgotten is not absolutely certain and even if a requester is successful, it is still possible to track down the "removed" articles and link them to a specific person, and in some cases, the requesters themselves bring to the public's attention personal information that would otherwise go unnoticed. This raises certain questions. Firstly, is the Streisand effect in the context of the right to be forgotten so common that it constitutes a significant interference with the application of this right? Secondly, can the variables that increase the chances of this effect be identified and described so that they can be avoided or minimized as much as possible?

In order to answer these questions, it is necessary to first discover and identify the variables that may influence this effect. The identification of each variable was obtained by the author through research by analysing and comparing each right-to-be-forgotten case and other cases included in the paper. Cases were

[5] *Barbara Streisand Vs. Kenneth Adelman Et. Al.*, Case No. SC077257, Superior Court of California, County of Los Angeles.

[6] CHIPIDZA, W., JIE, Y. *"Does Flagging Potus's Tweets Lead to Fewer or More Retweets? Preliminary Evidence from Machine Learning Models",* pp. 18 [online]. Available at: https://osf.io/preprints/socarxiv/69hkb/

[7] XUE, M. The Right to be Forgotten in the Media: A Data-Driven Study. *Proceedings on Privacy Enhancing Technologies*. 2016, vol. 6, no. 4, pp. 1–14.

selected to include real situations that may be similar to those of requesters claiming the right to be forgotten in the future. According to the author's research, three key factors influence whether the Streisand effect will be manifested for a requester claiming the right to be forgotten:

1) the extent to which the requester is a public figure;
2) the type of information the requester wants to hide;
3) the requester's actual actions.

In the next section of the paper, the author will discuss each variable in detail and also justify why and how it affects the chances for the Streisand effect to occur. Apart from these variables, however, it is important to note that the rule "*The Internet never forgets*" also applies. For anything that appears on the Internet, its complete removal from the Internet in future can never be guaranteed. Moreover, complete removal of content from the Internet is technically and legally impossible in practice today, as the right to be forgotten includes the obligation for search engines to delete search results, but there is no obligation that the content itself be removed from all Internet sites where the information is located.[8] Even personal information that is on the Internet and currently has a low potential for the Streisand effect may become public knowledge in the future for a number of reasons. An example of a fact partly related to the first variable is when an individual becomes a public figure only later. He or she comes into greater public scrutiny and the public is able to track down information from that individual's past.

An example of this is two *American Idol* contestants who made it to the "TOP 32" but were subsequently eliminated from the competition, because their names becoming public brought to light the fact that they had been arrested in the past.[9] The second variable may be related to the example of Jacqueline Laurent-Auger, who made an adult video when she was young and became a teacher later in life. Due to her profession, this was viewed as a major transgression against social expectations of morality and the school did not renew her employment contract.[10] The author gives these examples only so that readers understand that whatever is put on the Internet, it is there to stay. The fact that the person whose personal information is on the Internet does not currently see it as an invasion of his or her privacy does not mean that he or she will not

[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, where the definition of „*data processing*" includes „*searching*", Article 17 and article 4 paragraph 2.

[9] JONES, M. L. *Ctrl + z the right to be forgotten*. New York: New York University Press, 2016, pp. 1–2.

[10] JONES, M. L. *Ctrl + z the right to be forgotten*. New York: New York University Press, 2016, pp. 4.

come to view it differently in the future. However, this paper does not address this topic further as the fact that the information in question becomes known in the future is not, in the author's view, directly related to the right to be forgotten in the form of the Streisand effect. However, other authors have addressed this topic in greater detail.[11]

For public figures, the likelihood of the Streisand effect increases with the degree to which the figure is well-known among the public. Public figures and invasion of their privacy through the disclosure of personal information to the public is a long-standing topic in the scholarly community, with a large body of research presented, and not only in the field of law but also in philosophy, ethics, and journalism. As early as 1999, the British scholar Matthew Kieran, currently Professor of Philosophy and the Arts at the University of Leeds, distinguished three categories of public figures, and for each of them he distinguished and assumed a different level of protection against privacy invasion in the form of disclosure of personal information to the public.[12] For the purposes of this paper, however, it is sufficient to define a public figure as one who has come to public attention by virtue of his or her own activities. Therefore, for the purposes of this paper, the author does not consider public figures to include their family members, as they are not in the public eye by virtue of their own actions. The same position was taken by the European Court of Human Rights which, in its judgment in the *Krone Verlag v. Austria* case, stated that what matters is not the extent to which a person is actually known to the public but whether that person enters the public eye through his or her own actions.[13] Therefore, the author does not consider the Spanish lawyer Mario Costeja González (*Google Spain v. AEPD and Mario Costeja González*) to be a public figure because he was not as well known to the public as, for example, politicians, actors, athletes, and other public figures are. The chance of the Streisand effect is thus as likely for him as for any average public figure, for whom legislation pays more attention to privacy and protection of personal information. This means that information about him will only have a local reach, and thus significantly fewer people will directly link the information with his person. Conversely, a publicly known actress will have a global reach and therefore there is a chance of the Streisand effect occurring for her.

[11] For example: MYERS, C. Digital Immortality vs. „The Right to be Forgotten ": A Comparison of U.S. and E.U. Laws Concerning Social Media Privacy. *Romanian Journal of Communication & Public Relations*. 2014, vol. 16, no. 3, pp. 47–60, or MAYER-SCHÖNBERGER, V. *Delete: The Virtue of Forgetting in The Digital Age*. Princeton: Princeton University Press, 2011.

[12] KIERAN, M. *Media ethics: A philosophical approach.* Westport: Praeger Publishers, 1999, pp. 77–81.

[13] *Krone Verlag Gmbh & Co. KG v. Austria*. Case No. 34315/96, European Court of Human Rights.

Another important factor influencing the likelihood of the Streisand effect is the type of information the requester is asking to be removed from search results. Information that contains a significant transgression against societal expectations of morality has a greater potential for the Streisand effect. It is much easier to track down and identify a requester who has information on the Internet about, for example, sympathizing with or being a member of an extremist movement[14] or information related to a crime. Again, the more serious the transgression, the more societal expectations of morality have been violated and the greater the chances of the Streisand effect occurring. However, it should be kept in mind that this assessment is highly subjective and always depends on the society in question. Several factors come into play for the evaluation of transgression here, and the same or similar transgression may be judged as significant by one individual and judged considerably more leniently by another. The assessment of the seriousness of the transgression may differ based on the social status of the individual, his or her occupation, and other factors that influence this assessment. Misconduct that is tolerated in society in professions that are not seen as socially significant is judged much more harshly in the case of politicians, police officers, or teachers, for example. An example of this can be seen in the aforementioned case of teacher Jacqueline Laurent-Auger.[15] Although the case of Mario Costeja González involved a lawyer, the transgression against societal expectations of morality was not significant enough to have much potential for the Streisand effect to occur. Quite logically, the preceding sentence begs the question of how it is that the case of Mario Costeja González is so familiar to the public, not only the professional but also the lay public, when this case does not show a high probability for the Streisand effect to occur for both of the aforementioned variables.

To answer this question, we need to mention a third variable that affects the likelihood of the Streisand effect occurring, which are the actions of the requester claiming the right to be forgotten. Although Mario Costeja González was not a public figure with a large social impact, nor did the information for which he requested removal show a significant violation of societal expectations of morality, the Streisand effect in this particular case may have been due to the fact that Mario Costeja González surprisingly refused to anonymize his personal information in a published court order after winning the case. Paradoxically, on

[14] SCRIVENS, R. and coll. *Detecting Extremists Online: Examining Online Posting Behaviors of Violent and Non-Violent Right-Wing Extremists* [online]. Available at: https://www.researchgate.net/publication/354626128_Detecting_Extremists_Online_Examining_Online_Posting_Behaviors_of_Violent_and_Non-Violent_Right-Wing_Extremists

[15] JONES, M. L. *Ctrl + z the right to be forgotten*. New York: New York University Press, 2016, pp. 1–2.

the one hand, he achieved what he demanded, on the other hand, he brought the same information to the attention of the professional public across continents. The newspaper *La Vanguardia*, whose website featured the article contested by Costeja González, is the fourth best-selling newspaper in Spain.[16] Moreover, the text is written in Castilian and more than 60% of readers are located in Spain.[17] Consequently, significantly fewer people could have read the article originally, before it had been publicized, because it was necessary to know the language and to be aware of the existence of *La Vanguardia*. After the judgment, the information in the article appeared in several places in different languages, making it more accessible to the public. It also made the information more interesting to the public. For the time before the case was heard by the Court of Justice of the European Union, Google Trends does not record searches for the keywords "*Mario Costeja González*" or "*Costeja González*". The onset of searches is only apparent from the time of the court's judgment, and the interest continues to this day in searches.[18] The case has also become frequently cited in academic publications. Thus, in the case of *Google Spain vs. Mario Costeja González*, the Streisand effect can be demonstrably confirmed. Other related examples associated with the third factor include placement of personal information on the Internet, most often social networks, by the users themselves. Specifically, this happened to Stacy Snyder, who posted on the social networking site Myspace a photo of herself wearing a pirate hat and drinking from a plastic cup with the caption "Drunken Pirate". Because of this post, which she put online herself, she was then denied her teaching degree days before graduation.[19] This variable also contributes significantly to the probability for the Streisand effect to occur. An individual who publicly provides his or her own personal information, or does not adequately protect it, is less likely to hide his or her personal information retrospectively. Related to this point is the fact mentioned above, namely that whatever information is put on the Internet can never be guaranteed to be completely removed from the Internet in the future. Even the right to be forgotten, a powerful legislative instrument for the protection of personal data of European Union citizens, cannot, by its very nature, fully remove the requested information from the Internet. However, by removing the results from search engines, it can

[16] Similiarweb.com [online]. Available at: https://www.similarweb.com/top-websites/spain/category/news-and-media/

[17] Similiarweb.com [online]. Available at: https://www.similarweb.com/website/lavanguardia.com/#overview.

[18] Google trends. Available at: https://trends.google.as/trends/explore?q=costeja%20gonz%C3%A1lez&date=all

[19] JEFFREY R. The Web Means the End of Forgetting [online]. Available at: https://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html

make this information more difficult to access for other users. Nevertheless, a significant portion of the responsibility lies with the users themselves to try to protect their privacy and their personal information that they do not want to share with others, thus avoiding situations where they would need to claim the right to be forgotten or even expose themselves to a possible Streisand effect in connection with their personal information.

By defining the variables affecting the probability of the Streisand effect, it is useful to look at the Streisand effect itself in practice because, while in theory one can determine the probability of the effect's occurrence, in practice it may differ from the probability for the effect to occur. In any case presented, variables can be found and evaluated to determine whether or not the Streisand effect will occur. In practice, however, there may be situations where the chances for the Streisand effect were high but the effect ultimately did not manifest. Conversely, a case with a low chance of the Streisand effect in practice may contain this phenomenon. As of September 2021, nearly 1.2 million users have filed a right-to-be-forgotten request with Alphabet, owner of the most-used Internet search engine Google, to have their search results deleted. In total, they have requested the removal of nearly 4.5 million links to specific URLs.[20] While some requesters have made a request to remove multiple links in the search engine, it can be assumed that this concerns duplicates of the same information they want to hide in the search engine results across multiple websites rather than removing multiple pieces of information. However, despite the millions of requests, no significant trend in the Streisand effect can be observed. On the other hand, it should be stressed that the Streisand effect only concerns the awareness of the general public. As demonstrated by the study "The Right to be Forgotten in the Media: A Data-Driven Study" by a team of authors from China, Brazil, and the USA,[21] both the requester and the personal information he or she wants to hide from the search engine can be traced back again. As mentioned earlier in the post, this is possible due to the fact that only the link in the search engine is removed, while the information itself is not deleted from the Internet. However, the actual retrieval and association of the requesters with the removed links cannot be taken as the Streisand effect because the information did not come to the attention of the general public spontaneously. Rather, it took targeted research to discover these connections, and even though it was a targeted search by a team of authors who followed a methodical approach, they were still unable to link the requesters to the information with a 100% success rate. While there are cases mentioned

[20] Transpareny Report [online]. Available at: https://transparencyreport.google.com/eu-privacy/overview

[21] XUE, M. The Right to be Forgotten in the Media: A Data-Driven Study. *Proceedings on Privacy Enhancing Technologies*. 2016, annual 6, No. 4, pp. 1–14.

in the paper that may appear to involve the Streisand effect in the context of the right to be forgotten, the only really known case that has demonstrably involved the Streisand effect in connection with the right to be forgotten is *Google Spain v. AEPD and Mario Costeja González*.[22] It is quite paradoxical that the Streisand effect in this case is directly due to Mario Costeja González, who refused to anonymize his case. Although the Streisand effect is not currently widespread in connection with the right to be forgotten, there are chances for the effect to manifest itself. However, due to the low numbers of case-law judgements related to the right to be forgotten, only one case is known and there is always a threat of it appearing in future cases. A positive point is the search engine's first-instance decision whether to keep or remove the information in question, as this reduces the number of applications that have to be decided by the court and thus also the risk of the Streisand effect. Alphabet, the owner of Google, the largest search engine, has a form available for such cases and a team to deal with such requests.[23] Through these forms, it has granted more than 2 million requests, i.e. slightly more than 50% of the requested removal of URLs[24] it has accepted as legitimate, and has deleted the requested search results themselves. The first-instance decisions on requests to delete search results as a positive part of the process in the right to be forgotten is considered in this paper only in terms of the Streisand effect under investigation; some authors of studies consider this decision-making to be negative from a legal perspective.[25] Some members of the United Kingdom's House of Lords were of the same opinion.[26]

3. Conclusion

Since 2014, European Union citizens have been able to request the deletion of search results from search engines for information they consider their personal information if they demonstrate a legitimate interest in having it removed from

[22] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C131/12, ECLI:EU:C:2014:317.

[23] Request form for removal of personal data [online]. Available at: https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&visit_id=637677606071761815-1818041994&rd=1

[24] Google Transparency report. Request for removal of content under EU privacy rules [online]. Available at: https://transparencyreport.google.com/eu-privacy/overview.

[25] See for example: LEE, E. „Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten." *UC Davis Law Review*. 2015, vol. 49, No. 3, pp. 1017 – 1096.

[26] HERN, A. Lords Describe Right to Be Forgotten as „unworkable, unreaseonable, and wrong" [online]. Available at: https://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable.

search results. This right, found in the GDPR,[27] is called the right to be forgotten. Thus, the requester, on his or her own initiative, "hides" some of his or her personal information from the public. However, the direct opposite of this right is what is called the Streisand effect. Here the requester, on his or her own initiative, inadvertently makes known to the public information about himself or herself that he or she considers personal and does not want to share with anyone. The paper focused on the possible manifestations of the Streisand effect in connection with the right to be forgotten. Specifically, it addressed the question of how much of an intervention the Streisand effect is in the right to be forgotten and whether variables can be defined that affect the chances of the Streisand effect manifesting in connection with the right to be forgotten, both positively and negatively. The paper begins by asking whether it is possible to identify and describe what variables increase the chance of this effect so that one can avoid or try to minimize them as much as possible. The paper answers these questions in the first half, where it names and describes the variables that affect the chances for the Streisand effect to occur. These are three key factors: to what extent the requester is a public figure; the type of information the requester wants to hide; and the requester's own actions. Beyond these three variables, however, there is also the nature of the Internet itself to consider. Any information, photograph, video, or other content placed on the Internet can never be completely removed from there. Due to the sharing and copying of content, the removal of the original uploaded content from the Internet cannot be considered as removal from the Internet, as there is a high probability that the content thus uploaded is already circulating on the Internet on other websites and platforms. Therefore, it is possible to assess the risk of the Streisand effect occurring as of a given date, but a zero chance that the effect will occur cannot be ensured because it is not possible to guarantee nor to technically or legally enforce that the personal information in question will cease to exist on the Internet. Therefore, there will always be a chance that the Streisand effect might occur. The second half of the paper then addresses the question of whether the Streisand effect is so common in connection with the right to be forgotten that it constitutes a significant interference with the application of this right. In seeking an answer to this question, the paper then concludes that it is not currently a frequent phenomenon, and thus not a significant interference with the application of the right to be forgotten. Emphasis should be placed on the word "currently", however, as the Streisand effect is not presently widespread due to the small number of judgments of the Court of Justice of the European Union.

[27] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC, Article 17.

However, an increase in judgments can be expected over the next few years due to the right having existed for longer and been used more, and parallel with this the Streisand effect could appear in more cases. A special category then may be the Streisand effect in the case of the deceased, where the survivors will try to delete some information. This is because the right to be forgotten Post-mortem is not legislated for.[28] Therefore, it is advisable to address this phenomenon now in an effort to eliminate or minimize it in the future. However, the disadvantage remains that the occurrence of the Streisand effect is highly dependent on the individual concerned and not on the legislation.

The right to be forgotten allows individuals to defend themselves against a breach of their privacy by having personal information removed from Internet search results within the European Union. A problematic aspect for a right that is supposed to ensure the protection of an individual's privacy is when the opposite occurs, i.e. the facts are publicized and thus become known to the general public. This is known technically as the Streisand effect, and this paper deals with the Streisand effect in connection with the right to be forgotten. More specifically, it looks for and analyses the variables that influence the possible manifestation of the Streisand effect in connection with the right to be forgotten. In the following part of the paper, the author addresses the question of whether this is currently a frequent phenomenon in the context of the right to be forgotten, and thus a significant interference with this right, or whether it is only a minimum manifestation. The author also presents his prediction of the future development of the Streisand effect in connection with the right to be forgotten.

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The European Union on Cross-Roads: an Overview of Post-Lisbon Crises and a Way Forward

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Summary: The main aim of this chapter is to make a brief and comprehensive overview of various events of crises across the EU member states that arose in the period from the adoption of the Lisbon Treaty until the end of year 2020. The chapter first, examines the period of crisis in the EU after the adoption of Lisbon Treaty and before BREXIT which includes: economic and debt crisis, euro-zone crisis, Ukrainian crisis and migration crisis. The next part of the chapter looks at BREXIT as "another serious test for the EU". In the third stage, the chapter looks at the most recent crisis the EU is facing as a consequence of global spread of COVID19 virus in the world and examines various options for further potential cooperation of member states in this new area. In this part chapter looks at the scope of EU competences and explores measures adopted by the EU since the beginning of the pandemic. In its conclusions the chapter looks at various options and scenarios of further potential developments the "European union on crossroads" at the end of year 2020. This includes reflections on various (and often contradictory) views and arguments on the shape of future euro integration process.

Keywords: European Union, Lisbon Treaty, BREXIT, Crisis, COVID-19.

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1. Introduction

The idea of the European integration was formulated and declared 70 years ago by Robert Schuman, Minister of Foreign Affairs of France, supported by Konrad Adenauer, the Chancellor of the Federal Republic of Germany as well as by Alcide the Gasperi, the Prime Minister of Italy, joined by others. The three founding fathers – Christian democrats with high moral imperatives who believed that Christian values together with the great ideals of enlightenment would function for uniting European nations and for creation of free space of economic stability, prosperity, security and justice.

The project of the European integration was built on sound basis, stemming from values of the three founding fathers – exceptional personalities with no personal ambitions or self-seeking interest behind their political actions. They wished to unite the sovereign nation states of Europe. This unification should be based on voluntary natural need for cooperation, instead exercising centrally regulated control over them. This is one of the reasons why, after decades of the Cold War the concept of unification became attractive for the states from the Central and Eastern part of Europe. Between 2004–2012 thirteen of these states joined the European Union[1] and other countries probably will follow in the years to come.

Seventy years of the European integration, started by the Schuman Declaration of 9 May 1950, might be perceived as decades of successes, but also various challenges. The end of year 2020 has brought the European Union back on cross-roads. It might seem that various challenges and events of crisis that appeared in EU in the past decade, almost immediately after adoption of the Lisbon Treaty, are also a test of both the unity of EU27 Member States, already without the UK in the EU, as well as a test of confidence of citizens in the common EU project.

The main aim of this chapter is to make a brief and comprehensive overview of various events of crises across the EU member states that arose in the period from the adoption of the Lisbon Treaty until the end of year 2020. The chapter first, examines the period of crisis in the EU after the adoption of Lisbon Treaty and before BREXIT. This includes a brief look at: economic and debt crisis (euro-zone

[1] In 2004 (1 May) the EU was enlarged by 10 countries.

crisis), Ukraine crisis and migration crisis. In the next stage the chapter examines BREXIT as "another serious test for the EU". In the third stage, the chapter briefly looks at the most recent crisis the EU is facing as a consequence of global spread of COVID19 virus. In the conclusions the chapter looks at various options and scenarios of further potential developments the "European Union on crossroads" at the end of year 2020. This includes reflections on various (and often contradictory) views and main arguments on the shape of future euro integration process.

As rightly noted by Dinan "*crises are nothing new on the trajectory of the European integration*". He offers an extensive overview to history of crises in Europe before 2017. The term "*crisis*" can be defined as "*any event that is going (or expected) to an instable and dangerous situation, affecting an individual, group, community or the whole society*"[2]. This might concern economics, politics, security, social, environment, energy, or other areas in the society. Crises start at various circumstances. For the purpose of this chapter we will focus on observing the most evident consequences of crises that emerged after the adoption of Lisbon Treaty, rather than on profound reflection on the circumstances at which the respective events of crisis emerged. We share the view of Dinan, Nuggent and Patterson who point out to the "*multi-dimensional*" element of crises that emerged after 2009, "*spanning politics and economics, touching on cultural and identity issues and covering both internal and external affairs*", emphasizing the "*unprecedented nature of the current crisis*"[3]. The crisis had very close links to EU leadership, solidarity principle, decision making[4].

The aim of the sub-chapters 2, 3 and 4 is to offer an overview of crises and the "cross-roads" the EU has been facing in the period after the adoption of Lisbon Treaty and before the BREXIT. This will include a brief retrospective look on economic and debt crisis, Ukrainian crisis and migration crisis. The aim of sub-chapter 5 is to take a brief look on BREXIT as "another tests for the EU" and explore selected views on the concept of sovereignty. Finally, the sub-chapter 6 looks at the first year of global attack of pandemics COVID-19 on the EU – looking at the scope of EU competences and exploring measures adopted by the EU since the beginning of the pandemic.

As shown in table 1, all events of crises the EU was facing after the adoption of Lisbon treaty have an external as well as an internal dimension: depending on whether the factors contributing to crisis originated inside (internal factors) or outside (external factors) of the EU supranational decision making.

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2 LIDELL, H. G., SCOTT, R. *κρίσις. Perseus: A Greek-English Lexicon.* 2020 [online]. Available at: http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0057:entry=kri/sis

3 DINAN, D., NUGENT, N., PATTERSON, W. *The European Union in crisis*. Palgrave, 2017. 395 p.

4 Compare NOVÁČKOVÁ, D. *Organizácia a manažment inštitúcii Európskej únie.* Eurounion, Bratislava 2008.

EVENT OF CRISIS (starting year)	INTERNAL FACTORS (including supranational decision making)	EXTERNAL FACTORS (outside of the supranational decision making)
Economic and debt crisis (2010)	Rules governing the functioning of euro-zone breached by the EU member states that initiated them, followed by other member states;	After WW2 constant and gradual increase of debt in most EU countries, in particular in Greece; Global financial crisis – start in the US in 2007;
Migration crisis (2015)	EU´s failure to control its own external borders; Mass migration as a consequence of "open door" political messages and initiatives encouraging mass migration (to great extent irregular) without free common consensual decision across EU Member States; EU´s failure to sufficiently prevent these conflict in the countries/ regions;	External military interventions causing conflicts and instability in the region;
BREXIT (2016)	Failure of EU institutions and national (including UK) representatives to convince UK citizens about benefits of the EU membership; EU tendency for centralized policy and decision making ("Ever closer union");	UK politics (Cameron´s referendum as a part of pre-election campaign); UK´s traditional emphasis on "independence", opposing tendencies of further centralisation of EU decision making; UK referendum on withdrawing the EU with final "yes" result;
Ukrainian crisis (2016)	Association Agreement between EU and Ukraine (proposed by EU);	Russia – US/EU relations – opposite/rivalry geopolitical interests; Ukraine in-between of these interests;
COVID-19 crisis (2020)	Unpreparedness of EU member states; Lack of coordination among member states and their potential EU policies;	Disputes on origin of the virus – affecting international relations; Global, uncontrolled impact of COVID-19 on EU and the rest of the world; Part of politics and pre-election campaigns (US);

Table 1: Internal and external factors that contributed to respective events of crises involving EU after the adoption of Lisbon Treaty (2009–2020); Source: own elaboration;

2. Economic and debt crisis

Bondarenko defines debt crisis as "*a situation in which country is unable to pay back its governance debt. A country can enter into a debt crisis when the tax revenues of its governments are less than its expenditures for a prolonged period*"[5].

The economic and debt crisis whose impact in the EU was visible in the end of 2009 can be perceived from two main points of view – first, from the external origin of crisis (US financial crisis); second, from the internal point of view of EU decision makers who decided on how to react to it. Generally, by the economic and debt crisis is understood to be connected to global financial crisis started in the US in 2007 as a consequence of subprime mortgage affecting primarily the banking sector – in the first stage in the US, in the second stage the EU and other countries of the world. In the EU the first Member States hit by the crisis were five members of euro area: in the first place Greece – where the consequences appeared to be most serious, followed by Portugal, Spain, Ireland and Italy (known as PIIGS countries). These countries were not able to finance their debt (bail-out) to banks, operating on their national territory which resulted into a "domino effect", threating the stability of the whole euro-zone. There were options either to leave the consequences of the insolvency on the member state(s) in question, meaning their "default" or to provide an assistance to them (by ECB, IMF, other member states). The member states have on the European Council level decided on the second option. However, the price they had to pay for that was a breach, in first stage of the Stability and Growth Pact; in second stage breach of articles 123 and 125 of the Lisbon Treaty (TFEU) that consequently led to creation of new administrative instruments, first EFSF which was later transformed into an ESM. These sudden *ad hoc* political decisions, executed under the time-constraint and political pressure, in some member states, started turbulences leading, in some cases to pre-term resignation of their governments[6].

It should be not forgotten that the accumulation of debt in some member states emerged as: first, a consequence of various levels of macroeconomic indicators among the member states of euro-zone, before adoption of euro; secondly,

[5] BONDARENKO, P. *Debt crisis*. Encyclopædia Brittanica, 2020 [online]. Available at: https://www.britannica.com/topic/debt-crisis

[6] In Slovakia, 11 October 2011 one of the coalition government party (Sloboda and Solidarita) refused to vote in favour of governmental agreement with the annex to framework treaty between 17 countries of euro-zone and European Financial and Stability Mechanism (EFSM) which meant further commitments for Slovakia in this mechanism. The PM Iveta Radičová connected this vote with voting on the confidence to the Government (by one single vote). As only 55 MPs out of 155 voted in favour of this proposal – the Radičová Government was dismissed. After early elections, the newly formed government led by Robert Fico voted in favour of EFSM.

as a consequence of various level of fiscal discipline of governments of these countries. When speaking about the origin of the euro-zone crisis it should be mentioned the history of discussions between two main camps of views that were at the beginning shaping the ideas of the European Monetary Union (EMU), in times of preparation of the Werner Report in 1970: The Economists and the Monetarists. Economists (led by Germany and the Netherlands) proposed that the EMU would be created only after the level of national economies would get harmonised. Economists favoured fixed exchange rates and high degree of co-ordination and convergence of national economic policies, followed by creation of EMU. Monetarists (led by the European Commission, France, Belgium and Luxembourg) saw creation of EMU as the main precondition for a successful functioning of the EC/EU. Monetarists had a clear political priority to introduce the common currency as soon as possible as they believed this would have a positive impact on the next economic integration of the Member States. Monetarists advocated strong institutional structure of EMU, fixed exchange rates that could be used as an instrument for further integration policies[7].

These opposite views on the fundamental principles of functioning the EMU continued to be present in 1990s in national positions of Member States that negotiated on its future shape: in most pronounced way represented by the most influential actors: Germany and France. In 1992 62 professor of economics mostly from German universities warned the German Chancellor Helmut Kohl about the premature start of the monetary union. This was repeated in 1997 when the petition named "*Es ist zu früh*" ("It is too early") addressed to Kohl was signed by 155 professors of economics[8]. However, this initiative remained unheard. In the final stage of launching the EMU there was an intra-governmental dispute on whether this launch should be done only after the euro-zone members will comply with the Maastricht criteria, or whether there should be fixed date (politically decided in advance) on the start of EMU (1 January 1999). In the end it was the second scenario that prevailed on the European Council level of EU15 member states. This, in fact, as confirmed later, meant a victory of political criteria over absolute necessity to respect simple economic rules defined by Maastricht criteria. "*This unexpected modification of agreed rules ultimately led to a euro-zone based on completely different rules than the EMU was originally designed and foreseen to function. This confirms and underlines the political*

[7] URAMOVÁ, M., ŠUPLATA, M., LACOVÁ, Ž. *The financial and monetary integration in the European Union at the beginning of the third decade of the 21st century: the past and post-Lisbon focus*; 26th Conference GREG-PGV; Grenoble, 10–11 September 2020; In *L´Europe est-elle la bonne echelle pour que les acteurs et les parties prenantes puissent relever les défis du futur?*

[8] The Association Agreement was signed in March 2014 by the Prime Minister Arseyi Yatsenyuk and in June 2014 the President Petro Poroshenko

nature of EMU, instead of EMU based on simple, credible and predictable economic rules that would avoid "ad-hoc" political decisions that in the end might be perceived as speculative"[9]. No surprise, this change of rules "in the middle of the game" significantly predetermined the future of euro-zone and ultimately led to consequences the EU was facing in 2009 as EU economic and debt crisis.

The economic and debt crisis, among other issues, revealed:

- the failure of member states to be able to maintain sustainable fiscal discipline;
- the failure of the European Commission and the Council to preserve all member states to keep (at least) the level of Maastricht criteria (with no exceptions) – political decisions dominated over simple economic criteria;
- EU institutions and member states as a reaction to crisis breached the Stability and Growth pact, as well as some provision of the Lisbon Treaty, articles 123 and 125;
- EU institutions and member states instead of respecting simple and commonly agreed comprehensive economic rules, preferred making further interventions: create additional administrative "solutions" (European Stability Mechanism, European Financial Stability Facility);

3. EU and Ukrainian crisis

Within the EU´s external policies, Ukraine is one of the countries belonging to Eastern Partnership (since 2009) and European Neighbourhood Policy. EU´s closer political and economic relations to Ukraine are officially defined since 2014 by an Association Agreement and since 2016, by Deep and Comprehensive Free Trade Area (together with Georgia and Moldova Ukraine).

The start of Ukrainian crisis is usually associated to 21 November 2013 when V. Yanukovich, the president of Ukraine refused to proceed with implementation of Association Agreement of Ukraine with the EU[10]. Yanukovich´s decision started massive protests organized by the proponents of the agreement – leading to revolution, demission of the president Yanukovich and in February 2014 to his ousting from the territory of Ukraine after that, Russian Federation (directly

[9] ŠUPLATA, M. *Vybrané aspekty inštitucionálneho rozhodovania Európskej únie v migračnej kríze.* In: *Európska ekonomická integrácia v kontexte aktuálneho vývoja a výziev pre členské štáty Európskej únie*. Praha: Wolters Kluwer, 2016. pp 122.

[10] Compare PAWERA, R., ŠUPLATA, M. *Schengenský systém v integrácii Európy – podpora cestovného ruchu v Európskej únii.* In: *Európska integrácia v univerzitnom vzdelávaní: Európska integrácia v procese výučby a tvorby na Fakulte managementu UK*. Bratislava: Eurounion; 2004 s. 234–142.

or indirectly) intervenes on some autonomous territories (Crimea and Donbas, Luhansk) which creates an international conflict. These circumstances led to division of Ukrainian people between proponents who would wish to see their perspective in closer relations with the EU, between those who would wish to have closer relations to Russia and the rest, who would wish to remain "somewhere in the middle" of these two opposite preferences.

The Ukrainian crisis impacted the EU also through so called "gas crisis"-meaning bypassing Ukraine as a transit country affecting access to EU via some member states neighbouring to Ukraine. This came as one of the Russian´s response to political changes in Ukraine. The EU, learned by a similar gas crisis in 2009, in the meantime, responded by preparing the soil for gas diversification via other gas lines. Two of gas projects (North Stream 1 and North Stream 2) aim to transit gas directly from the Russian Federation to EU (via Germany).

The Ukrainian crisis, among other issues, revealed:

- The EU´s offer to sign the Association Agreement with Ukraine showed that Ukraine as a country of the lines of force of power between rivalry geopolitical interests of the West and the Russian Federation. This was expressed in division of the country into pro-EU and pro-Russian camps and ultimately revealed lack of internal preparedness of Ukraine accept this agreement without escalating tensions inside and outside the country.

4. Refugee and migration crisis

In 2015, when the migration crisis was the most apparent, more than a million of migrants and refugees massively crossed the EU borders (BBC, 2016) – in most cases illegally. The vast majority of refugees were coming from Afghanistan, Iraq, Syria, the majority of irregular migrants from North Africa. 83% of all asylum requests were headed to 5 EU member states: Germany (175 000, 61%); Italy (22 300, 8%); France (18 000, 6%); Austria (13 900, 5%) and the UK (10 100, 4%)[11].

Generally, there might be perceived two main reasons for the start of refugee and migration crisis. First: the external and internal factors that caused the instability in the region where the migration crisis emerged. Second reason was the "open-door policy" by both the European Commission, led by J.–C. Juncker who in the beginning of their mandate defined dealing better with migration as one of top ten priorities at the beginning of its mandate, as well as representatives of

[11] Compare PAWERA, R. *Manažment európskej bezpečnosti.* 1. vydanie. Bratislava: Eurounion, 2004, pp. 134.

some EU member states. Probably most known became the quotes by the German Chancellor Angela Merkel: "*alle sind wilkommen*" ("*all are welcome*") and: "*wir schaffen es*" ("*we will manage it*") that sent a strong message to – the incoming migrants, to German citizens and the rest of EU member states.

Whereas in case of refugees who under the international laws, are automatically entitled for international protection, the sudden irregular inflows of illegal migrants to the EU, underlined by this political message, that was interpreted to "invite all" including irregular migrants, to EU, ultimately led to increase of tensions among EU member states. The main reasons of these tensions were: (1) the failure to secure the external borders from irregular inflows (that since the existence of the state traditionally belongs to elementary and necessary area to be exercised by any state); (2) an unclear limit and concept of the integration of migrants, (3) concerns from a potential massive (ab)use of generous social system of EU countries; (4) concerns from cultural incompatibility of the irregular mass inflows. Despite more or less enthusiastic approach towards the "policy of migration of chaos", the criticism of this concept could be underlined by a series of terrorist attack that as broadly believe, increased by the start of migration crisis.

Another source of criticism is a lack of consistency in EU policy making: after the accession of the EU15 by EU10 in 2004 the citizens of the EU10 member states, as a consequence of transitional period adopted by some member states (Germany, Austria) and even as EU citizens were not entitled to work on their territory for 7 years. Moreover, before accession to the Schengen system[12]. Some EU10 member states (for example Slovakia and its Ukraine border, before acceding the Schengen area in 2007) were criticized by the European Commission for failing to preserve their external borders. The migration crisis that emerged in 2015, only 4 years after the end of these transitional periods putting restrictions on free movement of labour for citizens of EU10 countries on the territory of some former EU15 countries, seemed to put citizens from non-EU countries coming to EU territory often in irregular way, in some aspects, in more favourable positions than the citizens of EU10 member states of the enlarged EU between 2004–2011 were.

The migration crisis, among other issues, revealed:

- First: the heterogeneity of views across the EU, on political and in broader terms on societal (public opinion) level on the key fundamental questions, for example: *Was the involvement of some states in the conflict region aiding to*

[12] Bulletin of the European Communities. March 1985, No 3. Luxembourg: Office for official publications of the European Communities. „Report from the Ad Hoc Committee on Institutional Affairs", p. 102–110 [online]. Available at: https://www.cvce.eu/content/publication/2001/10/19/17c22ae3-480a-4637-ad28-e152d86105b7/publishable_en.pdf

avoid or causing the migration crisis? To which extent the EU should be open to economic migration? Would the common approach proposed by EU be in line with the necessity to comply with the minimum security standards?[13] etc. Since the very beginning there was no consensus among EU member states on the focus and on the scope of the new migration policy. The Juncker´s European Commission which defined migration policy as one its 10 priorities at the beginning of their mandate, decided to keep constantly pushing for new common proposals on migration policy, despite of clear strong refusal by some member states from the very beginning of these initiatives.

- Second, the non-functioning EU external border and the lack of ability of the member state in charge of defence of EU external border to avoid irregular inflow. Especially Italy and Greece were exposed to sudden inflows. It became evident they were not able to defend the border from illegal inflow by their own capacities. The situation has shown the necessity to extend the solidarity principle from the principle of binding relocation of migrants to all member states (agreed by the Council by never fully executed, due to disagreement of some member states) also on the protection of common borders (so called "flexible solidarity" was an initiative agreed during the Slovak presidency.
- Third, the lack of clear leadership in the EU institutions unable or unwilling to set-up clear functioning rules that would be acceptable for all EU27, be able to distinguish between refugees – escaping wars, genocide or persecution and between irregular economic migrants. This failure to distinguish and push by the European Commission and larger member states for introducing binding quotas on relocation of migrants have ultimately increased tension and brought a division across member states.
- Fourth, this resulted into divergence in national positions of EU member states on migration. Some member states, mostly of former EU15 were generally supportive for an "open-door" migration policy and were supporting new common EU political initiatives to respond migration, based on centrally regulated of relocations of migrants (quotas). Some member states, especially from former EU10 (most visibly four *Visegrád* countries) refused to accept this "forced way of placing migrants on their national territory", emphasizing, firstly the necessity to start from the protection of external borders and secondly careful considering the reasons, motivation and eligibility to enter the EU territory.
- Fifth: this division based either on positive or negative attitudes from member states towards migration led to a slow-down or even a stuck of any further

[13] BAFOIL, F. *Europe centrale et orientale. Mondialisation européanisation et changement social*. Paris, Presses de Sciences Po; 2006.

common EU initiatives not only on migration policy but in other common policy areas.

5. BREXIT: another test for the EU?

The economic and debt crisis, as well as migration crisis might be perceived as a failure of both the EU and member states in the efficiency of their responsive policies. The initiative for BREXIT, on the other hand, came from the UK domestic policy, triggered by pre-election campaign and internal tensions within the governing Conservative Party, led by PM David Cameron.

On January 31, 2020, for the first time in its history, the EU saw one of its members leaving this unique international organisation that Jacques Delors called the "unidentified political object",[14] a product of 70 years of gradual integration process. The referendum initiated by David Cameron and the state of play about "remain" or "leave" question in his own Government and within his Conservative Party indicated the existing division between fervent Europeans of deeper European integration and between proponents of "sovereignty first" principle. In this sub-chapter we would like to take a brief look on the BREXIT by exploring selected views on the concept of sovereignty.

In the aftermath of the World War II, the European project was first seen as a means of putting an end to fratricidal conflicts on the old continent through the creation of interdependence and economic solidarity. Peace has been found, but in a globalized world where interdependencies have gradually increased, there are other issues requiring a deeper European integration. To defend their interests vis-à-vis other continents and to deal with issues that transcend national borders, the powers of the European institutions have gradually been broadened. The Maastricht Treaty establishing the European Union, the Schengen Agreement or the creation of the euro are often perceived as a sign of gradual transfer of elements of national sovereignty to the European level. This was reinforced by the adoption of the Lisbon Treaty. The EU, an economic giant who was for a long time a political dwarf, wanted to equip himself with tools allowing him to defend his interests and values. Yet there is as much connection to sovereignty as there are states on the old continent. While the Britain have endorsed the plan to create a large European market allowing the free movement of goods, they have been always more hostile towards the idea of a "Europe power" being historically attached to their independence. Various opt-outs and negotiated by the Great Britain achieving

[14] FAREED, Z. *De la démocratie illibérale*, vol. 99, 2nd ed., Le Débat; 1998, p. 17–26.

exceptions in common agricultural policy, (with so called British rebate), for remaining outside the Schengen area as well as the euro zone are an illustration of its particular attitude to sovereignty. The historical relationship of European states to sovereignty differs from country to country. Certain countries such as France have seen the process of the European integration as an opportunity to regain their lost influence on the international scene. The Central European states quickly knocked on the doors of the European Union after the fall of the Berlin wall, but their integration at the cost of "shock treatment"[15] could have created the feeling of a too quick transfer of parts of a newly rediscovered sovereignty. Zakaria developed the concept of "illiberal democracy" to denote the disenchantment that followed the collapse of communism in Central Europe[16]. In this geographic area, as elsewhere in Europe, politicians are trying to react to these realities in the election campaign and after, by their governance approach. The clash between the interests of representatives on the EU level and between the representatives of Poland and Hungary have led to continuous tensions among other issues seriously threatening approval of the EU financial perspective for the next seven years. The actions initiated by the European Commission against these member states is seen by their democratically elected leaders as an attack on their sovereignty. Besides, it was on the issue of sovereignty that Boris Johnson's campaign was carried out. By freeing itself from "European constraints" and regaining its freedom of action, the United Kingdom would be in a better position to defend the interests of its citizens.

Promoting this concept theorized in the 16th century by Jean Bodin[17] raises various questions, for example: *Is there a lasting trend towards a return to the concept of national sovereignty which implies the full power of states or is it a matter of cyclical epiphenomena which are part of an inevitable global expansion of international law, of which European law is the illustration at the scale of the old continent?* The analysis of BREXIT using the tools offered by international law and political science allows finding elements of responses to this question.

The relationship of states to sovereignty has evolved over the time. The emergence of numerous international organizations, with different degrees of integration, the rise of multinationals whose turnover is greater than some of the micro-states' have progressively undermined the omnipotence of states.

[15] BODIN, J. *La république*. 1576.

[16] DELMAS-MARTY, M. *Les forces imaginantes du droit, vol. III. La refondation des pouvoirs, Etudes juridiques comparatives et internationalisation du droit.* Editions du Seuil, 2007.

[17] BODIN, J. *La république*. 1576.

Traditional state governance has given way to more diffuse[18], more complex, less visible and sometimes incomplete modes of regulation. International organizations as well as international law are trying to find solutions based on compromises to face the challenges that are now being played out on a global scale (fight against global warming, regulation of migration, control of pandemics, fight against terrorism). In addition, the specialization of production capacities on a global scale has led to an exponential increase in international flows of goods and services but also an increase in the phenomena of fiscal, social and environmental dumping. The increasing movement of people, capital and information made possible by technical progress has also exacerbated competition, leading to the disappearance of certain sectors of activity in Europe. Many criticisms are raised against globalization described as too liberal and some European political leaders are calling for a return of state sovereignty for better regulation of certain phenomena. The race to supply masks and respirators during the first phase of Covid19 virus expansion in Europe, reminded Europeans of the dependency relationship that is being created in a system of specialization in the production of goods. These changes have adverse effects and can undermine the strategic interests of States and therefore their sovereignty. In his works Jean Bodin developed the concept of modern state, the existence of which is characterized by the sovereignty which he defined in 1576 as "the absolute and perpetual power of a republic". However, in 1625 in his work "The Law of War and Peace" Grotius demonstrated that this sovereignty is limited to the rights of individuals by subscribing to the logic of "natural rights". George Scelle in "Précis du droit des gens" will also challenge the absolute sovereignty of states and elaborate the theory of sociological objectivism in international law. His work, inspired by the research of Léon Duguit and Emile Durkheim, father of French sociology, will contribute to the development of contemporary international law and particularly of international labour law[19]. Many authors have brought to light the limits of the concept of sovereignty in a postmodern world where interdependencies are increasing. Not even the US, a global superpower can act on the international scene without a dialogue, trading, exchanging with the other international powers which tend to assert themselves. For Bertrand Badie, the end of the Cold War and the process of globalization have ended up discrediting what

[18] SCELLE, G. *Précis de Droit des Gens. Principes et Systématique. First part. Introduction*, Le Millieu Inter social. Paris : Recueil Sirey, 1932.

[19] HERRERA, C. M. Un juriste aux prises du social. Sur le projet de Georges Scelle, Revue Française d'Histoire des Idées Politiques [online]. 2005. p. 113–137. Available at: https://www.cairn-int.info/revue-francaise-d-histoire-des-idees-politiques1-2005-1-page-113.htm

he calls "sovereigntist fiction"[20]. He suggests replacing the untenable concept of sovereignty with that of responsibility. Thus, awareness of the existence of issues common to whole of Humanity (preservation of the planet, fight against pandemics, etc.) could lead to the creation of "communities of responsibility" at local, regional and global level. The European Union's desire to assert itself as a pioneer in the fight against global warming is an illustration of this phenomenon. However, it would be perilous to draw conclusions about the weakening of the role of states on the international scene. It is also important to avoid excessive optimism about the future of European integration process, because often, under the guise of defending common interests, states first and foremost defend their own interests. Moreover, by openly showing their desire to become a sovereign power again, the British seem to be going against the current global trend of recent decades which tends towards ever closer integration.

It was under the principle of sovereignty that the referendum on BREXIT was organized and its result accepted by its European partners. The European treaties did not originally anticipate for this possibility of a member state leaving the Union. The Lisbon Treaty established a withdrawal clause which allows a country of the European Union to regain its sovereignty from a legal point of view:

Article 50[21]

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after

[20] BADIE, B. Un monde sans souveraineté. Les Etats entre ruse et responsabilité. In: Politique étrangère, n°2. 1999. 64ᵉannée, p. 410–411.

[21] Official Journal of the European Union. Article 50 TFE [online]. 2016. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M050&from=FR

the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.

In accordance with article 50, BREXIT has become a legal reality since January 31, 2020. To achieve this, the withdrawal agreement concluded between the European Union and the United Kingdom was signed on October 17, 2019. The agreement came into effect on February 1st, 2020[22] and set the conditions for an orderly withdrawal. It consists of the actual Withdrawal Agreement which includes a Protocol on Ireland and a Political Declaration which aims to set a framework for the future relationship. In particular, this agreement aims to protect the three million citizens of the EU who live in the United Kingdom. It resolves many uncertainties relating to the separation: intellectual protection, police and judicial cooperation, etc. It is also expected that the United Kingdom will honour the financial obligations it contracted when it was a member. Although, this agreement also deals with the question of the areas of territorial sovereignty in Cyprus and Gibraltar, it is the question of Ireland that proves to be the most problematic. A solution avoiding the reestablishment of a physical border protecting the Belfast Agreement had been found and incorporated into the Withdrawal Agreement.

This international treaty, duly ratified, created rights and obligations for the signatory parties. However, the UK government has decided to pass a law, making certain aspects of this treaty obsolete. The Internal Market Bill was passed by the House of Commons on Tuesday, September 29. On October 20, 2020 a motion of censure which "regrets" the provisions violating the treaty was adopted by the House of Lords with 395 votes in favour and only 169 against. « I wanted to be an independent country which truly is a beacon unto the nations and I am dismayed that the government, the government which

[22] WALKER, P. Brexit plan to breach international law could face battle in Lords [online]. 2020. Available at: https://www.theguardian.com/politics/2020/sep/10/brexit-plan-to-breach-international-law-could-face-battle-in-lords

I have supported for so long and which I have very, very rarely disagreed with and rebelled against, that that government has chosen as one of the first assertions of its newly-won sovereignty to break its word, to break international law and to renege on a treaty it signed barely a year ago. », said Michael Howard, former leader of the ruling Conservative Party, yet in favour of BREXIT. He even added "*'How can we reproach Russia, China or Iran when their conduct falls below internationally accepted standards, when we are showing such scant regard for our treaty obligations?*"[23]

Although this motion of censure will allow a detailed examination of the text, the members of Parliament will have the last word. If the law on the internal market is adopted, it would allow a unilateral revision of the divorce agreement signed between London and Brussels contrary to international law. Moreover, this law would contradict the Northern Irish Protocol which made it possible to avoid the return of a physical border to Ireland.

The European Commission, in an effort, to respect international law and the signed agreement, has initiated infringement proceedings before the Court of Justice of the European Union. Indeed, even if the United Kingdom is no longer part of the European Union since January 31, it remains subject to European jurisdiction for the next four years for any action started before December 31, 2020. The United Kingdom is notably accused of not comply with the obligation of good faith provided for in Article 5 of the Withdrawal Agreement.

Article 5 *Good faith*

The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.

They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardize the attainment of the objectives of this Agreement.

This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation. [24]

[23] READ, J. Former Tory leader leads fight to strip Boris Johnson's Brexit bill of ‚law-breaking' powers [Internet]. 2020. Available from: https://www.theneweuropean.co.uk/brexit-news/westminster-news/michael-howard-on-internal-market-bill-6217110

[24] Official Journal of the European Union. AGREEMENT on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [online]. 2019. Available at: https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=uriserv:OJ.CI.2019.144.01.0001.01.FRA&toc=OJ:C:2019:144I:TOC

The transition period will come to its end on December 31, 2020. Until then, the United Kingdom will be treated as a member state but the future relationship between the United Kingdom and the European Union will depend on the agreements currently being negotiated. The possible violation of international law by the British has been the subject of much criticism. The Vice-President of the European Commission, the Slovak Maroš Šefčovič points out in his statement that "if the bill is approved, it will constitute an extremely serious violation of the Withdrawal Agreement and of international law (...) By proposing this text, the United Kingdom has seriously undermined to the trust that prevails between London and the EU[25]".

This unilateral revision, which would be contrary to international law, is a good illustration of the British attitudes towards the concept of sovereignty. By placing British sovereignty above international law, it goes against the global legal order seeking implementation of a hierarchy of norms in which international norms take precedence, similar to that of unlimited sovereignty developed in the 16th century by Jean Bodin. The coming of well thought-out global legal framework in which international law is better respected seems to be a tendency that might perceive the attachment of some British leaders to unlimited sovereignty as it existed in the past in the postmodern era as anachronistic.

The EU member states emphasizing the respect for the rule of law and international law have so far shown high degree of unity in negotiations with the United Kingdom. On December 8th UK government announced it will drop some clauses that rip up parts of the divorce agreement. In a statement, Britain agreed to remove parts of legislation that would have allowed the government to override aspects of landmark BREXIT withdrawal agreement designed to avoid of a hard border between Northern Ireland and Ireland[26] but it will be probably not enough to ratify a trade agreement before December 31th.

EU leaders seem to have realized the need to speak by one voice in international negotiations with other world powers who try to use their divisions. Paradoxically, BREXIT and the departure of a State which was rather hostile to further political integration due to its historical attachment to its independence could open the door to more extensive European cooperation in other areas, mainly in the field of healthcare. The measures taken by European states to deal with the first wave of COVID-19 have shown a lack of coordination, but often it can be the crises that will move forward the European integration.

[25] European Commission. Déclaration du Vice-président Maroš Šefčovič à l'issue de la troisième réunion du comité mixte UE-Royaume-Uni [Internet]. 2020. Available at: https://ec.europa.eu/france/news/20200928/declaration_maros_sefcovic_reunion_comite_mixte_ue_royaume_uni_fr

[26] CASTLE, S. As Brexit Talks Stall, Boris Johnson Offers the E.U. an Olive Branch [online]. 2020. Available at: https://www.nytimes.com/2020/12/08/world/europe/as-brexit-talks-stall-boris-johnson-offers-the-eu-an-olive-branch.html

The BREXIT, among other issues, revealed:

- First, before the referendum, the EU leadership failed to convince the UK government and citizens on the prevailing benefits of EU membership;
- Second, the UK Prime Minister David Cameron in decisive way contributed to BREXIT by his pre-election campaign promise to come-up with the referendum. This decision also led to his later resignation from the post of UK Prime Minister.
- Third, the referendum electorate decided on "too serious" question by "too narrow majority" of votes.

6. The EU and the global attack of COVID-19: a space for new area of co-operation among EU member states?

The COVID-19 pandemic is currently the most debated topic in the EU and its Member States. At the moment it is generally not a consensual view on, neither where this virus originated, nor whether and when it will be definitively eradicated. The first of the questions, asked by some head of states (US, Australia) had already brought some tension in the international relations. The number of cases is growing every day and the major opinion of the experts is that COVID-19 will be with us for some time[27]. However, this is not the first time in this millennium that the EU has been threatened with communicable diseases. Epidemiological threats have recurred over the last 20 years, but none have been as serious as COVID-19[28]. We can claim that the past two decades should have slowly prepared us for the growing threat of viral diseases, as this scenario was foreshadowed by a number of epidemiologists[29][30].

In the context of the COVID-19 crisis, we will focus on the division of competences in the field of public health between the EU and the Member States, and try to assess the effectiveness/ efficiency of a possible deepening of integration in this area.

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[27] Science Alert. When Will The Coronavirus Pandemic End? [online]. 2020. Available at: https://www.sciencealert.com/pandemic-end

[28] SARS, Mumps, H1N1, MERS-CoV, Ebola, Zika.

[29] PMC. EMBO reports. Inevitable or avoidable? Despite the lessons of history, the world is not yet ready to face the next great plague [online]. 2007. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2002527/

[30] Foreign Affairs. The Next Pandemic? [online]. 2005. Available at: https://www.foreignaffairs.com/articles/2005-07-01/next-pandemic

6.1. The lack of EU competence?

In general, the EU's competences, by their very nature, are based on the principles of delegated powers, subsidiarity and proportionality. According to the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States[31]. In accordance with the principle of subsidiarity – in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level[32]. In accordance with the principle of proportionality – the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties[33].

Following these principles, competences are divided between the EU and the Member States into three categories – exclusive, shared and supporting/cooperative powers. Exclusive competences are areas in which the EU alone is able to legislate and adopt binding acts. EU countries are able to do so themselves only if empowered by the EU to implement these acts. This group includes, for example, the customs union, monetary policy, the common commercial policy – areas where the EU decides in the form of regulations (legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law). In these areas it presents the highest level of integration. After the failure of the original intention of direct political integration through the European Defence Community in 1954[34], the idea of a "European Community" began to be coined with economic instruments to create a free market. By the theory of spill over [35], EU has gradually become a unique organization, which in some forms covers almost all areas of social activities, including criminal law, immigration and asylum policy, defence and

[31] Art. 5(2) TEU.

[32] Art. 5(3) TEU.

[33] Art. 5(4) TEU.

[34] This Community should have been established on the 27th of May 1952, however ratification was blocked by French parliament on the 30th of August 1954. Earlier in French doctrine, there were opinions that ratification of the Paris Treaty of 27 May 1952 would result in a new constitution, and therefore consent to ratify it should be given not by ordinary but by constitutional law. See: „Consultation of six public law professors on the European Defense Community". In: *Droits* 1992, no. 19, pp. 102–111.

[35] LINDBERG, L. N. *The Political Dynamics of European Economic Integration*. 1st ed. Stanford, 1963, p. 367.

security policy, in other words, activities that were (traditionally) considered fundamental powers of sovereign states. The official acknowledgment of this trend was the 1992 Maastricht Treaty, the signing of which can indeed be described as a "tipping"[36]moment in European integration. However, it must be said that long before the creation of the European Union, the doctrine stated that "*it is indisputable that the Community system looks quite original*"[37] and today it is even more true that "*the European Union is a legal and political creation of such originality that we cannot find a suitable model for it*"[38]. However, the Union's exclusive competences still have a predominantly economic dimension, so harmonization at EU level is the most effective way for Member States' economies to work together.

On the other hand, in the area of supporting powers, (we deliberately omit shared powers at this point)[39] – The EU can intervene to support, coordinate or complement the actions of EU countries, but legally binding EU acts must not require harmonization of EU countries' laws or regulations. Protecting and improving people's health belongs precisely in this area. Despite its very limited powers, the EU seeks to improve the health of its citizens and residents, in particular, ensuring health security, healthcare, disease prevention – in these cases, it is the regulation of social relations that are closely and necessarily linked to free movement of workers (protection of health and safety of workers, protection of pregnant workers, etc.). This form of protection is, *inter alia*, an expression of the principle of non-discrimination, where workers must have a level playing field throughout the EU. In these cases, we can see that health is (also / especially?) an economically important aspect of integration in the European area.

Although the EU itself is not yet "endowed" with public health competences[40], there is one clear exception. It is the European Parliament and Council Decision on serious cross-border threats to health[41]. Legal basis for this Decision is Article 168 TFEU which declares a high level of human health protection

[36] TELÓ, M., MAGNETTE, P. *De Maastricht à Amsterdam. L'Europe et son nouveau traité*, coll. Études européennes. Éditions Complexe: Bruxelles, 1998. 15 p.

[37] BOULOUIS J. «À propos de la fonction normative de la jurisprudence. Remarques sur l'œuvre jurisprudentielle de la Cour de Justice des Communautés Européennes», In *Mélanges Marcel Waline*, tome 1, Paris: LGDJ, 1974, p. 150.

[38] MAUS D. «À propos de la Constitution européenne : les mots et les choses», In *Revue politique et parlementaire*. 2003. no. 1022, p. 36.

[39] DOBBS M. „National Governance of Public Health Responses in a Pandemic?" In *European Journal of Risk Regulation*. 2020. 11(2), 240–248.

[40] SPEAKERMAN E. M., BURRIS S., COKER, R., „Pandemic legislation in the European Union: Fit for purpose? The need for a systematic comparison of national laws", In *Health Policy*. 2017, Volume 121, Issue 10, pp. 1021–1024.

[41] Decision No 1082/2013/EU Of European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC.

(shall be) ensured in the definition and implementation of all Union policies and activities. In particular, the Union has a coordinating role and promotes cooperation between Member States to improve the prevention and control of the spread of major human diseases across Member States' borders and lays down rules for epidemiological surveillance, early warning, in the event of their occurrence, and the fight against them (preparedness and response planning). As the objectives of this Decision cannot be sufficiently achieved by the Member States due to the cross-border dimension of serious health threats and can therefore be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives[42].

From an institutional point of view, the Health Security Committee (HSC) and the Early Warning and Response System (EWRS) have been included among the already existing tools in the field of crisis management (rescEU and EERC – assistance in natural disasters, part of the civil protection mechanism) to speed up and increase a quality of coordination and cooperation between the Member States and the Commission in combating serious cross-border threats to health. In particular, the Committee and its sub-groups are intended to ensure the rapid exchange of information and strategies and to address communication challenges in order to coordinate risk and crisis communication based on a thorough and independent public health risk assessment adapted to national needs and circumstances[43]. It is composed of representatives of the Member States[44].

The Early Warning and Response System (EWRS) provides prompt warning, risk assessment and the identification of measures that may be necessary to protect public health. In particular, the EWRS is a prevention tool that serves to improve the action of Member States and the Union to combat cross-border health threats and informs about the type and origin of the disease, the location of the outbreak, toxicological data, etc.[45].

However, we see the greatest benefit in the Commission's ability to recognize emergencies. If human influenza has occurred which may have a pandemic potential or a serious cross-border threat to public health at Union level, the Commission shall, after informing the Director-General of the WHO, declare a state of emergency. At this point, we must again emphasize the reduced nature of the

[42] Ibid Preamble (22).

[43] Ibid. Preamble (22).

[44] Each member state appoints its representatives at its own discretion.

[45] The decision has a broader than purely anti-epidemiological dimension, as it can also be used effectively for threats of chemical or environmental origin.

EU's powers in the field of public health, as, by analogy, at Member State level, a declaration of an emergency would mean a further extension of the powers of the executive, where it has only one legal effect at Union level. The Regulation 182/2011 of the EP and of the Council shall apply to the adoption of Commission implementing acts in connection with the declaration of an emergency situation[46].

The declaration of a state of emergency has only one legal effect, namely the application of the Commission Regulation on the examination of variations to the terms of a marketing authorization for medicinal products for human and veterinary use[47] under simplified conditions. Chapter 5 of the Regulation provides specific procedures for the placing vaccines on market, in the event of a human influenza pandemic. In principle, this means that in the absence of non-clinical, resp. clinical data, the Commission may authorize the use of such a vaccine, thus speeding up and simplifying the administrative procedure in the event of pandemics.

Decision 1082/2013 on serious cross-border threats to health contributes to building and strengthening the EU's comprehensive framework for health security and enables the Union to protect the population from such threats. The development and implementation of this Decision and relevant health security activities at EU level, including funding programs, is complex, due to the large number of actors and complicated structures operating in individual countries as well as from a legal point of view. Member States have the main responsibility for health policy, and the EU's action in this area is only intended to complement and support Member States' action. The role and responsibility of the Commission therefore lies in particular in providing support and, where necessary, in taking additional measures. In Special Report No 28[48], the European Court of Auditors addressed, in detail, the functioning of the Decision on serious cross-border threats to health. Court pointed out many shortcomings that could cause significant complications in the application of the Decision. Here, we will list only some of the points necessary for the purposes of this article:

- Draw up a strategic plan for the HSC to implement and develop the aim of Decision

[46] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

[47] Commission Regulation (EC) No 1234/2008 of 24 November 2008 concerning the examination of variations to the terms of marketing authorisations for medicinal products for human use and veterinary medicinal products.

[48] European Court of Auditors. Dealing with serious cross-border threats to health in the EU: important steps taken but more needs to be done. In: Special report no 28/2016 [online]. Available at: https://www.eca.europa.eu/sk/Pages/DocItem.aspx?did=%7bAE5B9737-ABB4-4C4B-99FB-27FE08BADD5F%7d.

- To speed up work on joint procurement of vaccines (Commission and Member States)
- To modernize EWRS system
- but in particular to strengthen cooperation and coordination in joint procedures

Although a binding decision has been adopted at Union level, which is so far the only one of its kind, in the words of the Court of Auditors, more needs to be done. Until the start of the COVID-19 pandemic, we have no data on the Commission's efforts to respond to constructive criticism and make the decision a viable document. On the contrary, even in such an important area of social relations, to which health clearly belongs, the Commission seems to be approaching it in a panic-solution-panic-style[49].

6.2. Measures adopted by the European Union since the beginning of the pandemic

The pandemic is in full swing again and criticism of the EU has been relatively constant since February 2020[5051]. Undeniably, the Union is making an effort, especially in the area of economic aid, but criticism is directed mainly at the lack of cooperation, the insufficient involvement of the Member States in decision-making processes and, in particular, the lack of solidarity between states[52]. Although, it could be argued in certain circumstances that solidarity between states goes beyond the framework of EU policies, but it is especially the Union that is designed to encourage and deepen solidarity between its Member States.

The beginning of the current pandemic crisis has inevitably raised the question of how the EU will be able to react and help. In the previous part, we noted that too many requirements were placed on the Union, despite the limited tools available. Especially because the Union's activities and policies have a major impact on the daily lives of EU citizens, so there is a contrast in the subjective perception of the EU during a pandemic crisis. The steps taken by the EU from

[49] RENDA A., CASTRO R. „Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic". In: *European Journal of Risk Regulation*, 11(2), 273-282.

[50] Investigate Europe. Europe's failure to cooperate on Covid-19 is a universal problem [online]. 2020. Available at: https://www.investigate-europe.eu/en/2020/europes-failure-to-cooperate-on-covid-19-is-a-universal-problem/.

[51] Politico. How Europe failed the coronavirus test [online]. 2020. Available at: https://www.politico.eu/article/coronavirus-europe-failed-the-test/.

[52] PIRKER B. „Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis". In: *European Papers*. 2020, Vol. 5, No 1, European Forum, Insight of 25 April 2020, pp. 573–585.

February 2020 to the present day can be counted in the hundreds. The purpose of this paper is not an in-depth analysis of individual actions, but to draw attention to, in our opinion, the most important ones in individual months. We also want to highlight the huge number of steps in the field of economy and economic aid (given the primary nature of the EU) that could be elaborated in a series of several articles. Now, we will focus only on the important non-economic activities of the Union[53].

In early January 2020, DG SANTE (Health and Food Safety) issued an Early Warning and Response System (EWRS) alert, through which most Member States have since shared information on how to react and response to current threats. Subsequently, the first meeting of the Health Security Committee was called[54]. COVID-19 was presented at the meeting as a potential threat, but all representatives of the Member States and organizations present (ECDC, WHO Euro) agreed that no additional safety measures were necessary at this point[55]. A few days later, in view of the accelerated spread of the new coronavirus and France's request for assistance in providing consular support to EU citizens in Wuhan, the Union Civil Protection Mechanism was activated. The first air repatriations from France and Germany, co-financed by the Union's civil protection mechanism, brought 447 EU citizens home from Wuhan.

February 2020 was mostly in a spirit of solidarity with China, which received 12 tonnes of protective equipment, and at the end of the month, following the activation of the Union Civil Protection Mechanism, the Commission co-financed the delivery of more than 25 tonnes of personal protective equipment to China. The EU has launched joint procurement, making the EU one big buyer that encourages suppliers to act quickly, to the sufficient amount and to provide as much equipment as possible at the best possible price.

At the beginning of the "emergency", all the Union's resources may seem to have worked as they should. However, we can see from the example of Italy that this is not quite the case. Italy registered the first case at the end of January and a month later asked the Commission to activate the Union civil protection mechanism. The Union Mechanism was established by a Decision

[53] In the context of economic activities, for example: March – Increased investment in research and funding to combat coronavirus, Temporary framework for stronger economic support, Activation of the general escape clause of the budgetary framework to respond to a pandemic. April – EUR 2.7 billion from the EU budget to support health, Measures to support the agri-food sector ... In addition to partial subsidies, targeted at individual areas of the economy, it is worth mentioning the „Recovery Plan" totaling € 2.5 trillion, provided Member States in the form of grants and loans free of charge for the period 2021-2027.

[54] On which 13 member states have participated.

[55] At this point, 59 cases have been identified in Wuhan. On January 16, the WHO declared that there was no evidence of human-to-human transmission.

of the European Parliament and of the Council[56]. The Union Civil Protection Mechanism aims to strengthen cooperation between the Union and the Member States and to facilitate civil protection coordination in order to improve the effectiveness of systems for preventing, preparing for and responding to natural and man-made disasters, while contributing to the implementation of Article 222 TFEU[57]. In other words, a Member State can request assistance through the CECIS (Emergency Communication and Information System) and the Commission, as well as other Member States, should provide this assistance in a form of various assets, for example staff, resources, material aid. Italy requested material aid[58] (in particular a protective masks), but none of the Member States replied. Before the Union mechanism was launched, Italy received personnel and material equipment on the basis of bilateral agreements, namely from: China, Cuba, Germany, Russia, the Czech Republic, Albania, Poland[59] etc. None of the countries made use of the possibilities offered by the Union mechanism until the intervention of the European Commissioner for the Internal Market[60]. This raises the legitimate question of the extent to which this mechanism is effective and useful[61].

March 2020 was a critical month for Member States as well as for the EU. The increase in cases has triggered an avalanche of countermeasures by Member States that have not fully aligned with the philosophy of free movement of persons, services and capital, which is essential for the EU[62]. Travel restrictions, lock downs, quarantine zones have had a non-harmonious impression, especially since each Member State has determined its rules according to its own criteria, regardless of the will of the neighbour. However, viruses do not respect sovereign boundaries. The Commission has therefore prepared a number of guidelines[63],

[56] Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism.

[57] So-called Solidarity clause.

[58] Politico. Italy needs Europe's help [online]. 2020. Available at: https://www.politico.eu/article/coronavirus-italy-needs-europe-help/

[59] See also: TOSSERI, O. Coronavirus, cit.; Coronavirus, Mosca manda in Italia virologi e medici militari e attrezzature sanitarie, in La Stampa, 22 March 2020.

[60] Thierry Bretton, Twitter, 15.3.2020, twitter.com.

[61] BEAUCILLO, C. International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: „Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last", *European Papers* [online]. 2020. Available at: http://www.europeanpapers.eu/en/europeanforum/international-and-european-emergency-assistance-eu-member-states-during-covid-19-crisis

[62] Coronavirus: Europe plans full border closure in virus battle [online]. Available at: 2020. https://www.bbc.com/news/world-europe-51918596

[63] COMMUNICATION FROM THE COMMISSION: Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19

practical advices[64] – "soft-law" acts, which were intended to synchronize national action on border restrictions. They were aimed at ensuring the continuity of the flow of goods by air and road, and the free movement of medical personnel and equipment. Subsequently, the first ever reserve of medical equipment, within the rescEU system, was created to help individual countries fight the pandemic[65].

In April 2020, a team of European doctors and nurses from Romania and Norway was sent through the Union Civil Protection Mechanism to help Italian medical staff. In the words of the Commissioner for Crisis Management: "*I thank Romania, Norway and Austria for helping Italy at a time that is so difficult for the whole continent. This is EU solidarity in practice. Our EU Emergency Response Coordination Centre works 24 hours a day, 7 days a week, in cooperation with all Member States, to ensure that assistance is directed where it is most needed*"[66]. Italy, after a few weeks, has finally seen European solidarity. At this point, the EU's "managerial skills" have shown itself in a full glory. This is evidenced by the wide range of activities aimed at supporting the economy, the development of new control materials enabling reliable testing[67], guidelines on drug distribution between Member States, assistance (in the form of financial and material assistance) to Member States but also to non-European countries, and international organizations[68]. While all this was happening, the EU worked on vaccine development, mobile applications, data sharing platforms among researchers, supported biology development and helped repatriate half a billion EU citizens through consular assistance.

In the spring and summer of 2020, the EU continued to act in all the above areas, notably through soft law[69], which can be seen as a positive necessity (due to the lack of powers to issue binding public health legislation), however, the legitimacy, legal binding nature and "democracy" of soft law may be unclear

[online]. 2020. Available at: https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf

64 The Commission provides practical guidelines to ensure the continuity of the flow of goods within the EU „green lanes" [online]. 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/sk/ip_20_510.

65 Medical equipment: intensive care medical equipment such as ventilators, personal protective equipment such as reusable drapes, vaccines and therapeutics, laboratory supplies.

66 LENARČIČ, J. [online]. 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/sk/ip_20_613

67 Regulation (EU) 2020/461 of the European Parliament And of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency.

68 EU global action to fight the pandemic [online]. 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/sk/ip_20_604

69 Dozens of soft-law acts were issued during 2020.

in some cases[70]. From the end of the summer to the end of 2020, EU action aimed in particular at ensuring a sufficient supply of vaccines[71] for the citizens of member states[72] and the preparation of new legislation. Strengthening powers, in other words, deepening integration in the field of public health, is one of the ways in which the EU could respond better to future threats. For the time being, the Union has only supporting powers, consisting in the coordination of national policies, in accepting the significant differences in the health systems of the Member States. Experience in 2020 has shown that, although support powers can be useful in combating a pandemic, they have limits due to their nature that limit their effect.

At this point, in the face of the threat of a third wave of coronavirus, the Commission has presented a proposal for a Regulation[73] to achieve the creation of a "Health Union". The Regulation would strengthen the Union's competences[74] in the field of public health, introduce better threat monitoring and establish crisis management plans (at both EU and national level), thus strengthening preparedness and action at all levels. Although the EU does not have the necessary scope of the powers conferred on the founding treaties, the scope of the proposed actions can be better achieved at Union level (subsidiarity principle), as was the case with Decision 1082/2013 / EU.

The COVID-19 crisis, among other issues, revealed:

- First, no consensual view on the origin and expected end of the COVID-19 crisis;
- Second, lack of preparedness in most EU member states;
- Third, strong negative impact on EU and global economy;
- Fourth, new space for area of co-operation among EU member states;
- Fourth, pandemic, and response to it became strong political issue inside and outside the EU: influencing US pre-election campaign and election results in 2020 as well as international relations (US, Australia, China disputes).

[70] See also STEFAN, O. „COVID-19 Soft Law: Volumious, effective, legitimate? A research agenda", In *European Papers*, Vol. 5, 2020, No 1, pp. 663–670.

[71] PIROZZI, N. COVID-19 Emergency: Europe Needs a Vaccine. In Rome, IAI, March 2020, 4 p. Issue: 20|08.

[72] At the end of November, the EU already had contracts with various pharmaceutical companies for a total of 700 million vaccines.

[73] The regulation is intended to replace the current Decision 1082/2013 / EU on serious cross-border threats to health.

[74] The proposal extends the competences of the Union's institutions and bodies, for example, the Commission can formally declare a state of emergency with more legal effects – issuing delegated acts to ensure rapid assistance to Member States during a crisis situation and coordination of crisis management.

7. Conclusions

The political nature of European integration has been clear since its inception. In the famous Schuman Declaration, Robert Schuman foreshadowed that the Coal and Steel Community is not the last step in bringing nations closer together; on the contrary: "*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity*. *By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace*"[75]. Schuman´s one of the closest collaborator, Jean Monnet, declared: "*experience has shown us that cooperation between states at intergovernmental level does not guarantee peace and prosperity in Europe. Only common institutions and rules can prevent a repeat of world wars, build a sustainable framework of democracy, prosperity and peace*"[76]. History so far shows us that the integration process is being accelerated by various crises, whether internal or external, and each of these events has so far led to EU´s strengthening.

One of the dominating political arguments of proponents of introduction the Lisbon Treaty was that the adoption Lisbon Treaty will allow better functioning of the European Union. Paradoxically, almost immediately after the adoption of Lisbon Treaty, the European Union has been facing an unprecedented and more-dimensional crisis: starting by economic and debt crisis in 2009, continuing by Ukraine crisis in 2014; migration crisis in 2015, followed by BREXIT started in 2016 and by global attack of COVID-19 pandemic in 2020. This had significant impact on the EU economy that might be felt by economic turmoil and general downturn of economic indicators. Much more than economy, however, might be perceived the risk of crisis related to citizen´s potential increase of mistrust in politics, politicians and governance both on EU and on national level. BREXIT is the top of an iceberg of other serious tests of unity that might follow.

In particular, the migration crisis has revealed completely opposite views preferences on future integration between the supranational approach (led by the European Commission) and approach of most Western countries basically focusing on acquiring and integrating the incoming migrants and the national approach (led by some CEE countries) emphasising to secure and control the common borders first and accept migrants only on a selective basis. The sudden

[75] The Schuman Declaration was presented by French foreign minister Robert Schuman on 9 May 1950.

[76] MONNET, J. *Mémoires*. Paris: Fayard, 1976.

and uncontrolled inflow of irregular migrant and the disability of the member states to control external borders, combined by an unlimited "open-door" policy efforts by European Commission and Angela Merkel, have in some member states brought back questions on national identity, and Christian roots of Europe. These issues were further reflected in various discussions where some member states (most explicitly the Polish and Hungarian governments) opposed the "over-regulatory approach" by the European Commission which they perceived contradictory with their national laws. Another conflict was visible during the negotiations on the multiannual financial framework (2021–2028). In autumn 2020 the European Commission proposed and the European Parliament approved that the funding from the common EU budget during 2021–2028 to each member state should depend on the respect of rule of law and democracy. This condition was refused by the governments of Hungary and Poland that were concerned about potential abuse of this provision for political purposes to use it "as a stick against disobedient member states" and threatened to put veto on the final package of the multiannual financial framework on the European Council. Hungarian Prime Minister Victor Orbán was even talking about an option that Hungary would leave the EU. However, on 11 December 2020, in the last month of the German presidency, after 22 hours of intensive negotiations under the leadership of German Chancellor Angela Merkel the conflict was solved on 11 December 2020 and the budget for 2021–2028 finally approved. However, the discussion and arguments revealed during the summit and past months have pointed out to a division on the perception of the further integration process which might come back later again.

The discussion between both camps basically includes: First, the extent (by simplified narrative: "more" or "less") of the European integration; Second, the subsidiarity principle where the politicians of some national governments feel threatened by some supranational initiatives by the European Commission which for example keeps proposing actions that are undesired in some member states. This is particularly sensitive in areas that some member states wish to govern on their own (for example issues related to family, ethical or moral issues)[77]. It is clear that if the EU27 would like to have a perspective to continue as a common

[77] For example: Commission´s proposal for financing research from common EU budget that includes research practices that are illegal in some member states: During the first Barroso Commission in case of proposal by Commissioner for Research Janez Potočnik on financing research on embryo stem cells, that is bioethical illegal in some member states. Even the European Commission that usually proposes initiatives in a consensual way, remained divided on this issue. Even if this this concrete initiative has passed through the Council by vote of one singe member state (Slovenia) – the result was a common EU initiative that funds activities that are in some member states illegal and globally from bioethical point of view controversial.

entity for the future, this kind of "political wrestling" should be avoided. The future initiatives by the European Commission should be governed by the common good of all member states which is clearly justified and easy to explain.

In 1957, at a Conference in Brussels, one of the founding fathers of the integration project Konrad Adenauer declared: "*European integration should not be a straight-jacket for European nations, but should be their common basis for sound, individual development of each of them*". If citizens of any member state will perceive the EU membership and policies to be a "straight-jacket", which is "*in uncontrolled way influencing their lives*", but "*outside of their control*", it is not excluded that discussion on "lack of sovereignty" and on "exit(s)" across the EU member states might still be an issue. Even after the important EU´s lesson learned: the BREXIT. Obviously, it is neither in the interest of the EU´s unity, nor it follows the great vision the founding fathers had about Europe. It can be said that historically all events of crisis have led to strengthening of the processes of European integration. The search for response to the most recent COVID-19 crisis will be another test for the EU´s ability to respond.

Considering the future of the EU there are basically seven options where the EU can move further on: first, to continue in the same manner it did in the last months. Second, to strengthen the supranational power by new competences. Third, to reduce the scope of supranational cooperation, for example within the border of the actual common market with four freedoms (persons, goods, services, capital); Fourth, to create new platforms for enforced cooperation for the member states that would wish to collaborate more closely; Fifth, to come back in the process of integration and reduce the common initiatives and policies only to areas that are really perceived as beneficial to member states. This would probably, among other issues, require reconsidering the actual qualified majority voting in the Council and possibly come back to unanimity principle, at least in most of EU decision making process areas; Sixth might be an option of other qualitative/quantitative change in the relations guiding the European integration; Seventh and the last option is total disintegration. However, it is clear, this option would lead to loose-loose position of all member states. In a globalized world, none of the member states is strong enough to succeed with the perspective offered by the founding fathers. Therefore, it is indispensable that representatives of all member states look for solution in a sincere, open way, respecting the legacy and moral imperatives of the founding fathers that need to be recognised, nourished, and commemorated.

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EU Member States' Representation in the European Parliament: the Politics of Seat Reapportionment in a Historical Perspective*

Jakub Charvát**

Summary: Modern democratic political systems are hardly conceivable without political representation. This also applies to the political system of the EU, and namely the European Parliament. The EP has undergone several changes over time, including changes in its composition. The case study addresses the composition of the EP from the historical perspective. It investigates the origins of the EP's composition, reapportionment strategies chosen and their effects on malapportionment of the EP seats. When changing the EP's composition, the accommodation, expansionary and redistributive modes can be distinguished. While the accommodation mode is closely linked to the processes of enlargement, the expansionary and redistributive modes follow both enlargements and institutional reforms. The redistribution mode may be the strategy for the maintenance of malapportionment while the expansionary mode is a way to reduce the disproportionality of seat allocation among Member States in the context of institutional reforms, at least until the 1990s.

Keywords: European Parliament; representation; reapportionment; degressive proportionality; malapportionment

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1. Introduction

The development of post-war European integration is, inter alia, closely linked to the changes in the status and scope of the powers of the European Parliament (hereinafter "EP") and the two parliamentary assemblies that preceded it (the Common Assembly of the European Coal and Steel Community and the European Parliamentary Assembly).[1] In this context, the EP may be perceived as a remarkably successful institution as it underwent the most dynamic development of all institutions of the European Union's political system.[2] And it is important to mention that the EP itself has played a central role in "*the gradual institutionalisation of representative democracy as a constitutional principle of the EU*".[3]

At the very beginning of its existence the Common Assembly, a predecessor of the EP, was conceived as a consultative assembly whereby its members were not elected but delegated by national governments of the Member States of the Community. However, the EP gradually strengthened its position up to the present form of a "*directly elected, fully-fledged parliamentary forum*",[4] with significant legislative control and budgetary powers at the European Union (hereinafter "EU") level. From an institutional perspective, the EP has therefore been a unique institution within a unique political system. Above all, it is one of the largest representative bodies in the world representing more than 500 million inhabitants and the first transnational parliamentary assembly ever to strive for democratic political representation.

Thus, the EP's composition, and especially the apportionment of seats among Member States appears to be a relevant issue. Moreover, the topic is gaining importance because both the EP has been conceived, despite some early discussions,[5] as a unicameral assembly, and the size of the population varies significantly across Member States (see Figure 1). This combination makes the issue in question even more difficult. And as former British MEP Duff pointed out, the question of the size of representation of Member States in the EP has traditionally

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1 The term "European Parliament" will hereinafter be used to refer also to the two assemblies that preceded it.

2 RITTBERGER, B. *Building Europe´s Parliament: Democratic Representation Beyond the Nation State*. Oxford: Oxford University Press, 2005.

3 RITTBERGER, B. Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament. *Journal of Common Market Studies*. 2012, vol. 50, no. 1, p. 18.

4 VIOLA, D. M. The genesis of the European Parliament: From appointed Consultative Assembly to directly elected legislative body. In VIOLA, D. M. *Handbook of European Elections.* London, New York: Routledge, 2016, p. 3.

5 See, e.g., DEHOUSSE, F. Rapport de Fernand Dehousse sur les Institutions de la Communauté européenne (La Haye, 8–10 octobre 1953) [online]. Available at: http://www.cvce.eu/obj/rapport_de_fernand_dehousse_sur_les_institutions_de_la_communaute_europeenne_la_haye_8_10_octobre_1953-fr-d416e1c6-b1f8-43df-bd81-906f8bd87a91.html

represented one of the most complex and sensitive issues of inter-governmental conferences (hereinafter "IGCs").[6]

Table 1. Member States representation since 1952

	1952	1958	1973	1979	1981	1986	1994	1995	2004	2007	2009	2014	Brexit
Belgium	10	14	14	24	24	24	25	25	24	24	22	21	21
France	18	36	36	81	81	81	87	87	78	78	72	74	79
Germany	18	36	36	81	81	81	99	99	99	99	99	96	96
Italy	18	36	36	81	81	81	87	87	78	78	72	73	76
Luxembourg	4	6	6	6	6	6	6	6	6	6	6	6	6
Netherlands	10	14	14	25	25	25	31	31	27	27	25	26	29
Denmark	-	–	10	16	16	16	16	16	14	14	13	13	14
Ireland	-	–	10	15	15	15	15	15	13	13	12	11	13
United Kingdom	-	–	36	81	81	81	87	87	78	78	72	73	-
Greece	-	-	-	-	24	24	25	25	24	24	22	21	21
Portugal	-	-	-	-	-	24	25	25	24	24	22	21	21
Spain	-	-	-	-	-	60	64	64	54	54	50	54	59
Austria	-	-	-	-	-	-	-	21	18	18	17	18	19
Finland	-	–	–	–	–	–	–	16	14	14	13	13	14
Sweden	-	–	–	–	–	–	–	22	19	19	18	20	21
Cyprus	-	-	-	-	-	-	-	-	6	6	6	6	6
Czechia	-	-	-	-	-	-	-	-	24	24	22	21	21
Estonia	-	–	–	–	–	–	–	–	6	6	6	6	7
Hungary	-	–	–	–	–	–	–	–	24	24	22	21	21
Lithuania	-	-	-	-	-	-	-	-	13	13	12	11	11
Latvia	-	-	-	-	-	-	-	-	9	9	8	8	8
Malta	-	-	-	-	-	-	-	-	5	5	5	6	6
Poland	-	-	-	-	-	-	-	-	54	54	50	51	52
Slovakia	-	-	-	-	-	-	-	-	14	14	13	13	14
Slovenia	-	-	-	-	-	-	-	-	7	7	7	8	8
Bulgaria	-	-	-	-	-	-	-	-	-	18	17	17	17
Romania	-	-	-	-	-	-	-	-	-	35	33	32	33
Croatia	-	–	–	–	–	–	–	–	–	–	–	11	12
Total	78	142	198	410	434	518	567	626	732	785	736	751	705

Yet the apportionment of the EP seats among Member States is probably the most understudied subject within the research field of European institutions. In political science, there has been very little scholarly literature dealing with this issue.[7] So far, the topic has been addressed generally by

[6] DUFF, A. Finding the balance of power in a post-national democracy. *Mathematical Social Sciences*. 2012, vol. 63, no. 2, pp. 74–77.

[7] For the few exceptions see THEIL, H., SCHRAGE, L. The Apportionment Problem and the European Parliament. *European Economic Review*. 1977, vol. 9, no. 3, pp. 247–263; BALINSKI, M. L., YOUNG, H. P. Fair Representation in the European Parliament. *Journal of Common Market Studies*. 1982, vol. 20, no. 4, pp. 361–373; RODDEN, J. Strength in Numbers? Representation and Redistribution in the European Union. *European Union Politics*. 2002, vol. 3, no. 2, pp. 151–175; TAAGEPERA, R., HOSLI, M. O. National Representation in International Organizations: The Seat Allocation Model Implicit in the EU Council and Parliament. Political Studies, 2006, vol. 54, no. 2, pp. 370–398; RITTBERGER, B. The historical origins of the EU´s system of representation. *Journal of European Public Policy*. 2009, vol. 16, no. 1, pp. 43–61; ROSE, R., BERNHAGEN, P., BORZ, G. Evaluating competing criteria for allocating parliamentary seats. *Mathematical Social Sciences*, 2012, vol. 63, no. 2, pp. 85–89; ROSE, R. *Representing Europeans: A Pragmatic Approach*. Oxford: Oxford University Press, 2012; CHARVÁT, J. Zastoupení členských zemí a hodnota hlasu v evropských volbách 2014. *Central European Journal of Politics*. 2015, vol. 1, no. 2, pp. 71–78; CHARVÁT, J. Poměrné sestupné zastoupení v Evropském parlamentu: unijní právo vs. realita. *Mezinárodní vztahy / Czech Journal of International Studies*.

mathematicians.[8] This is concisely evidenced by the fact that the only special issue devoted to the apportionment in the EP was published in *Mathematical Social Sciences* in 2012 (see Vol. 63, iss. 2). In the vast majority, however, the authors focus primarily on comparing the (dis-)advantages of different reapportionment methods to find the most accurate mathematical algorithm.

Despite the continuing lack of interest of political scientists, the topic is essentially political. It is politicians who decide on the EP's composition and what counts as "fair" representation. An active involvement of politicians and officials in political and scholarly discussions further underlines the political nature of this issue,[9] which is why it should not remain outside the interest of the political

2019, vol. 54, no. 1, pp. 22–40; BAYSAL, A. National Representation in European Democracy: Seat Apportionment in the European Parliament. Conference paper, European Union Studies Association Fifteenth Biennial Conference, May 4–6, 2017, Miami, Florida [online]. Available at: https://eustudies.org/conference/papers/14.

[8] See, e.g., RAMÍREZ GONZÁLEZ, V., PALOMAREZ, A., MÁRQUEZ, M. L. 2006. Degressively proportional methods for the allotment of the European Parliament seats amongst the EU member states. In SIMEONE, B., PUKELSHEIM, F. (eds.). *Mathematics and Democracy: Recent Advances in Voting Systems and Collective Choice*. Berlin, Heidelberg: Springer, 2006, pp. 205–220; CICHOCKI, M. A., ŻYCZKOWSKI, K. (eds.). *Institutional Design and Voting Power in the European Union*. London: Ashgate, 2010; DNIESTRZAŃSKI, P. Degressive proportionality: source, findings and discussion of the Cambridge Compromise. *Mathematical Ecomomics*. 2011, vol. 7, no. 14, pp. 39–50; MISZTAL, A. Adjustment Function as a Tool for Distribution of Seats in the European Parliament. *Mathematical Economics*, 2011, vol. 7, no. 14, pp. 138–154; MISZTAL, A. *Degresywna proporcjonalność a kształtowanie składu Parlamentu Europejskiego*. Wrocław: Wydawnictwo Uniwersytetu Ekonomicznego ve Wrocławiu, 2012; DELGADO-MÁRQUEZ, B. L., KAEDING, M., PALOMARES, A. A more balanced composition of the European Parliament with degressive proportionality. *European Union Politics*. 2013, vol. 14, no. 3, pp. 458–471; DNIESTRZAŃSKI, P., ŁYKO, J., MISZTAL, A. *Degresywna proporcjalność w dystybucji dóbr niepodzielnych*. Wrocław: Wydawnictwo Uniwersytetu Ekonomicznego ve Wrocławiu, 2013; ŁYKO, J., RUDEK, R. A fast exact algorithm for the allocation of seats for the EU Parliament. *Expert Systems with Applications*. 2013, vol. 40, no. 13, pp. 5284–5291; PETERNEK, P., KOŚNY, M. 2015. The Allocation of Seats in the European Parliament and the Principle of Degressive Proportionality. *Mathematical Economics*. 2015, vol. 11, no. 18, pp. 99–113; CEGIEŁKA, K. 2016. Degressively Proportional Apportionment of Seats in the European Parliament. From a Simple Idea to a Problematic Legal Rule. *Mathematical Economics* 12 (19): 15–30; CEGIEŁKA, K., DNIESTRZAŃSKI, P. ŁYKO, J., MACIUK, A., RUDEK, R. On Ordering a Set of Degressively Proportional Apportionments. In NGUYEN, N., KOWALCZYK, R. MERCIK, J. (eds.). *Transactions on Computational Collective Intelligence XXVII*. Berlin, Heidelerg: Springer, 2017, pp. 55–63; PUKELSHEIM, F., GRIMMETT, G. R. Degressive Representation of Member States in the European Parliament 2019–24. *Representation*, 2018, vol. 54, no. 2, pp. 147–158.

[9] See DUFF, A., op. cit; MOBERG, A. EP seats: The politics behind math. *Mathematical Social Sciences*. 2012, vol. 63, no. 2, pp. 78–84; TRZAZKOWSKI, R., POPIELAWSKA, J. How European are the European Elections? The European Pariament´s Long Struggle for a Direct and Universal Suffrage Conducted According to a Uniform Electoral Procedure. In

science discussions. At the same time, (re-)apportionment is such an important and complex issue with several political and social consequences that it should not be left solely to mathematicians and their best-known calculations, however inspiring. Thus, the paper seeks to contribute to the contemporary debate on the subject as it focuses on the composition of the EP in the historical perspective.

The structure of the article is as follows. After a brief discussion of the objectives follows a description of the strategy to measuring malapportionment. Next, the article discusses the historical background of the Member States' representation in the EP and its transformations over time. Subsequently, it turns to the description of malapportionment and representation profile in the EP since the very beginning of its existence. The analytical section is devoted to the politics of reapportionment in the EP since 1952, specifically to the three reapportionment modes that have been observed to date, and its effects on malapportionment in the EP.

2. Objectives of the study

When analysing representation and redistribution in the EU, Rodden concluded that future studies in the EU might attempt to make apportionment itself an endogenous variable.[10] They might ask under what conditions do large Member States allow themselves to be underrepresented, under what conditions do they demand reapportionment, etc. The present article seeks to address these (and other related) questions via an exploratory case study.

The key objectives of the article are both analytical and descriptive. Building on primary sources (e.g., the founding treaties, Council decisions and/or reports and resolutions of the EP) as well as secondary literature, the paper seeks an in-depth qualitative analysis of the composition of the EP over time through process tracing. In order to study the politics of seat (re-)apportionment from the historical perspective, the paper employs a pragmatic approach which evaluates existing policies, in this case the politics of the EP's seats reapportionment, by asking how they work and what their consequences are.[11]

For a long time, the EU law has not provided any (even) general principle of the seat apportionment strategy. It was only the Treaty of Lisbon of 2007 that officially introduced a degressively proportional representation of EU citizens in the EP and the lowest and highest possible number of MEPs per Member State.

KUŻELEWSKA, E., KLOZA, D. *Elections to the European Parliament as a Challenge for Democracy*. Warszawa, Białystok: Oficyna Wydawicza ASPRA-JP, 2013, pp. 27–42.

[10] RODDEN, J., op. cit.

[11] ROSE, R., op. cit.

But in fact, the degressive proportionality had been a reality even before the adoption of the Lisbon Treaty. In order to better understand the emergence and the current composition of the EP, the research focused on *what are the origins of the degressively proportional representation in the European Parliament* (RQ1)?

The degressive proportionality, therefore, reflects path dependence.[12] But, even though the underlying principle for composing the EP has been based on the original composition of the Common Assembly from 1952, certain modifications have taken place over time (e.g., due to the accession of new countries, the reunification of Germany, etc.). Thus, the research further addressed the question of how the composition of the EP has changed over time. Moreover, as the seat apportionment has traditionally been the result of political negotiations and agreements at IGCs, the research paid attention to the reasons for reapportionment and the constraints of and processes behind the decision-making on the seat apportionment in the EP. Or in other words, *what were the apportionment strategies when changing the composition of the European Parliament* (RQ2)?

Last but not least, because the degressive proportionality causes a distortion of the proportional representation of the EU Member States (malapportionment) in the EP, tracking the roots of malapportionment may help to understand the politics of (national) representation in the EP over time.[13] Thus, the research dealt with the questions of *how malapportionment has changed regarding the changes in the composition of the European Parliament* (RQ3), and *whether different apportionment strategies tend to have different effects on the value of malapportionment* (RQ4)?

3. Measuring malapportionment

Malapportionment may be defined as an uneven allocation of parliamentary seats among territorial units as compared to their population shares (seats–population disproportionality). To measure malapportionment, the adaption of the Loosemore–Hanby distortion index[14] was employed.[15] Malapportionment (*MAL*) in the EP is thus calculated as follows. The proportion of seats in the EP for each Member State (s_i) is deducted from the share of its population within the EU's

[12] ROSE, R., BERNHAGEN, P., BORZ, G., op. cit.

[13] Cf. BAYSAL, A., op. cit.

[14] LOOSEMORE, J., HANBY, V. J. The Theoretical Limits of Maximum Distortion: Some Analytical Expressions for Electoral Systems. *British Journal of Political Science*. 1971, vol. 1, no. 4, pp. 467–477.

[15] SAMUELS, D., SNYDER, R. The Value of a Vote: Malapportionment in Comparative Perspective. *British Journal of Political Science*. 2001, vol. 31, no. 4, pp. 651–677.

total population (p_i). Then the absolute values of these differences for all Member States are added up and the result is divided by two (so that no distortion of the proportional representation is counted twice).

$$MAL = \frac{1}{2}\sum_{i=1}^{n} |p_i - s_i|$$

This index provides information on how large a proportion of seats in the EP was occupied by another Member State than would correspond to the proportional seat allocation among the EU Member States. E.g., $MAL = 0.25$ would imply that a total of 25 per cent of the total number of seats was allocated unevenly and hence occupied by the other Member States than strict proportionality would imply.

The malapportionment index characterises the composition of the entire EP, which may be useful for comparative purposes, but it does not reveal how the apportionment affects territories of different population sizes. Or more specifically, the malapportionment index does not detect whether there is an advantage in the parliamentary representation for large or small Member States (measured by population size). Thus, it would be useful to add a tool to indicate, or even better visualise, the deviation from proportional representation for each territorial unit in individual elections. Thus, the (*territorial*) *representation profile* has been "designed" as an adaption of the proportionality profile used by Taagepera and Laakso[16] for visualising the seats–votes disproportionality.

According to the definition of the degressive proportionality, the Member State's representation in the EP depends on its population size, with underrepresentation of the most populous and overrepresentation of less populous Member States. As the under-/over-representation are quantified by the advantage ratio (A), or seats–population ratio of a given Member State, i.e. the proportion of seats of the Member State in the EP divided by the proportion of its population ($A = 1$ implies perfect proportionality of seats among Member States regarding their population size while $A < 1$ means under-representation and $A > 1$ implies over-representation of the Member State), the representation profile plots advantage ratio of each Member State (y-axis) versus its population share (x-axis) in one or several elections.

Following Taagepera's definition of the proportionality profile,[17] the representation profile may be described as a 'snapshot' of the territorial composition

[16] TAAGEPERA, R., LAAKSO, M. Proportionality Profiles of West European Electoral Systems. *European Journal of Political Research*. 1980, vol. 8, no. 4, pp. 423–46.

[17] TAAGEPERA, R. *Predicting Party Sizes: The Logic of Simple Electoral Systems*. Oxford: Oxford University Press, 2007.

of the given assembly where oddities are to be quickly spotted. It figures the dependence of the parliamentary representation on the population size of the examined territorial units in the respective or several elections. The representation profile is a way to indicate at a glance which Member States are under-/over-represented in the EP and how much they are (dis-)advantaged (as compared to other Member States). In the case of the EP's composition, for which the degressively proportional representation is laid down, we expect that smaller Member States should be overrepresented while the most populous Member States should be underrepresented. The figure curve should thus have a downward trend.

The research used the data on the actual number of persons having their usual residence in EU Member States on 1st January of the year in which the European elections[18] were held while the data were drawn from Eurostat.[19] It could be argued that the Lisbon Treaty's wording of citizens should be taken literally so it would be appropriate to use data on their numbers,[20] but there are a number of problems when preferring such an approach. There is a considerable migration within the EU and thus, some of the Member States' citizens may be residents in other Member States (or even outside the EU). In addition, the population data are collected by Eurostat via a uniform methodology and are easily available while methods of collecting data on citizens vary across Member States. Another argument may be the electoral practice of the USA, where the total population is considered in the apportionment in the House of Representatives.[21]

4. Member States representation in the EP: a historical perspective

From the very outset, the institutional structure of the European integration presupposed the existence of an assembly, albeit with only limited powers, in which all the Member States would have adequate representation. For the German and French delegation, one of the crucial issues were the questions of democratic

[18] The term "European election(s)" will be used as a synonym for "European Parliamentary election(s)".

[19] See https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&pcode=tps00001&language=en.

[20] PUKELSHEIM, F. Putting Citizens First: Representation and Power in the European Union. In: CICHOCKI, M. A., ŻYCZKOWSKI, K. (eds.). *Institutional Design and Voting Power in the European Union*. London: Ashgate, 2010, pp. 235–254.

[21] COWAN, S. K. Periodic Discordance Between Vote Equality and Representational Equality in the United States. *Sociological Science*. 2015, vol. 2, pp. 442–453.

control and accountability of the High Authority.[22] In early June 1950, the French diplomat Uri proposed that the High Authority should be responsible to the Assembly of the European Union (*Assemblée de l'Union Européenne*). Fourteen days later, a working document by the French delegation referred to the Common Assembly (*Assemblée Commune*), a designation which was later actually used.[23] Monnet then advocated the establishment of an Assembly by arguing that "*in a world in which government authority is derived from representative parliamentary assemblies, Europe cannot be built without such an assembly*".[24]

While relatively soon an agreement was reached on a unicameral structure of the Assembly, the question of its size and composition became the subject of further negotiations. German officials initially proposed determining the Member State's representation from its coal and steel production. But such an apportionment strategy was not favoured by the French authorities, as it would lead to Germany's leading position within the Community's institutional structures. After negotiations with Monnet in early April 1951, the German Chancellor Adenauer withdrew all proposals for weighted economic voting and agreed to the proposal of equal representation of Germany and France in the ECSC's institutions.[25] However controversial this offer may seem, Baysal aptly pointed out that in a situation where the most populous country was also the most vulnerable actor in the post-war international order, the French offer of equal representation can be seen as a reward, rather than a punishment.[26]

Although France was only the third most populous country in the ECSC, with Italy having about a tenth more inhabitants, the original French proposal provided for equal parliamentary representation only in the case of Germany and France. The Italian delegation therefore focused on achieving the same representation in the Assembly as Germany and France, which the Italian negotiators ultimately succeeded in achieving. At that moment, the composition of the Common Assembly followed up on the institutional arrangements of the Consultative Assembly of the Council of Europe established two years earlier. France, Italy and Germany were to have 18 seats each, the Netherlands and Belgium six representatives each and Luxembourg three seats in the Common Assembly. However, the Foreign Ministers of Italy and the Benelux countries refused to accept Franco-German dominance in ECSC structures (either in composition of the High Authority and its Presidency, voting in the Council of Ministers, or in the Common Assembly).

[22] The High Authority is the forerunner of today's European Commission.

[23] For more details, see RITTBERGER, B. *Building Europe´s Parliament*.

[24] Quoted in RITTBERGER, B. *Building Europe´s Parliament*, p. 1.

[25] SPIERENBURG, D., POIDEVIN, R. *The History of the High Authority of the European Coal and Steel Community: Supranationality in Operation*. London: Weidenfeld and Nicholson, 1994.

[26] BAYSAL, A., op. cit.

French Foreign Minister Schuman therefore supported increasing the representation of the Benelux countries to a total of 18 representatives, but the Benelux countries were eventually able to negotiate an even stronger representation, with Belgium and the Netherlands taking ten seats and Luxembourg four seats in the Common Assembly, compared to 18 seats for France, Italy and Germany.[27]

Rodden notes that "*from the beginning, the large states in the European Community – most notably Germany – have explicitly sacrificed voting power in EU institutions in order to establish their commitment to integration and assuage the fears of smaller states*".[28] This is also evident from the resulting composition of the Common Assembly in 1952, which is not in fact the result of a compromise in the true sense of the word but rather a significant concession from Germany in order to implement the intended European integration project. The resulting composition of the Common Assembly significantly met the demands of the French negotiators, who conditioned the future of the integration process, inter alia, by the requirement of equality between the German and French representations. This was largely legitimised by the over-representation of less populous Member States. As Baysal pointed out, the discrepancies between small, medium and large Member State clusters in favour of less populous countries were also prevalent within the clusters themselves, or the apportionment strategy of clustering that favoured Luxembourg vis-á-vis other Member States at the same time provided an advantageous position for France over Germany.[29]

The debates among the founding countries' representatives resulted in the Member States being clustered according to population size and in favour of less populous Member States, i.e., with under-representation of the most populous and over-representation of less populous countries. The transformation of the Common Assembly to the European Parliamentary Assembly in 1958 or the first enlargement of the Communities in 1973 did not alter the underlying seat apportionment strategy. The Rome Treaty increased the total number of MEPs to 142, with six seats for Luxembourg, 14 seats for Belgium and the Netherlands, and France, Italy and Germany increasing their representation to 36 seats. With the 1973 enlargement, the total number of MEPs increased to 198, as the U. K. joined the cluster with 36 seats, while Denmark and Ireland formed a separate cluster with ten seats (see Table 1).

A change in the established practice of clustering was attempted by the Patijn Report (on behalf of the EP's Political Affairs Committee) of February 1975.[30]

[27] SPIERENBURG, D., POIDEVIN, R., op. cit.

[28] RODDEN, J., op. cit., p. 152.

[29] BAYSAL, A., op. cit.

[30] European Parliament. Resolution on the adoption of a draft convention introducing elections to the European Parliament by direct universal suffrage. *Official Journal of European Communities*.

The Report proposed a politically impartial reapportionment procedure based on the existing logic of degressively proportional representation. Other conditions for the proposed procedure included that all relevant political forces from each Member State would be represented in the EP and that the new allocation of seats would not reduce the number of MEPs of any Member State.[31] However, in the end the proposed seat apportionment procedure was not adopted.[32]

Even so, the reapportionment preceding the first elections of MEPs by direct universal suffrage brought a heated political debate. As Balinski and Young pointed out, many competing proposals were advanced while the deadlock developed.[33] To resolve the deadlock, French delegates preferred maintaining the status quo while the Belgian delegation proposed adding another 198 seats apportioned proportionally according to Member States' populations, and German delegates put forward to double the existing distribution. However, the German proposal proved unsatisfactory and thus, the final composition of the EP was a kind of modification of the original Belgian suggestion. Because of the population figures, 28 seats for Belgium and the Netherlands (twice the original number of 14 MEPs), 20 seats for Denmark and Ireland (twice 10), and especially, 12 seats for Luxembourg (twice 6) would produce an unacceptable overrepresentation of less populous Member States in the EP as compared to 72 seats (twice 36) for Germany, France, Italy and the U. K. each. As a consequence, Belgium and the Netherlands were allotted 25 seats, Denmark and Ireland 15 seats, while Luxembourg was left with 6 MEPs. In addition, the U. K. delegates found 72 seats insufficient for the internal allotment of seats among England, Scotland, Wales and Northern Ireland. Thus, all four most populous Member States were apportioned 81 seats in 1979. Yet the 1979 apportionment eventually brought about a relaxation of the existing practice of clustering as Denmark did not agree with the proposed number of MEPs, requiring an additional seat for Greenland to satisfy the demands of the local population for their own representative in the

1975, C 32/15.

[31] The Report proposed that each Member State of up to a million inhabitants is entitled to 6 MEPs and of fewer than 2.5 million inhabitants to 12 MEPs. Countries with a larger population would be entitled to at least 12 seats, and the size of their representation would increase with a growing population as follows: up to 5 million inhabitants should be given an additional seat for every 500,000 inhabitants; with a size from 5 to 10 million, an additional seat should be given for every 750,000 inhabitants; from 10 to 50 million, an additional seat should be given for every million inhabitants; and countries with larger populations should be given a seat for every 1.5 million inhabitants. As a result, Germany would have 71, the U. K. 67, Italy 66, France 65, the Netherlands 27, Belgium 23, Denmark 17, Ireland 13, and Luxembourg 6 seats, with a total of 355 MEPs in 1979.

[32] In a similar vein, the EP considered the mid-1992 proposal (see MOBERG, A., op. cit.).

[33] BALINSKI, M. L., YOUNG, H. P., op. cit.

EP.[34] Finally, the Belgian representation gave up one seat in favour of Greenland. Thus, the existing equal representation between Belgium and the Netherlands was disturbed, as well as between Denmark and Ireland, which has never been restored. Belgium did not get the seat back even after Greenland left the Communities in 1985.

Last but not least, the reunification of Germany should be mentioned in this context. As the reunification resulted in the German population growing by approximately a third, the EP proposed increasing the German representation by 18 seats to 99 MEPs,[35] which was later confirmed by the Council Decision in 1992. Germany thus newly created a separate "cluster". However, the strengthening of Germany's representation without any compensation to France, Italy and the U. K. was seen by others as a threat to shift the European institutional balance in favour of Germany. Therefore, an agreement was also needed to increase the representation of France, Italy, and the U. K. This was finally achieved and the EP representation of these three Member States was increased, although by 'only' six seats to 87 MEPs. As for the other Member States, the Netherlands increased its representation by six seats to 31 MEPs, Spain by four seats to 64 MEPs and Belgium and Greece by one seat, while the remaining Member States were left with the same number of MEPs as before.[36]

This created a whole new reapportionment strategy. Until then, it was possible to pursue two approaches; either seats were added to all or almost all Member States except Luxembourg (such as in 1958 or in 1979), or seats were added only to acceding countries, with their number of seats being created by taking into account the existing apportionment and added to the extant total. Before the 1994 elections, however, not only the 'new' Member State (East Germany) but also several, not all or almost all as before, old Member States were allotted new seats in the EP. Puklesheim and Grimmett called this "*a strategy of an ever enlarging parliament*".[37] As a consequence, the size of the EP grew more than eightfold (from 78 to 626 MEPs) between 1952 and 1995. This was due

[34] HUBER, C. H. Approaches to European Elections. In: SASSE, C., BREW, D. A., GEORGEL, J., HAND, G., HUBER, C. H., VAN DEN BERGHE, G (eds.). *The European Parliament: Towards a Uniform Procedure for Direct Elections*. Firenze: European University Institute, 1981, pp. 83–180.

[35] European Parliament. European Parliament Resolution of 9 October 1991 on democratic representation in the European Parliament of the 16 million new Germany EC citizens (B3-1531/91/rev.). *Official Journal of European Communities*. 1991, C 280: 94.

[36] European Council. Decision amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976. *Official Journal of the European Communities*. 1993, L 033: 15.

[37] PUKELSHEIM, F., GRIMMETT, G. R., op. cit., p. 147.

to the increase in the number of the Member States and an informal rule that the reapportionment should not lead to a reduction in the number of MEPs of any Member State. Thus, with the 1995 enlargement, the EP became one of the largest representative bodies in the world.

Facing the forthcoming Eastern enlargement, the 1997 Amsterdam Treaty introduced an upper limit of 700 MEPs. However, given the size of the 2004 enlargement, the upper limit was insufficient and required a fundamental re-apportionment. But the Member States representatives did not want to do so, especially for fear of disturbing the fragile balance of the existing institutional arrangement. Instead, the EP's size limit was changed with the Treaty of Nice increasing the maximum number of MEPs to 732. Nevertheless, the existing size of the Member States' representation had to be revised; the number of their MEPs fell from the original 626 to 535 in 2004, while the remaining 197 seats were to be allocated to representatives of the acceding countries. For the first time, the Member States representation was decreasing (except for Germany and Luxembourg) and this trend was also repeated in 2009 and 2014, as the Lisbon Treaty, setting a maximum of 751 MEPs, became effective in the meantime (see Table 1).

Table 2. The politics of reapportionment in the EP in a historical perspective

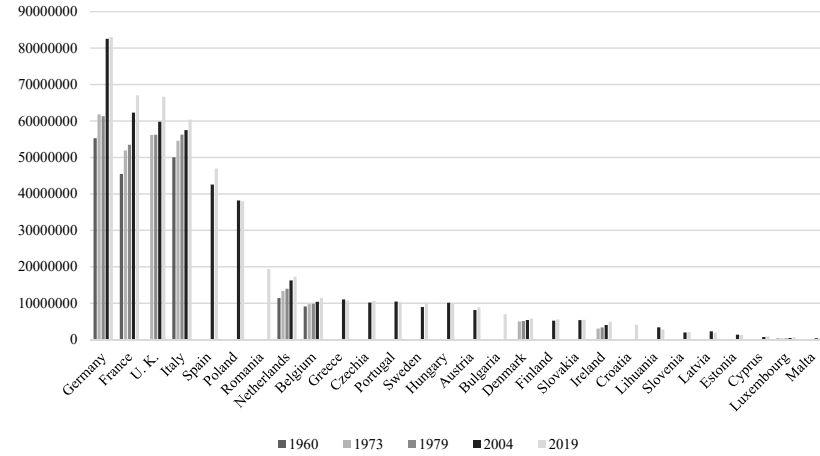
Year	event	the nature of the change	seats	mode	MAL
1952	establishment of the Common Assembly (EU6)	default state	78	default	0.1860
1958	establishment of the European Parliamentary Assembly (EU6)	new seats for all Member States	142	expansionary	0.1179 (1960)
1973	enlargement (EU9)	new seats for acceding countries	198	accommodation	0.1496
1979	introduction of the direct universal suffrage (EU9)	new seats for all Member States	410	expansionary	0.0841
1984	elections after the second enlargement (EU10)	new seats for acceding countries	434	accommodation	0.0951
1989	elections after the third enlargement (EU12)	new seats for acceding countries	518	accommodation	0.0927
1994	elections after the German reunification (EU12)	new seats for several Member States	567	expansionary	0.0951
1999	elections after the fourth enlargement (EU15)	new seats for acceding countries	626	accommodation	0.1139
2004	elections after the fifth enlargement (EU25)	reapportionment (Treaty of Nice)	732	redistribution	0.1443
2007	enlargement (EU27)	new seats for acceding countries	785	accommodation	0.1428
2009	change in the EP's composition (EU27)	reapportionment	736	redistribution	0.1427
2014	change in the EP's composition (EU28)	reapportionment (Treaty of Lisbon)	751	redistribution	0.1423
2020	Brexit (EU27)	reapportionment (Brexit)	705	expansionary	0.1474

In connection with the planned Brexit, reapportionment was approved in 2018.[38] However, it was decided to apportion only 27 out of 73 UK seats in the

[38] European Parliament. European Parliament resolution of 7 February 2018 on the composition of the European Parliament (2017/2054(INL) – 2017/0900(NLE)), 2018.

EP, while the remaining 46 seats were left vacant to reduce the total number of MEPs to 705 after Brexit. As the only (unofficial) provision was that the new apportionment should not lead to a reduction in the present number of any Member State's representatives, some Member States have the same number of seats as in 2014 (Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Portugal and Slovenia), while others will get one (Austria, Croatia, Denmark, Estonia, Finland, Poland, Romania, Slovakia and Sweden), two (Ireland), three (Italy and the Netherlands) or five seats more (France and Spain).

Figure 1. Member States population data since 1960



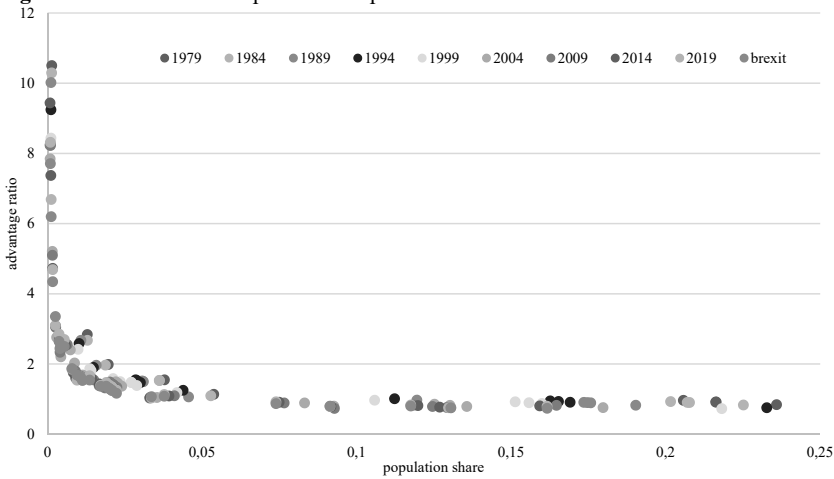
Source: Eurostat population data.

Although it was only the Treaty of Lisbon that introduced the degressive proportionality, the composition of the EP was, in fact, degressively proportional from the very beginning of its existence (see Figure 2). It was mainly the procedure of clustering, which significantly contributed to the degressively proportional representation in the EP before 2004.

However, with the gradual dismantling of this procedure, it became increasingly difficult to comply with the degressive proportionality, which became fully apparent after the largest enlargement of the EU in May 2004. And just since 2004, i.e., somewhat paradoxically from the moment the degressive

proportionality became an official tenet within the institutional framework of the EU,[39] several deviations from this principle may be repeatedly found in the composition of the EP in each election (see Figure 3).[40]

Figure 2. Member States representation profile since 1979



Source: author's calculation (using the Eurostat population data).

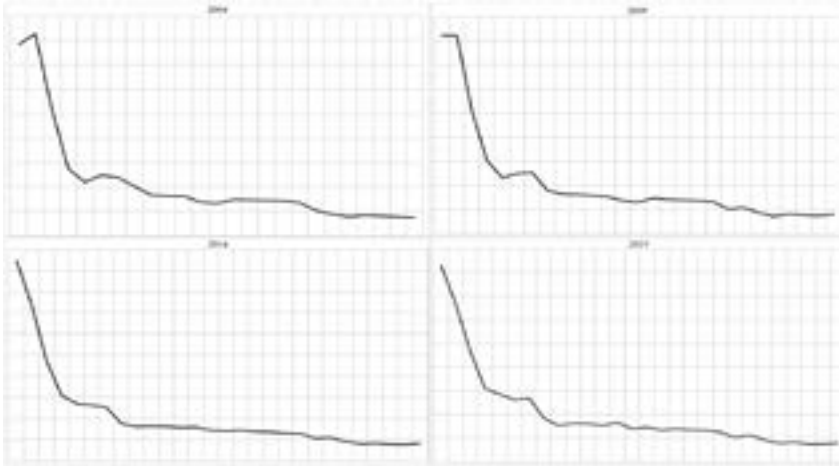
As it is evident from its very designation, the degressive proportionality necessarily assumes the presence of malapportionment. Thus, existing EU legislation implies a disproportionate (unequal) representation of citizens in the EP across the

[39] The composition of the EP has already been the subject of negotiations at the Convention on the Future of Europe (from the end of February 2002 to mid-July 2003). In April 2003, the Presidium of the European Convention first discussed the proportional representation of Member States in the EP (according to population size), but with each country being entitled to at least four MEPs. However, there was a strong reaction against such a proposal. The Presidium therefore suggested the degressively proportional representation in the EP, without, however, specifying this principle in any way (MOBERG, A., op. cit., p. 81). Following this, the requirement for degressively proportional representation was included both in the draft text of the Treaty establishing a Constitution for Europe of 2004 (see Article I-20 of the Treaty) and the Treaty of Lisbon, in both cases again without further specification.

[40] An even more serious problem was the parliamentary representation of Hungary and Sweden. In 2019, there were about 250,000 more inhabitants in Sweden than in Hungary, but Hungary gained one more seat. This is in direct conflict with the definition of degressive proportionality by which "*(...) the larger the population of a Member State, the greater its entitlement to a large number of seats*" (European Council. European Council Decision of 28 June 2013 establishing the composition of the European Parliament (2013/312/EU). *Official Journal of the European Union*. 2013, L 181: Art. 1).

Member States, with underrepresentation of the most populous Member States and overrepresentation of the remaining Member States (whereas the smaller the population the greater the overrepresentation). The value of malapportionment has changed over time but has stabilised at between 14 and 15% since the largest (Eastern) enlargement in 2004 (see Figure 4). This is equivalent to about 105 (in 2009) to 108 seats (in 2019) in the EP, occupied by representatives from the other Member States than being equivalent to the proportional representation. These values are close to the figure from 1973 when the first enlargement of the EU took place. After a decline in malapportionment because of the expansion of the EP in connection with the introduction of direct universal suffrage, the distortion ranged from 8.4% (in 1979) to 9.5% (in 1984 and 1994), and it rose to 11.4% only in 1999, following the accession of Finland, Austria and Sweden.

Figure 3. Member States representation profiles in the 2004, 2009, 2014 and 2019 elections



Source: author's calculation (using the Eurostat population data).

5. The politics of (re-)apportionment in the EP

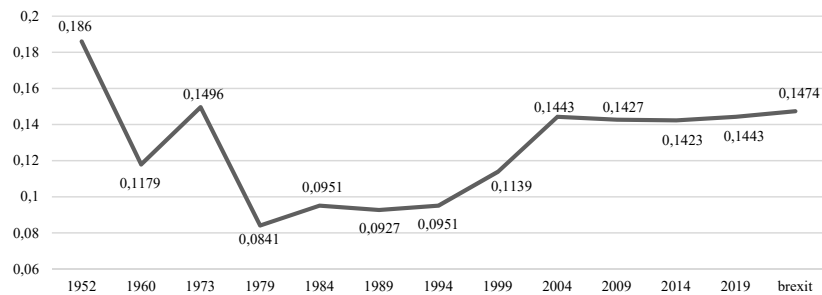
From the very beginning of its existence, the EP's composition has been determined by political negotiations and agreements at IGCs. As is clear from the previous (historical) description, political debates on the apportionment of the EP seats typically took place in the context of either enlargement or institutional reforms (e.g., with the creation of the European Parliamentary Assembly in 1958, the introduction of direct universal suffrage in 1979, implementation the Lisbon

Treaty or Brexit most recently). However, the chosen apportionment strategies varied from case to case.

When discussing apportionment strategies for national representation in European democracy, Baysal distinguishes between two reapportionment modes, namely an accommodation mode and a redistribution mode.[41] While the accommodation mode refers to an increase in the total number of seats in order to provide representation to (create new seats for) the acceding countries, with avoiding loss of any seats for the existing Member States, the latter mode describes a situation where the redistribution of seats concerns all Member States, including the possibility of a reduction in the present number of seats of any existing Member State. As a consequence, the redistribution mode may lead to both an increase and a decrease in the total number of seats in the EP.

As inspiring as the Baysal's typology is, it does not capture the politics of reapportionment in the EP in all its complexity. In addition, we may add an expansionary mode while reformulating the definition of the redistribution mode. Thus, three approaches to the reapportionment in the EP can be distinguished: an accommodation mode, a redistribution mode and an expansionary mode. While the accommodation mode corresponds to the instances where the composition of the EP changes by increasing the total number of MEPs because of new seats created for acceding countries (and adding them to the extant total), historically we have also encountered situations where some Member States have lost part of their representation in the EP due to the need to redistribute (at least part of) the seats; such cases are referred to as the redistribution mode. On the contrary, the expansionary mode refers to the instances when the total number of MEPs increases, either because the number of MEPs in several selected Member States increases, or because the total number of seats increases for both the acceding countries and several existing Member States. Thus, the accommodation mode is a strategy closely linked to enlargements and it was employed in 1973, 1981 and 1987, while the remaining two modes were used for both enlargement and institutional reform (see Figure 5).

Figure 4. Malapportionment in the EP since 1952



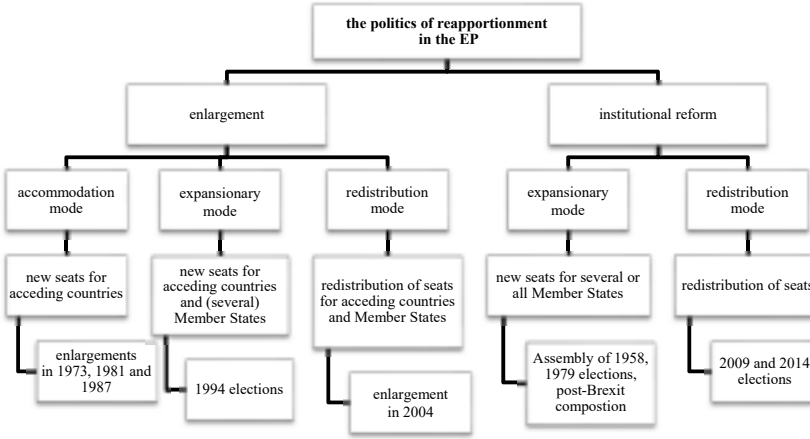
Source: author's calculation (using the Eurostat population data; data for 1952 taken from BAYSAL, A., op. cit).

The redistribution mode is characteristic of situations which reduce the overall size of the EP, as happened, e.g., before the 2009 elections, when the total number of MEPs was reduced from 785 to 736 seats. Another example may be a combination of setting the maximum number of MEPs and enlargement, as was the case in May 2004. The Eastern enlargement has resulted in reducing the number of MEPs for the existing Member States from 626 to 570 seats, while the acceding countries divided the remaining 162 seats. Although the total number of MEPs was increased by representatives for the acceding countries, representation of the existing Member States had to be redistributed to meet the Treaty of Nice requirement of a maximum of 732 MEPs. The redistribution mode also took place before the 2014 elections. Thus, the redistribution mode appeared only after the Amsterdam and, in particular, Nice Treaty that have established the maximum number of MEPs.

On the contrary, the expansionary mode results in an increase in the total number of seats in the EP. An increase in the number of MEPs for the existing Member States was typically the case for institutional reforms, such as the replacement of the Common Assembly by the European Parliamentary Assembly in 1958, or the introduction of direct universal suffrage (increasing the representation of all Member States except Luxembourg). This approach was also applied for the post-Brexit composition of the EP (increasing the number of MEPs for thirteen Member States). The option of increasing the total number of EP seats by MEPs for both acceding countries and several existing Member States was applied after the German unification.

As the accommodation and expansion modes prevailed during the second half of the twentieth century (see Table 2), while the (unofficial) rule was that no existing Member State would have fewer MEPs than before the change, a constant increase in the EP's size was the result of the reapportionment at this time. However, given the number of acceding countries, the trend of increasing the total number of MEPs continued even with the Eastern enlargement in 2004, although in this case the new composition of the EP was the result of the redistribution mode. The EP's size culminated in the accession of Bulgaria and Romania to the EU in mid-2007, as these countries were granted representation by the accommodation mode. Between 1952 and 2007, the EP's size increased more than tenfold, from the original 78 MEPs to 785 MEPs following the 2007 enlargement. Only the implementation of the Treaty of Lisbon reduced the number of seats to 736 MEPs in 2009, to 751 seats in 2014 (after the accession of Croatia) and to the current 705 seats after Brexit.

Figure 5. The politics of reapportionment in the EP: an analytical framework



Source: author.

Table 2 not only summarises the politics of reapportionment in the EP since 1952, but also shows how a different context of the change and different modes affects the malapportionment in the EP's composition. Not surprisingly, under the condition of a degressively proportional composition, most enlargements were a source of increased malapportionment, regardless of the reapportionment mode chosen. In general, the greater the change in the total population, the greater the increase in malapportionment. However, the expansionary mode seems to be an effective approach for how to keep this increase to a minimum. In the case of institutional reforms, the expansionary mode was a way to reduce malapportionment, at least until the 1990s. Last but not least, the redistribution mode may be the strategy for the maintenance of malapportionment if the political elites stand for it, as it appears from the instances of 2009 and 2014.

6. Conclusion

Modern democratic political systems are hardly conceivable without political representation. This also applies to the political system of the EU, and namely the EP, a directly elected and fully-fledged assembly representing the EU citizens. The EP has undergone a number of changes over time, not only in terms of its powers, but also in terms of its composition. In addition to the introduction of direct universal suffrage since 1979, the size of national representations in the

EP have also changed over time. The case study, therefore, addressed the issue of Member States' representation in the EP from the historical perspective. It investigated the origins of the EP's composition, its changes over time, reapportionment strategies chosen and the effects of different reapportionment modes on malapportionment of EP seats among Member States.

Although it may be argued that the current functioning of institutions cannot be inferred from the aspirations of their designers,[42] the diachronic analysis of Member States' representations in the EP underlined the influence of the original apportionment procedure among founding Member States from 1952 on the later composition of the EP while the composition of the Common Assembly was inspired by the Consultative Assembly of the Council of Europe from 1949. Although the degressive proportionality was only formally introduced by the Treaty of Lisbon, it was the composition of the Common Assembly of 1952 that, as a result, established a tradition of degressively proportional representation of EU citizens. During the first decades this was made possible by a strategy of clustering similarly populous Member States into clusters with the same number of EP seats, and clustering has proven to be an effective approach for achieving degressively proportional representation.

As Baysal pointed out, although the strategy of clustering was not a necessary condition for further integration in later years, once this practice was established, it was easier for those who benefited from the existing institutional arrangement to actively seek to maintain the *status quo*.[43] However, over time, under the influence of factors such as the accession of new countries, the reunification of Germany, etc., certain modifications to the original approach occurred. Yet, the deliberate overrepresentation of less populous Member States and conversely, the underrepresentation of the most populous countries can be considered as one of the reflections of path dependence in the institutional development of the European integration.

The EP seat reapportionment has traditionally been the result of IGCs, with the need for reapportionment being a consequence of enlargement or institutional reform. When changing the EP's composition, three approaches can be distinguished, the accommodation, expansionary and redistributive modes. While the accommodation mode is closely linked to the processes of enlargement, the expansionary and redistributive modes follow both enlargements and institutional reforms. As the accommodation and expansion modes prevailed until the implementation of the Treaty of Lisbon, while the rule was that no existing

[42] Cf. PIERSON, P. The Path to the European Integration: A Historical Institutionalist Analysis. *Comparative Political Studies*. 1996, vol. 29, no. 2, pp. 123–163.

[43] BAYSAL, A., op. cit.

Member State would have fewer MEPs than before the reapportionment, there was a constant increase in the size of the EP until 2009. The Lisbon Treaty then introduced a ceiling on the number of seats at a maximum of 751 MEPs.

As it is evident from its very designation, the degressive proportionality necessarily assumes the presence of malapportionment. But if in the case of national parliaments, the malapportionment is evaluated as a 'pathology' of electoral systems, drawing on the results of the above analysis of the EP's composition from a historical perspective, it seems to be an effective strategy to reach institutional power balance and stability in the conditions of the transnational political system.

Last but not least, the study revealed how malapportionment has changed over time and how this change was affected by different reapportionment modes. After a decline of malapportionment because of the expansion of the EP following the introduction of direct universal suffrage, it rose from the 1980s but has stabilised at between 14 and 15% since the largest enlargement in 2004. The main reason for increase in malapportionment were enlargements that took place under the condition of a degressively proportional composition of the EP. If we take into account the impact of different reapportionment modes on malapportionment, it can be concluded that the redistribution mode may be the strategy for the maintenance of malapportionment while the expansionary mode is a way to reduce the disproportionality of seat allocation among Member States in the context of institutional reforms, at least until the 1990s.

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The Shifting Approach of the Court of Justice of the European Union towards the Principle of Mutual Trust and the Impact of the Rule of Law*

Lilla Ozoráková**

Summary: The principle of mutual trust is based on the idea that there is mutual confidence between Member States that their national legal systems are in line with the European Union law and are able to provide similar protection of the shared values. However, the experience of last years has brought multiple challenges questioning these fundamental building blocs. This article focuses on understanding the role of fundamental rights and the rule of law in limiting the principle of mutual trust as suggested by the case law of the Court of Justice of the European Union (CJEU). It discusses the shift in the approach of the CJEU towards the limitations, exploring whether the recent case law suggests that the current crises of values, including the systemic violations of the rule of law and fundamental rights play a crucial role in widening the limits of mutual trust.

Keywords: principle of mutual trust; fundamental rights; the rule of law; judicial cooperation in civil matters, Court of Justice of the European Union.

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1. Introduction

The European Union (EU) has grown to include a "diversity of legal cultures, of legal traditions, of languages […]."[1] Nonetheless, as stipulated in Article 2 of the Treaty on European Union (TEU), "[t]he Union is founded on the values

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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. These 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." Besides reflecting the shared identity on which the EU is built, these values have been considered as the foundations for effective opening up of national legal borders and the suppression and removal of barriers between the Member States.

The reduction of physical and legal barriers between the Member States is primarily achieved through mechanisms built on mutual trust.[2] The principle of mutual trust is often seen as a cornerstone tool for European integration, contributing to the creation of a borderless EU area, while at the same time, offering the possibility to preserve Member States' prerogatives.[3] First used and applied in the area of internal market regarding the obligation of EU Member States to recognize the national rules concerning products' standards,[4] the notion of mutual trust has since largely emerged and expanded to cover also the EU's Area of Freedom, Security and Justice (AFSJ), which comprises of three policy areas, namely asylum and immigration, criminal justice and civil justice.[5]

In 2013, during a major conference on the future of EU Justice Policy hosted by the European Commission, it was repeatedly highlighted that "a truly European Area of Justice can only work if there is trust in each other's justice systems."[6] As also held by the European Council, "the smooth functioning of a true European Area of Justice with respect for different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another's justice systems should be enhanced."[7]

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1 SEFTON-GREEN, R. Cultural diversity and the idea of a European Civil Code. In: HESSELINK, M. W. (ed.). *The Politics of a European Civil Code*. Kluwer Law International, 2006, p. 71–72. See also, VAN HOECKE, M. The harmonisation of private law in Europe: Some misunderstandings. In: VAN HOECKE, M., OST, F. *The Harmonisation of European Private Law*. Hart Publishing, Oxford 2000, p. 1, 3–5.

2 RIZCALLAH, C. The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration. *European Law Journal*. 2019, vol. 25, no. 1, p. 1.

3 Ibid.

4 CAMBIEN, N. Mutual recognition and mutual trust in the internal market. *European Papers*. 2017, vol. 2, no. 1, p. 98.

5 BONNELLI, M. A Union of values: safeguarding democracy, the rule of law and human rights in the EU Member States. Maastricht University, 2019, p. 145 .

6 EUROPEAN COMMISSION. *Building Trust in Justice Systems in Europe: 'Assises de la Justice' Forum to Shapte the Future of EU Justice Policy*. Press release, 21 November 2013 [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1117.

7 European Council Conclusion, 'Strategic Agenda for the Union in Times of Change', Conclusions, 26–27 June 2014, p. 11.

Recognizing the crucial role that the principle of mutual trust plays in achieving a true and fully functioning common European Area of Justice,[8] it appears that the EU is increasingly focusing its attention on strengthening horizontal relationships across the Member States. This also explains why from the wide range of values which found their place in Article 2 TEU, an increasing attention is being paid to the principle of rule of law.[9] In light of this, it appears that the quality and effectiveness of institutions, as one of the elements of the principle of rule of law[10] is essential for building trust on the one hand,[11] while on the other hand, unfair laws and systemic violations of human rights promote distrust.[12] As further highlighted by the European Commission, issues related to the respect of fundamental values and principles have an impact on the entire functioning of the EU.[13] In other words, the shortcomings in a particular national justice system and institutions may impact the functioning of the whole European Area of Justice built on mutual trust.

Nonetheless, in the last few years, the EU has faced multiple challenges questioning the fundamental building blocs of the idea behind the principle of mutual trust. While mutual trust might have been unwavered before, today, it is gradually becoming more obvious that the increasing systemic violations of values coined in Article 2 TEU question the existence of mutual trust between the Member States. In particular, continuous violations of fundamental rights, increasingly highlighted by the myriad of cases dealt with by the European Court of Human Rights (ECtHR), or the recent judgments concerning the breach of the principle of rule of law as found by the CJEU further suggest the existence of value disagreement.[14]

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[8] EUROPEAN COMMISSION. T*owards a true European area of Justice: Strengthening trust, mobility and growth*. Press release, 11 March 2014 [online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_14_233.

[9] LYSINA, P. Ochrana právneho štátu v podmienkach Európskej únie. *Justičná revue*, 2020, vol. 72, no. 11, p. 1.

[10] Ibid., p. 5.

[11] YU, S., BEUGELSDIJK, S., DE HAAN, J. Trade, trust and the rule of law. *European Journal of Political Economy*. 2015, vol. 37, p. 103.

[12] HiiL, *EU Concept Paper: Measuring the rule of law, justice and fundamental rights*, developed in consultation with the European Union Agency for Fundamental Rights (FRA), 2013 [online]. Available at: https://fra.europa.eu/sites/default/files/concept-paper-on-the-rule-of-law-hiil-fra.pdf, p. 5.

[13] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council 'Further strengthening the rule of law within the Union', COM/2019/163 final; See also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '2020 Rule of Law Report, The rule of law situation in the European Union,' 30 September 2020, COM/2020/580 final, p. 2.

[14] See for example, SUYUNOVA, K. The conflict between the principles of the national Member States and Values of European Union such as rule of law, human rights and liberal demoracy – case study of Hungary. *International and Comperative Law Review*. 2020, vol. 20, no. 2, p. 160.

The impact of the existence of value disagreement may already be observed in the area of judicial cooperation in criminal matters. The latest case law of the CJEU[15] confirm that the principle of mutual trust may be set aside in cases facing rule of law problems. From a theoretical perspective in particular, previous research has largely focused on exploring the relationship between the principle of mutual trust and the protection of fundamental rights and the rule of law in the context of judicial cooperation in criminal matters, or in the area of asylum and migration.[16] However, it still remains questionable whether and how, in the future, this value disagreement will manifest itself also in other areas of AFSJ, namely in the field of judicial cooperation in civil matters. Therefore, the aim of this article is to analyze the relationship between the principle of mutual trust on the one hand, and fundamental rights and the principle of rule of law on the other, with a specific focus on the area of judicial cooperation in civil and commercial matters, as one of the policy areas of EU's AFSJ. In particular, the central interest of this paper is to also explore the limits that the current challenges concerning the breach of the rule of law and violations of fundamental rights can set to the proper functioning of the principle of mutual trust in the field of judicial cooperation in civil and commercial matters.

Regarding the research aspect of this paper, the paper firstly employs a systematic and theoretical analysis to explore the idea behind the need to recognize the principle of mutual trust, and to establish it as a legal category within the EU law. Furthermore, a descriptive analysis will be employed in order to understand more comprehensively the key implications of the principle of mutual trust in the area of judicial cooperation in civil and commercial matters. Additionally, the paper also predominantly relies on methods of comparative analysis in order to discuss to what extent the limitations to the principle of mutual trust are allowed in the different fields of the AFSJ and ultimately to assess the impact of the findings of clear violations of fundamental rights and the principle of rule of law by the recent jurisprudence of the CJEU on the proper functioning of the principle of mutual trust.

The paper will consist of four chapters. The first chapter will explore the fundamental idea behind the emergence of the principle of mutual trust and will aim to define the principle of mutual trust, namely as interpreted by the jurisprudence of the CJEU. The second chapter will focus on analyzing the role of the principle of mutual trust specifically in the area of judicial cooperation in civil matters, focusing namely on civil and commercial matters. Furthermore, the third

[15] CJEU, Judgment of 25 July 2018 [GC], Case C-216/18 PPU, *LM*.

[16] GRABOWSKA-MOROZ, B. *The systemic implications of the vertical layering of the legal orders in the EU for the practice of the rule of law*. Reconnect project, December 2020 [online]. Available at: https://reconnect-europe.eu/wp-content/uploads/2021/01/D8.3.pdf

chapter will focus on understanding the role that the protection of fundamental rights and the principle of rule of law play in limiting the principle of mutual trust. The paper will conclude with discussing whether the case law of the CJEU suggests that the current crises of values, including the systemic violations of the principle of rule of law and fundamental rights play a crucial role in widening the limits set to the exceptions of mutual trust, also in areas such as judicial cooperation in civil matters.

2. The Foundations of the Principle of Mutual Trust and the Relevance of the Jurisprudence of the Court of Justice of the European Union

The fundamental idea behind the principle of mutual trust is the existence of mutual confidence between the EU Member States that national legal systems of each Member State are not only in line with the EU law as such, but are able to promote and provide similar protection of the shared values, including respect for human rights and the rule of law. As the CJEU has further elaborated in its previous case law, "EU law is […] based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized, and therefore the law of the EU that implements them will be respected."[17]

However, despite its importance, the concept of mutual trust has not be integrated into the EU legal framework as a specific provision contained in EU primary law (it cannot be found explicitely stipulated in the founding treaties of the EU, including the Treaty on the Functioning of the EU (TFEU) and the TEU). Nonetheless, the principle of mutual trust has developed into a "legal" principle codified in EU secondary law,[18] and its meaning and importance within the EU legal system can be derived from the case law of the CJEU. In fact, the CJEU has played a key role in setting out the principle of mutual trust, its basis, limits and application, with its increasing references made in its jurisprudence.[19]

[17] CJEU, Opinion 2/13 of 18 December 2014, *Access of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, p. 168; see also, CJEU, Judgment of 6 March 2018 [GC], Case C-284/16, *Slovakia v. Achmea BV*, p. 34.

[18] WISCHMEYER, T. Generating trust through law? Judicial cooperation in the European Union and the "Principle of mutual trust". *German Law Journal*. 2016, vol. 17, no. 3, p. 342.

[19] See for example, CJEU, Judgment of May 2008, Case C-195/08 PPU, *Rinau*, p. 50; CJEU, Judgment of 21 December 2011 [GC], Joines Cases C-411/10 and C-493/10, *N.S. and Others*,

Previously, Advocate General Colomer characterized the fundamental idea behind the principle of mutual trust as "while another State may not deal with a certain matter in the same or even a similar way as one's own State, the outcome will be such that it is accepted […] because it reflects the same principles and values."[20] Subsequently in 2011, the Grand Chamber of the CJEU in its judgement in the case of *N.S and Others* used a much stronger language, finding that "the raison d'être of the European Union and the creation of an area of freedom, security and justice […] [are] based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights."[21] Further, and the most detailed understanding of the essence of the principle of mutual trust was elaborated by the CJEU in 2014 with regard to the question of accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), recognizing the principle of mutual trust as "of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained."[22] As mentioned above, according to this case law, the CJEU understands the essence of this principle to be based on the presumption that each Member State shares "a set of common values on which the Union is founded as stated in Article 2 TEU,"[23] and that Member States recognize and adhere to these common values. As such, the idea behind mutual trust is also closely linked with Article 4(2) of TEU and the principle of equality between Member States.

The reference to the importance of mutual trust first appeared in the context of internal market,[24] as well as the mutual recognition of diplomas and professional qualifications.[25] In the famous *Bauhuis* case, the CJEU recognized that the European system of veterinary and public health inspections, "is based on the trust which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and

p. 83; CJEU, Judgment of 6 March 2018 [GC], Case C-284/16, *Slovakia v. Achmea BV*, p. 34; CJEU, Judgment of 25 July 2018 [GC], Case C-216/18 PPU, *LM*, p. 35–36.

[20] Opinion of A. G. Colomer of 19 September 2002, Joined Cases C-187 and 385/01, *Gözütok and Brügge*, p. 124.

[21] CJEU, Judgment of 21 December 2011 [GC], Joined Cases C-411/10 and C-493/10, *N.S. and Others*, p. 83.

[22] CJEU, Opinion 2/13 of 18 December 2014, *Access of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, p. 191.

[23] CJEU, Opinion 2/13 of 18 December 2014, p. 168.

[24] CJEU, Judgment of 25 January 1977, Case C-46/76, *W.J.G Bauhuis v. The Netherlands State*, pp. 21–22; See also CJEU, Judgment of 20 February 1979, Case C-120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein*.

[25] See Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, OJEU L 255/22, September 2005.

public health departments."[26] Subsequently, in the *Cassis de Dijon* judgment, the CJEU outlined the Member States' obligation to trust the regulatory framework put in place by other Member States in relation to the prohibition on quantitative requirements and restrictions on imports and free movement of goods, in general.[27] The reasoning behind such understanding was the idea that requiring Member States to trust each other's regulatory framework will enhance the possibilities for Member States to agree to harmonizing legislation, foreseeing some minimum standards.[28] Notwithstanding, the principle of mutual trust did not remain only within the area of internal market. It has since gained increasing attention and has been further called upon by the CJEU also in relation to other specific fields of law, including areas of judicial cooperation.[29] Therefore, the next section of this paper will focus on exploring the foundations of the principle of mutual trust specifically in the field of judicial cooperation in civil matters.

3. Understanding the Role of Mutual Trust in the Field of Judicial Cooperation in Civil Matters

The judgment in the case of *Gasser*[30] was among the first cases where the CJEU referred to the principle of mutual trust as a legal category in civil law. As the CJEU held, the "Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions […]."[31] Subsequently, in the case of *Turner*[32], the CJEU confirmed its understanding of the principle of mutual trust as a legal category, codified namely in EU secondary law where it held that "[i]t is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect."

[26] Court of Jusice of the European Union, Judgment of 25 January 1977, Case C-46/76, *W.J.G Bauhuis v. The Netherlands State*, p. 21–22.

[27] CJEU, Judgment of 20 February 1979, Case C-120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein.*

[28] GILL-PEDRO, E. Groussot, X. The Duty of Mutual trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension? *Nordic Journal of Human Rights*. 2017, vol. 35, no. 3, p. 263.

[29] CANOR, I. Suspending horizontal Solange: A decentralized instrument for protecting mutual trust and the European rule of law. In VON BOGDANDY, A. et al. (eds.). *Defending checks and balances in the EU Member States,* Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, January 2021, vol. 298.

[30] CJEU, Judgment of 9 December 2003, Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*.

[31] Ibid., p. 72.

[32] CJEU, Judgment of 27 April 2004, Case C-159/02, *Turner v. Gravit*, pp. 24 and 28.

A common context in which the principle of mutual trust appears in the area of civil justice is in relation to mobility and mutual recognition of judgments. In particular, Articles 67(4), 70, 81(1)[33] of TFEU refer to mutual recognition being the fundamental principle on which the cooperation in civil matters within the EU Member States shall be built. Primarily, according to Article 67(4) of TFEU, *"[t]he Union shall facilitate access to justice, in particular, through the principle of mutual recognition of judicial and extrajudicial decisions in civil matter.*" In other words, the principle of mutual recognition refers to the recognition of judicial or administrative act of one Member State by another. For instance, a State of destination treats the judicial or administrative act of a State of origin as if the State itself had issued and acted, even in cases where the procedural or substantive law applied by the State of origin differs from the State of destination.[34]

While previously, the difference between the two notions was unclear, appearing that they were used interchangeably, as "different names for the same principle"[35], the subsequent interpretation given by the CJEU has confirmed that the principle of mutual trust crystallized into a legal principle distinguishable to that of mutual recognition. This contrast can namely be seen in the case of *TNT Express Nederland*, where the CJEU explicitely referenced both the principle of mutual trust and mutual recognition.[36] Nonetheless, the two principles are interrelated and connected.[37] The principle of mutual trust can thus be perceived as forming a basic prerequisite for mutual recognition, as it furthers judicial cooperation despite the procedural and substantive differences between the national legal systems of Member States.

In essence, mutual trust and mutual recognition are two fundamental notions in the EU's quest for the free movement of judicial decisions.[38] While mutual recognition implies that wherever a judicial decision has been issued, it shall be treated equally by the national legal order of the Member States, mutual trust is

[33] Article 81(1) TEU, "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."

[34] WISCHMEYER, T. Generating trust through law? Judicial cooperation in the European Union and the "Principle of mutual trust". *German Law Journal*. 2016, vol. 17, no. 3, p. 355.

[35] Opinion of Advocate General Sharpston of 15 June 2006, Case C-467/04, *Criminal proceedings against Giuseppet Francesco Gasparini and Others*.

[36] CJEU, Judgment of 4 May 2010 [GC], Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, pp. 54–56.

[37] STORSKRUBB, E. Mutual Trust and the Dark Horse of Civil Justice. C*ambridge Yearbook of European Legal Studies*. 2018, vol. 20, p. 182.

[38] LINTON, M. Abolition of Exequatur, All in the Na,e of Mutual Trust! In HESS, B.; BERGSTROM, M.; STORSKRUBB, E. (eds.). *EU Civil Justice – Current Issues and Future Outlook*, Hart publishing, 2015, p. 263.

the basic prerequisite for which the mutual recognition calls. In particular, in the field of judicial cooperation in civil matters, the principle of mutual trust reinforces and appears in the area of civil justice in connection with the principle of mutual recognition, as established by a number of legislative instrumets[39] namely in the area of civil and commercial matters,[40] or family matters and matters of parental responsibility.[41]

3.1. The foundations of the principle of mutual trust in civil and commercial matters – the evolution from Brussels Convention to Brussels I (recast) Regulation

It was the 1968 Brussels Convention that first dealt with recognition and enforcement of civil and commercial judgments in the EU.[42] As a predecessor to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (Brussels I (recast) Regulation), the 1968 Brussels Convention was the fundamental instrument covering all areas of civil and commercial law, except for those which were explicitely excluded from its scope, including for example, the status of legal capacity of natural persons or rights in property arising out of matrimonial relationships.[43]

Despite its significance, the most remarkable developments in the area of recognition and enforcement of judgements in particular, and judicial cooperation in civil matters in general, were achieved through the European Council Programme for the implementation of mutual recognition of decisions in civil and commercial matters (European Council Programme).[44] The European Council Programme was drafted with the "need to approximate Member States' legislation

[39] HO-DAC, M. *The Principle of Mutual Trust in the Face of a Crisis of Values*, *European Association of Private International Law*. Views and Comments, 22 February 2021 [online]. Available at: https://eapil.org/2021/02/22/the-principle-of-mutual-trust-in-eu-law-in-the-face-of-a-crisis-of-values/

[40] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351.

[41] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matter of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 228.

[42] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("1968 Brussels Convention"), 27 September 1968, OJ L 299/32.

[43] 1968 Brussels Convention, Article 1.

[44] European Council, 'Programme of Measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters', OJ C 12/1, 15 January 2001, p. 1.

in civil matters in order to eliminate obstacles to the good functioning of civil proceedings."[45] The European Council Programme identified and highlighted the existing barriers to the free movement of judicial decisions, namely in the requirement of intermediate enforcement (*exequatur*) procedure, enabling a ruling issued in one Member State to be enforced in another.[46] The term "exequatur" referred to a traditional safeguard, in the form of a particular intermediary procedure, with the aim to enable a foreign judicial decision to be enforceable in another State, requiring a verification by the domestic judicial authorities that the foreign judicial decision in question is acceptable in the national legal order of the given State.[47]

Seeking measures to implement the principle of mutual turst led to the European Council in its Programme to suggest further steps aimed at removing the exequatur procedure, namely by establishing minimum standards for certain aspects of civil procedure. According to the European Council Programme, it will be "essential, to lay down a number of procedural rules at the European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States. These guarantees will make it possible, *inter alia*, to ensure that the requirements for a fair trial are strictly observed, in keeping with the European Convention for the Protection of Human Rights and Fundamental Freedoms."[48]

The idea behind it was the need for the existence of mutual trust between Member States built on some degree of common minimum procedural standards, aimed at protecting fundamental rights, in order to enable the free movement and enforcement of judicial decision through mutual recognition. Abolishing the intermediary *exequatur* procedure, including the possibility to refuse to recognize judgments of other Member States on certain grounds, resulted in removing barriers to free movement and enforcement of judicial decisions, while strengthening the importance of the principle of mutual trust. As follows, the principle of mutual trust would enable to unify the national legal systems of Member States.[49]

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[45] European Counil Conclusions of 15–16 October 1999, p. 1.

[46] European Council, 'Programme of Measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters', OJ C 12/1, 15 January 2001, p. 2.

[47] RIZCALLAH, C. The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration. *European Law Journal*. 2019, vol. 25, no. 1, p. 10.

[48] European Council, 'Programme of Measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters', OJ C 12/1, 15 January 2001, p. 5.

[49] HO-DAC, M. *The Principle of Mutual Trust in the Face of a Crisis of Values,' European Association of Private International Law*. Views and Comments, 22 February 2021 [online]. Available at: https://eapil.org/2021/02/22/the-principle-of-mutual-trust-in-eu-law-in-the-face-of-a-crisis-of-values/

3.2. Abolishing the exequatur procedure as a step towards strengthening mutual trust in the area of recognition and enforcement of judicial decisions in civil and commercial matters

This quest was ultimately achieved with the adoption of Brussels I (recast) Regulation. According to its Recital 26,[50] "mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognized in all Member States without the need for any special procedure." As such, judicial decisions rendered by the courts of one Member State were ultimately fully equated with domestic judicial decisions, subject to specific grounds for refusal,[51] hence removing the specific intermediary *exequatur* proceedings to obtain the enforcement of judicial decisions in another Member State, established by its predecessors.[52] In other words, the abolition of the exequatur resulted in an ultimate situation where authorities of a Member State can be "required to automatically use coercive power attached to the sovereignty of their State in order to enforce a judgment decided by foreign officials."[53]

Pursuant to Article 36 of Brussels I (recast) Regulation, judgments in civil and commercial matters shall be automatically recognized by a Member State in which enforcement is sought. In terms of the requirements, Article 37 sets out the requirement to have a copy of the judgment which satisfies the conditions necessary to establish its authenticity and a certificate issued by the court of origin to be handed over by a party requesting to invoke the judgment. Similarly in the case of enforcement of judgments, Article 39 prescribes that judgments in civil and commercial matters shall be enforceable in other Member States without any declaration of enforceability being required. Recognition and enforcement of foreign judicial decisions by domestic judicial authorities can only be refused in exceptional cases, as set out by Article 45 of Brussels I (recast) Regulation.

[50] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012, OJ L 351/1, Recital 26.

[51] WELLER, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, vol. 11, p. 82.

[52] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012, OJ L 351/1, Recital 26, Article 36 and Article 39.

[53] RIZCALLAH, C. The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration. *European Law Journal*. 2019, vol. 25, no. 1, p. 10.

Under the current wording of Article 45 of the Brussels I (recast) Regulation, recognition as well as enforcement[54] will be refused under the following conditions:

a) if the recognition (enforcement) is manifestly contraty to public policy (ordre public) in the Member State addressed;
b) if in case of a judgment in default of appearance it is proved that the defendant was either not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a was as to enable him to arrange for his defence,
c) if it is irreconcilable with a judicial decision given between the same parties in the Member State addressed;
d) if it is irreconcilable with an earlier judicial decisision given in another Member State or in a third State involving the same cause of action and between the same parties;
e) if it conflicts with the rules of exclusive jurisidiction or the special rules of jurisidiction in matters relating to insurance, consumer contracts or individual contracts of employment.

4. The Impact of Fundamental Rights Protection on the Principle of Mutual Trust

Despite the fact that the recent legislative actions place an emphasis on the essential role of the principle of mutual trust, as seen for example, by the amendments brough by the Brussels I (recast) Regulation, it is clear that the lack of mutual control and power to review the compatibility of judicial decisions of a Member State with the fundamental values as well as the EU law generates certain risks. Therefore, it is necessary to establish certain limits to avoid the blind application of the principle of mutual trust and to hinder the risks of violation of EU's founding values. In fact, the principle of mutual trust is not absolute, and the presumptions may, in certain instances, by rebutted. The AFSJ itself contains a number of safety valves in the form of establishing exceptions to the principle of mutual trust.[55] The exchaustively enumerated textual limitations to the automatic application of mutual trust vary from one istrument to the other,[56] but almost all instruments allow for some exceptions.

[54] According to Article 46 of the Brussels I (recast) Regulation, "on the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist."

[55] PRECHAL, S. Mutual trust before the Court of Justice of the European Union. *European Papers*. 2017, vol. 2, no. 1.

[56] MAIANI, F.. MIGLIORINI, S. One principle of to rule them all? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice. *Common Market Law Review*. 2020, vol. 57, no. 1, p. 16.

4.1. The limitations to the principle of mutual trust

In the case of recognition and enforcement of judgments in civil and commercial matters, the textual limitations to the principle of mutual trust were described in detail in Section 3.2 As observed above, Article 45 of Brussels I (recast) Regulation provides specific conditions under which the recognition and enforcement of judicial decisions in civil and commercial cases issued in one Member State may be refused in another, including namely due to *ordre public*; irreconcilability; violation of procedural rights, in particular for decisions rendered in abstentia; challenges brought in the Member State of origin, to the decision to be recognized; and the violation of the rules of exclusive or specific jurisdiction regarding weaker parties.

However, it must be noted that not all instruments in the EU's AFSJ provide for all these above-mentioned exceptions. In fact, some other mutual recognition clauses and mechanisms contain fewer or almost no grounds for refusal in comparison with Brussels I (recast) Regulation. This was the case for example, of the 2003 Brussels II *bis* Regulation,[57] which set out a system for recognition and enforcement of certified decisions which could not have been opposed on any grounds. However, the new Brussels II (recast) Regulation[58] in its Article 50 added a ground for refusal of recognition and enforcement, namely in that order to return the child to the Member State of his or her habitual residence is irreconcilable with a later decision relating to parental responsibility concerning the same child which was either given in the Member State in which recognition is invoked; or was given in another Member States or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which the recognition is invoked.

On the other hand, the area of judicial cooperation in criminal matters, namely the Framework Decision on the European arrest warrant (EAW)[59] contains also different grounds for refusal of execution. Some of these grounds are mandatory, as set out by Article 3 of the Framework Decision on EAW. These are for example, grounds based on respect for criminal law of the executing Member States (including amnesty laws, double criminality, age of offender).

[57] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23 December 2003.

[58] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2 July 2019.

[59] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18 July 2002.

Additionally, some of these grounds for refusal are optional, granting Member States certain discretion. These are set out in Article 4 of the Framework Decision on EAW and include, for example, cases of statute of limitations or exceptions. However, the discretion in Article 4 of the Framework Decision on EAW does not allow Member States to refuse to execute the EAW on other grounds than the ones listed.[60]

Furthermore, as regards specifically the protection of fundamental rights and freedoms, only a few instruments setting out mutual recognition explicitely include a wide human rights clause, recognizing the violation of fundamental rights standards as a ground for a refusal to execute a decision issued in another Member State. A positive example of such a tool can be found in the field of judicial cooperation in criminal matters, namely as set out by the European Investigation Order.[61] Article 11(1)(f) of the European Investigation Order litsts the incompatibility with the State's obligation in accordance with Article 6 TEU and the Charter as a ground for non-recognition an non-execution of an European Investigation Order. On the other hand, another positive example are instruments which include a system of open restrictions which rather leave certain discretion and flexibility to the Member States when refusing to apply the principle of mutual trust. This is also the case of the above-mentioned Brussels I (recast) Regulation, namely when it comes to the *ordre public* clause, as a ground to refuse the recognition and enforcement of judgments in civil and commercial matters.

In light of the above examples, it is clear that the range of exceptions allowed even within the area of judicial cooperation in civil matters varies widely across the various instruments in the AFSJ, reflecting the high degree of discretion granted to the legislator.[62] As seen, it ranges from mandatory or almost absolute trust, limited to only few strictly defined exceptions, to optional trust. Limitation to this trust also range from mandatory to optional, or from wide to strictly enumerated exceptions.

[60] CJEU, Judgment of 29 January 2013, Case C-396/11, *Radu*.

[61] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1 May 2014.

[62] MAIANI, F., MIGLIORINI, S. One principle of to rule them all? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice. *Common Market Law Review*. 2020, vol. 57, no. 1, p. 17.

4.2. The limitations to the principle of mutual trust in the case law of the Court of Justice of the European Union regarding the violations of fundamental rights and freedoms

In parallel with the evolution of EU secondary law and the principle of mutual trust enshrined in them, the CJEU has provided guidance on the application and limitation to the principle of mutual trust.[63] Concerning the limitations to the principle of mutual trust as set out by the number of instruments mentioned above, it appears based on the previous case law of the CJEU that limitations and exceptions to the principle of mutual trust are to be construed strictly.

In particular, in the area of recognition and enforcement of judgments in civil and commercial matters, despite the fact that Brussels I (recast) Regulation includes a system of open restrictions and a certain flexibility to Member States with the public policy clause, the case law of the CJEU provides a rigid interpretation of such exceptions. In essence, public policy clause refers to the norms and values that are at the core of a state, including the fundamental principles underlying the legal order of that entity.[64] The case of *Krombach*[65] serves as a great example to illustrate the interpretation of the "public policy" exception and the CJEU's understanding of the impact of the violation of fundamental rights on the application of the principle of mutual trust. The CJEU found in the case of *Krombach* that the recognition or enforcement of judgments may only be refused on the basis of public policy clause in cases where the judgment is "at variance to an unacceptable degree with the legal order of the State in which enforcement is sough inasmuch as it infringes a fundamental principle."[66] It further held that for "the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order."[67] As clear from the subsequent case law, the right to a fair trial has been considered as a fundamental principle.[68]

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[63] Ibid., p. 29.

[64] HAZELHORST, M. Mutual trust under pressure: civil justice cooperation in the EU and the rule of law. *Netherlands International Law Review*. 2018, vol. 65, no. 2, p. 112.

[65] CJEU, Judgment of 28 March 2000, Case C-7/98, *Dieter Krombach v. André Bamberski*.

[66] Ibid., p. 37.

[67] CJEU, Judgment of 28 March 2000, Case C-7/98, *Dieter Krombach v. André Bamberski*, p. 37.

[68] Ibid., p. 40; CJEU, Judgment of 11 May 2000, Case C-38/98, *Régie Nationale des usines Renault SA*, p. 30, Judgment of 28 April 2009, Case C-420/07, *Meletis Apostilides v. David Charles Orams, Linda Elizabeth Orams*, p. 59.

Furthermore, in the case of *Trade Agency*,[69] the CJEU considered that the recourse to public policy clause can only be envisaged in the refusal of enforcement of a judgment given in default of appearance when the defendants' right to a fair trial as ensured by Article 47 of the EU Charter of Fundamental Rights[70] is manifestly and disproportionately breached "leading to the impossibility of brining an appropriate and effective appeal" against the judgment in the issuing State.[71] Hence, from the above-mentioned examples it is clear that the CJEU with its rigid interpretation of the limitations to principle of mutual trust, restricted the public policy clause in the area of recognition and enforcement of judgments only to cases where such judgments would be at variance to an unacceptable degree with the recognizing legal order, as they would either constitute a manifest breach of a rule of law or a manifest breach of a fundamental right. Such cases would involve fair trial violations where the defendant was prevented from defending himself due to practical reasons, such as insufficient information, short time limits for the preparation of defence or language barriers.[72]

Similar strict approach was also previously taken by the CJEU in the other fields of AFSJ. For example, in the field judicial cooperation in criminal matters, the CJEU appeared to incline towards the interpretation of exceptions to the principle of mutual trust that best preserve the operation of the system of cooperation.[73] In this regard especially, it is interesting to note the case of *Melloni*, in which the CJEU had to tackle the questionable scope of exceptions to the principle of mutual trust, delimiting the applicability of Article 53 of the Charter of Fundamental Rights providing that the highest standards of protection of fundamental rights should prevail, appearing to allow Member States to apply national standards of fundamental rights protection which are higher than the ones provided by the Charter of Fundamental Rights. As such, the CJEU held that applying a higher level of protection would cast "doubt on the uniformity of the standard protection of fundamental rights as defined in [the] framework decision [on EAW], would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy

[69] CJEU, Judgment of 6 September 2012, Case C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*.

[70] Charter of Fundamental Rights of the European Union, OJ EU C 326/391, 26 October 2012.

[71] CJEU, Judgment of 6 September 2012, Case C-619/10, *Trade Agency Ltd v. Seramico Investments Ltd*., p. 62.

[72] HAZELHORST, M. Mutual trust under pressure: civil justice cooperation in the EU and the rule of law. *Netherlands International Law Review*. 2018, vol. 65, no. 2, p. 113.

[73] MAIANI, F., MIGLIORINI, S. One principle of to rule them all? Anatomy of mutual trust in the law of the area of Freedom, Security and Justice. *Common Market Law Review*. 2020, vol. 57, no. 1, p. 34.

of the framework decision."[74] Thus, higher level of protection of fundamental rights at the national level cannot be required as it would quash the basis of the principle of mutual trust. The case of Melloni is also a great example of CJEU's approach to privilege mutual recognition and mutual trust to the protection of fundamental rights.

Same line of argumentation was used in the well-known *Opinion 2/13* in December 2014 clarifying the CJEU's approach to the mutual trust and protection of fundamental rights. According to the findings of the CJEU, "when implementing EU law, Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[75]"

4.3. The shift in the approach of the Court of Justice of the European Union in assessing the relationship between fundamental rights and the principle of mutual trust

Nonetheless, the subsequent tension between the need to protect fundamental rights and freedoms on the one hand, and the need to strengthen mutual trust which ensures the efficiency of cooperation on the other, led to softening of the CJEU's rigid approach towards exceptions to mutual trust, yet still only in exceptional circumstances. Particularly noteworthy is the CJEU's shift in recognizing the possibility to rebut the principle of mutual trust in cases involving risks of inhuman and degrading treatment.[76]

In the area of judicial cooperation in criminal matters, this shift was first seen in the case of *Aranyosi*, which included the execution of EAW of a person to be transferred being at risk of being subjected to inhuman and degrading treatment due to the conditions of detention in the issuing Member State.[77] As stated above, the Framework Decision on EAW includes mandatory and optional exceptions to

[74] Judgment of 26 February 2013 [GC], Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, p. 63.

[75] CJEU, Opinion 2/13 of 18 December 2014, *Access of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, p. 192.

[76] See for example, for judicial cooperation in criminal matters CJEU, Judgment of 5 April 2016, Case C-404/15 and C-659/15, *Aranyosi and Căldăraru* and CJEU, Judgment of 25 July 2018, Case C-220/18 PPU *ML*, 2018; in the area of Asylum and Immigration See CJEU, Judgment of 21 December 2011 [GC], Joined Cases C-411/10 and C-493/10, *N.S. and Others*.

[77] CJEU, Judgment of 5 April 2016, Case C-404/15 and C-659/15, *Aranyosi and Căldăraru.* See also, KLIMEK, L. Does the Slovak Republic fulfil European requirements on recognition of

the execution of EAW, among which the risk of violation of fundamental rights and freedoms is not specifically recognized. However, Article 1(3) of the Framework Decision on EAW includes a specific clause requiring that the execution of EAW shall not have the effect of modifying the obligation to respect fundamental rights. As such, the CJEU held that the execution of EAW may be postponed, but not abandoned.[78] However, the use of such postponement is subjected to a two-step test. Firstly, the executing judicial authority of the executing Member State is bound to assess the existence of a real risk of inhuman or degrading treatment of individuals detained in the isseing Member State, which demonstrate that there are systemic or generalized definiciences[79] Secondly, if a real risk of inhuman or degrading treatment is identified, the judicial authority in the executing Member State must make further assessment, specific and precise, to verify whether there are substantial grounds to believe that the individual concerned will be expose to that risk of breach of Article 4 of the Charter of Fundamental Rights.[80]

In sum, when studying the different limitations to the principle of mutual trust as interpreted by the CJEU, it can be noted that only the most serious breaches of fundamental rights and freedoms might reach the required threshold to set aside mutual trust. In addition, when it comes to the relationship between fundamental rights and the principle of mutual trust itself, despite the strictly construed exceptions in the existing instruments and the earlier employed rigid approach to the interpretation of exceptions, there is a clear shift in the CJEU's approach. The CJEU has over the time softened its approach towards the relationship between fundamental rights and mutual trust, namely when it concerns the exceptions to the applicability of mutual trust and mutual recognition based on non-compliance with human rights standards. In fact, one can observe the shift from a narrow and exhaustive interpretation of the limitations listed in EU secondary law instruments in the AFSJ to a rather rights-oriented case law, allowing also for exceptions.[81]

In fact, with the recent case law of the CJEU, a clear evolution is observed, shifting from "blind" trust, to rather "earned trust".[82] Such a noticeable shift in

foreing decisions on custodial sentences? *International and Comp.tive Law Review*. 2020, vol. 20, no. 2, p. 216.

78 CJEU, Judgment of 5 April 2016, Case C-404/15 and C-659/15, *Aranyosi and Căldăraru*, p. 98.

79 Ibid., pp. 88–89.

80 CJEU, Judgment of 5 April 2016, Case C-404/15 and C-659/15, *Aranyosi and Căldăraru*, pp. 91–92.

81 XANTHOPOULOU, E. Mutual trust and rights in EU Criminal and asylum law: three phases of evolution and the encharted territory beyond blind trust. *Common Market Law Review*. 2018, vol. 55, p. 491.

82 MITSILEGAS, V. The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust. *Revista Brasileira de Direito Processual Penal*. 2019, vol. 5,

the case law and overall approach of the CJEU is even more relevant in today's crisis of values, where increasing attention is being paid to the importance of observing the values set out in Article 2 TEU, including the rule of law, as a precondition for the effective and efficient functioning of EU law instruments which are predominantly based on mutual trust. In fact, with the increasing number of cases alleging systemic breaches of fundamental rights and the deterioriating state of rule of law, the jurisprudence of the CJEU has to further address the newly emerging challenges to the principle of mutual trust.

4.4. The current rule of law challenges and its implications on the principle of mutual trust

It has been generally agreed that today, the EU is facing a crisis of values. On the one hand, there are increasing efforts to promote the rule of law, as a value on wich the EU is founded and which is common to Member States, enjoying considerable protrection in EU primary law.[83] On the other hand, there are increasing challenges to the rule of law as confirmed by the recent findings of the CJEU, demonstrating that Member States comprehend and approach the founding values, especially the rule of law differently.[84] To further support this, the activation of Article 7 TEU proceedings by the European Commission against Poland and by the European Parliament against Hungary draw a particular attention to the importance of addressing systematic breaches of Artice 2 TEU by Member States in practice. Such a common response is apprehensible, as protection of the values under Article 2 TEU are not only of concern to Polish and Hungarian citizens, but also form the basis for judicial cooperation in the EU in both civil and criminal matters.[85] As described above, many EU secondary law instruments abolished cross-border checks based on the presumed idea that the rule of law is observed across the Member States in the EU.[86]

The impacts of the crises of values, namely the deteriorating state of rule of law can be already observed in the area of judicial cooperation in criminal matters, where increasing attention is being paid to the implications that the deteriorating state of rule of law may have on the judicial cooperation. Among

no. 2, p. 580.

[83] LYSINA, P. Ochrana právneho štátu v podmienkach Európskej únie. *Justičná revue*. 2020, vol. 72, no. 11, p. 5.

[84] CJEU, Judgment of 27 February 2018 [GC], Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas.*

[85] HAZELHORST, M. Mutual trust under pressure: civil justice cooperation in the EU and the rule of law. *Netherlands International Law Review*. 2018, vol. 65, no. 2, p. 105.

[86] Ibid., 105.

the first cases where the CJEU had to tackle such implications was the case of *LM*. The case was a preliminary ruling, which concerned a question reffered to the CJEU by the Irish judicial authorities, namely with regard to surrendering a suspected person detained in Ireland under the EAW issued by the judicial authorities in Poland. Answering the question ultimately required the CJEU to tackle the impact of the undermining principle of judicial independence in Poland on the execution of an EAW.[87]

The findings in the *LM* case show the CJEU' views on the independence of judicial authorities and its role in ensuring effective judicial protection of individuals.[88] In its finding, the CJEU built upon its previous judgment in *Aranyosi*, and held that when Article 7 TEU proceedings have been initiated by the EU institutions against a particular Member State due to the breach of Article 2 TEU, the executing judicial authority may take into account such information as emphasized by the EU institutions when assessing whether there exists a risk of a violation of the right to a fair trial in a particular case.[89] However, it stressed that when attempting to strike a proper balance between the effectiveness of judicial cooperation and the protection of fundamental rights, Member States may apply the limitations placed on the principle of mutual trust only in exceptional circumstances. Mutual trust cannot be automatically rebutted, as individual assessment is required, unless there is a final decision pursuant to Article 7(2) of the TEU.[90] Such findings suggest, that systemic deficiencies in terms of the deteriorating state of rule of law in particular Member State do not automatically exclude the Member State from the judicial cooperation built on trust.

The implications of the findings in the *LM* case go beyond the area of judicial cooperation in criminal matters. While there is no recent case law directly addressing the rule of law challenges in the field of judicial cooperation in civil and commercial matters, the implications of the CJEU's findings can be extended also to the field of judicial cooperation in civil and commercial matters. In fact, the findings in the *LM* case show that the CJEU recognizes the importance of tackling the newly emerging challenges through legal means, employing individual assessments of the particularities of the case.[91] This approach ultimately creates a new possibility for the CJEU's rule of law interventions, allowing the CJEU to be actively involed in protecting the values under Article 2 TEU also in the area of judicial cooperation in civil and commercial matters.

87 Judgment of 25 July 2018 [GC], Case C-216/18 PPU, *LM*, p. 153.
88 Ibid., pp. 48, 63, 65.
89 Ibid., p. 61.
90 Judgment of 25 July 2018 [GC], Case C-216/18 PPU, *LM*, p. 72.
91 Ibid., p. 22.

However, no generic conclusions can be drawn in terms of the approach of the CJEU to the impact of the deteriorating state of rule of law specifically on the recognition and enforcement of judicial decisions in civil and commercial matters. The previous experience shows that there is a shift from a rigid to a more lenient interpretation of the existing limitations to the principle of mutual trust when it comes to the protection of fundamental rights. Based on preliminary conclusions, such line of interpretation could be also applicable when assessing the rule of law challenges in the area of judicial cooperation in civil and commercial matters, namely when interpreting the public policy clause. Nonetheless, further discussion and case law interpretation handed down by the CJEU is necessary to fully assess the impact of the deteriorating state of rule of law on the principle of mutual trust in the area of judicial cooperation in civil and commercial matters.

5. Conclusion

Respect for different legal systems of the Member States is vital for the EU. As such, the principle of mutual trust plays a key role in achieving an effectively functioning common EU AFSJ. The notion of mutual trust has not only largely spread in the AFSJ with the aim to ensure an area of free movement of judicial decisions adopted by national authorities,[92] but today, it forms the fundamental basis on which the AFSJ is built. Despite the crucial role it plays, it is clear that the lack of mutual control and power to review the compatibility of judicial decisions of a Member State with the fundamental values as well as the EU law generates certain risks. Therefore, certain limits to avoid the blind application of the principle of mutual trust and to hinder the risks of violation of EU's founding values must be established. The AFSJ itself contains a number of safety valves to the principle of mutual trust.

When studying all limitations to the principle of mutual trust, certain conclusions can be drawn. Firstly, regarding the statutory exceptions to mutual trust and mutual recognition as outlined by the various instruments in the EU's AFSJ, different approaches and divergencies might be observed. In particular, divergencies even within the instruments on mutual recognition and enforcement of decisions in civil matters can be observed. While in the area of judicial cooperation in civil and commercial matters, there are a number exceptions to the principle of

[92] DÜSTERHAUS, D. Judicial coherence in the Area of Freedom, Security and Justice – squaring mutual trust with effective judicial protection. *Review of Administrative European Law*. 2015, vol. 8, no. 2, p. 153.

mutual trust, although strictly defined, allowing for at least a limited flexibility for the Member States to refuse to recognize or enforce judgments, in the area of recognition and enforcement of judgments in family matters, such exceptions are highly restricted in their variety. In addition, the area of recognition and enforcement of judicial decisions in criminal matters also contains exceptions which are either mandatory or optional, however, the threshold to apply such exceptions is set high.

Therefore it appears that there is no unified approach to understanding and setting out the concept of mutual trust or exceptions applicable in the different areas of AFSJ. In fact, any generic conclusions on mutual trust and its limitations should be drawn with careful attention. Nonetheless, certain commonalities may be seen namely with regard to the shift in the CJEU's approach as identified in the case law analysed in this paper and the relationship between the fundamental rights and the principle of mutual trust. It is clear that based on the CJEU's case law analysed above, previously, fundamental rights were not given sufficient attention when considering limitations to the principle of mutual trust. With the evolution of the case law, however, the concept of mutual trust as well as its relationship with fundamental rights was further reshaped, recognizing new grounds for exceptions. This period can be mostly characterized by a certain degree of judicial activity, attempting to reconcile mutual trust with the fundamental rights. Nonetheless, the newly established exceptions were firmly construed and controlled, introducing high tresholds.

Based on the CJEU's case law, it can be therefore concluded that not all violations of fundamental rights and freedoms lead to justifications of postponement or refusal of recognition or enforcement or rebuttal of the principle of mutual trust. In fact, only the most serious breaches of fundamental rights and freedoms might reach the required threshold to set aside mutual trust. This was nicely illustrated on the case law in the area of judicial cooperation in civil and commercial matters, where only a "manifest breach" of a rule of law regarded as essential in the Member States' legal order or a right recognized as being fundamental within the legal order might be considered for setting aside mutual trust and refusing to recognize or enforce a judicial decision. Similarly, in the area of criminal cooperation, not all interferences with fundamental rights and freedoms of individuals automatically lead to non-execution of an arrest warrant. In fact, not even systemic and generalized deficiencies in the issuing Member State lead to non-execution of an arrest warrant. Only cases where a real risk of violation of Article 4 of the Charter of Fundamental Rights prohibiting inhuman or degrading treatment because of systemic and generalized deficiencies in the issuing Member States were identified and are applicable in particular circumstances of the individual are covered. As such, it can be concluded, that with the

recent case law of the CJEU a clear evolution is observed, shifting its approach from "blind" trust, to rather "earned trust".[93]

Moving from blind to earned trust, and balancing the efficiency of EU law with the protection of fundamental rights is characteristic for the recent case law of the CJEU, focusing on a more extensive human rights review. Such a noticeable shift in the case law of the CJEU is even more relevant in today's crisis of values, which reveals divergencies and value disagreement between Member States. As was seen in this paper, the systemic breach of Article 2 TEU by some Member States has led to the questioning of mutual trust. The impacts of the crises of values, namely the deteriorating state of rule of law can be already observed in the area of judicial cooperation in criminal matters, where increasing attention is being paid to case by case analysis of the individual situation.

As regard the instruments in the field of judicial cooperation in civil and commercial matters more specifically, such tools can also be impacted by the value disagreement. Therefore, the subsequent discussions should also focus on the potential limits of the principle of mutual trust in other areas of AFSJ, namely judicial cooperation in civil and commercial matters. While no generic conclusions should be drawn in terms of the future approach of the CJEU to the impact of the deteriorating state of rule of law on the recognition and enforcement of judicial decisions in civil and commercial matters, one should strive for a more lenient interpretation of the existing limitations to the principle of mutual trust, such as the public policy clause, allowing the necessary flexibility for Member States to ensure that the values on which the principle of mutual trust is built, namely the protection of fundamental rights, are observed. When it comes to the relationship between the principle of mutual trust on the one hand, and the protection of fundamental rights, on the other, the protection of fundamental rights should be the cornerstone of achieving mutual trust.

To conclude, the increasing attention to the protection of fundamental rights and the observance of the rule of law cannot be considered as undermining the strength of the principle of mutual trust. Rather, it should encourage the reconsideration of reconceptualization of the principle of mutual trust, which is not based on a rigid obligation of Member States, but rather includes a tendency towards individual assessment, ensuring respect for fundamental rights as an essential tool for encouraging effective judicial cooperation. With the applaudable shift in the CJEU's approach towards increasingly placing the principle of mutual trust in the wider context of rights protection, it is inevitable to encourage and further

[93] MITSILEGAS, V. The European model of judicial cooperation in criminal matters: towards effectiveness based on earned trust. *Revista Brasileira de Direito Processual Penal*, vol. 5, no. 2, p. 580.

recognize the importance of protection of fundamental rights also in the context of strengthening the system of cooperation based on trust.

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sciendo

Euro-Conform Interpretation of Slovak Consumer Credit Act – Endless Saga Bound to End?*

Mária T. Patakyová**

Summary: Protection of individual rights arising from EU law is to a great extent in the hands of national courts. Their role is underlined in cases of imperfect implementation of a directive, where individuals are left at mercy of a euro-conform interpretation. Euro-conform interpretation is not limitless, as, for instance, it shall not be *contra legem*. However, when exactly is the interpretation *contra legem*, i.e. impossible? This article shows how intricate euro-conform interpretation may be, using the example of Directive 2008/48/EC on consumer credit agreements, a piece of law much discussed by the ECJ in preliminary rulings. Even if the proper way of interpretation is shown by the Supreme Court of a Member State, individuals may still find it difficult, even impossible, to enforce their rights arising from EU law. The aim of this article is to show how the euro-conform interpretation works in practice.

Keywords: Euro-conform interpretation, Indirect effect of EU law, Consistent interpretation, ***Contra legem*** interpretation – Directive 2008/48/EC – C-42/15 ***Home Credit*** – C-331/18 ***Pohotovost'***

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1. Introduction

Although principles and effects of EU law are well-established[1], their application in practice remains problematic due to at least two reasons. First, national lawyers may simply do not know when and how EU law should be applied.[2] Second, even if they have the knowledge in theory, it may be difficult for them to use the principles in practice.[3] This is what this article will explore in more detail.

Implementation of directives into national law is scarcely without issues, providing a great room for exploration of how EU law is applied in practice.[4] The article takes the example of Directive 2008/48/EC on Credit Agreements for Consumers (hereinafter referred to as the "Directive") which was implemented in the Slovak Republic by Act No. 129/2010 Coll. on Consumer Credits and on the Other Credits and Loans for the Consumers (hereinafter referred to as the "Act"). This choice of consumer law is not accidental. The field of consumer law is characterised by wrongful enforcement as well as by over-regulation.[5]

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[1] Naturally, this is not to say that EU law and its principles are immune to change. However, constitutional changes of last decade are usually not related to the effects and principles discussed in this paper.

Developments may be identified in relation to rather supranational (EU – Member States) or institutional level, see WTE/TWB. Editorial. *European Constitutional Law Review.* 2010, vol. 6, pp 335–338 at 337; or to horizontal direct effect of general principles of EU law, see HARTKAMP, A. S. The General Principles of EU Law and Private Law. *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The RabelJournal of Comparative and International Private Law.* 2011, vol. 75, pp. 241–259 at 250; or the ever-going discussion on primacy of EU law versus constitutional identity of Member States, see SPIEKER, L. D. Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts, CML. Rev. 2020, vol. 57, pp. 361–398.

[2] This has been an ongoing issue. PRECHAL, A. National Courts in EU Judicial Structures. *Yearbook of European Law.* 2006, vol. 25, pp. 429–450 at 433.

[3] European constitutional law is covered with many nuances which make its application to be a challenge. DOUGAN, M. The "Disguised" Vertical Direct Effect of Directives? *The Cambridge Law Journal.* 2000, vol. 59, pp. 586–611 at 610.

[4] The incompatibilities between the wording of a directive and the wording of a national act may be subtle, yet significant. CIACCHI, A. C. The Direct Horizontal Effect of EU Fundamental Rights" *European Constitutional Law Review.* 2019, vol. 15, pp. 294–305 at 297.

[5] MICKLITZ H.-W., SAUMIER G. Enforcement and Effectiveness of Consumer Law. In: MICKLITZ H.-W., SAUMIER G (eds.). *Enforcement and Effectiveness of Consumer Law.* Cham: Springer International Publishing, 2018, pp. 3–45 at 4. EU consumer law directives are rarely implemented duly. VAN DEN BOSSCHE, A. M. Private Enforcement, Procedural Autonomy and Article 19(1) TEU: Two's Company, Three's a Crowd. *Yearbook of European Law.* 2014, vol. 33, pp. 41–83 at 47.

Naturally, this is not the only field of law where incorrect implementation is identified. BLAŽO, O., KOVÁČIKOVÁ, H. Access to the market and the transparency as principles of public procurement in the legal environment of the EU neighbourhood policy. *International and Comparative Law Review,* 2018, vol. 18, pp. 218–236 at 221–222.

The implementation of the Directive was imperfect which led to a succession of problems created by the application of the Act in practice. This article dives into the problem related to the euro-conform interpretation of the Act. As will be presented, the Act went beyond the full harmonisation done by the Directive and the euro-conform interpretation was right on the verge of possibility due to the threat of *contra legem* interpretation as well as other particularities which spiced up the interpretation for national judges. This article will focus on the theoretical backgrounds of the indirect effect of directives to the necessary extent only, since its aim lies elsewhere. It aspires to show how the euro-conform interpretation works in practice and why it might be so confusing for a national judge.

The analysis is not self-centred. It aims to show whether the rights established in EU law are, in fact, reachable by individuals. Unless judges are ruling in matters based on (EU) law, legal certainty and essentially rule of law is undermined. This suggests that even an issue of euro-conform interpretation identified in a series of cases does not threaten the justice to be served in these cases, however, it may go well beyond and threaten the general presumption *iura novit curia*.

In order to discuss these issues, the article is divided as follows. First, we will summarise the basics of the euro-conform interpretation. Second, the problem which is at the core of this article is presented, namely, where the implementation of the Directive by the Act got incorrect. Third, we will present why the euro-conform interpretation of the Directive was seen to be difficult. The main findings are summed up in the conclusion.

2. Euro-conform interpretation in a nutshell

Considering the aim of this article, it appears sufficient to discuss the foundations of the euro-conform interpretation briefly.[6] First, it shall be remembered

[6] For further foundations laid down by scholars: CRAIG, P., DE BÚRCA, G. *EU Law, Text, Cases and Materials*. *Sixth Edition*. Oxford: Oxford University Press, 2015, at 209–216; CHALMERS, D., DAVIES, G., MONTI, G. *European Union Law, Text and Materials. Third Edition* Cambridge: Cambridge University Press, 2014, at 316–325; LECZYKIEWICZ, D. EFFECTIVENESS OF EU LAW BEFORE NATIONAL COURTS: DIRECT EFFECT, EFFECTIVE JUDICIAL PROTECTION, AND STATE LIABILITY". In: ARNULL A., CHALMERS, D. (eds.). *Oxford Handbook of European Union Law.* Oxford: Oxford University Press, 2015, pp. 212–48 at 218–225; BENACCHIO, G., PASA, B. *Common Law for Europe.* Budapest/New York: Central European University Press, 2005, at 249–252.

Regarding the interference between commercial law and consumer law within the frame of euro-conform interpretation in Slovakia see PATAKYOVÁ, M. Komentár k ustanoveniam §261, 262 [Commentary on Section 261, 262]. In: PATAKYOVÁ M. et al. *Obchodný zákonník. Komentár*, [*Commercial Code. Commentary*]. *Fifth Edition*. Praha: C. H. Beck 2016, pp. 1292–1306 at 1292–1311.

that indirect effect was established in the 80s.[7] The idea sprang from the fidelity principle,[8] requiring national courts to interpret national law in the light of directives.[9] The subsequent decisions of the ECJ have broadened the indirect effect. A very similar factual background[10] to the one discussed here was presented by *Marleasing*[11], which established that national courts must go as far as possible in their interpretation to achieve the result pursued by a directive.[12] The national courts may use all national law for this purpose.[13] In fact, as established in *Pfeiffer*[14], the national legal system as a whole shall be interpreted under the prism of EU law.[15] Thus, the national courts are required "*to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it*".[16]

Second, consequently, the outcome of the case at a national court will depend on the national legal system and the interpretative methods which are available for the national judge.[17] However, this seems to be perfectly in line with the nature of indirect effect.[18] Plus, as it will flow from the discussion below, the outcome of the case will always depend on the particular judge and his or her willingness to interpret the national law in line with the EU law.

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7 Case 14/83, *von Colson*, EU:C:1984:153.

8 LAND, J. T. The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and EEA Law. *ERA Forum.* 2006, vol. 7, pp. 476–501 at 477.

9 CHALMERS, D., DAVIES, G., MONTI, G. *European Union Law, Text and Materials*. *Third Edition*. Cambridge: Cambridge University Press, 2014, at 317.

10 Art. 11 of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards contained an exhaustive list of cases in which the nullity of a company may be ordered. Spanish Civil Code established another case which was not mentioned in the exhaustive list provided by the Directive. Case C-106/89, *Marleasing*, EU:C:1990:395, p. 3.

11 Case C-106/89, *Marleasing*.

12 Ibid., p. 8.

13 Ibid., pp.. 7, 8.

14 Joined Case C-397/01 to C-403/01, *Pfeiffer*, EU:C:2004:584.

15 Put simply, national judges shall interpret and apply national law in line with EU law. VON BOGDANDY, A., SPIEKER, L. D. Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges. *European Constitutional Law Review.* 2019, vol. 15, pp. 391–426 at 395.

16 Case C-282/10, *Dominguez*, p. 27. More recently Case C-187/15, Pöpperl, EU:C:2016:550, p. 43; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*, EU:C:2018:874, p. 59; Case C-679/18 *OPR-Finance*, p. 42.

17 PRECHAL, A. Joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer et al. CML Rev., 2005, vol. 42, pp. 1445–1463 at 1459.

18 BOBEK, M. et al. *Vnitrostátní aplikace práva Evropské unie* [*National Application of Law of the European Union*]. Praha: C. H. Beck, 2011, at 162.

Third, the euro-conform interpretation is not without limitations.[19] The obligation to apply national law in the light of directives cannot outweigh general principles of law, mainly legal certainty, non-retroactivity and prohibition of *contra legem* interpretation.[20] The most important limitation in the context of this article is related to *contra legem* interpretation. In general,[21] the national courts are not required to go against the meaning of national law. If a national legislation states, that something is "black", a judgement based on such legislation shall not state, that the same thing is "white".

However, where are the limits of *contra legem* interpretation?[22] What is the ordinary meaning of national law against which the interpretation shall not go? This will be, naturally, established on a case by case basis. More often than not, lawyers will disagree as to what should be the meaning of a particular word or sentence. As one saying forms it: two lawyers equal three opinions.

3. Incorrect implementation of the Directive

In this part of the article, we will focus on certain Articles of the Directive and their implementation into the Slovak legal order by the Act. To discuss the whole wording of the Directive would be superfluous. Taking into account the aim of this article, it is sufficient to focus on the parts which we will discuss further and which were incorrectly implemented by the Act.

3.1. The wording of the Directive

Pursuant to Art. 4 par. 2 lit. f) TFEU, the protection of consumers belongs to shared competences. The field is substantially covered by directives. Some of them set minimal requirements only.[23]

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[19] BETLEM, G. The Doctrine of Consistent Interpretation: Managing Legal Uncertainty. *Oxford Journal of Legal Studies.* 2002, vol. 22, pp 397–418 at 406-407.

[20] Case C-268/06, *Impact*, EU:C:2008:223, p. 100; Case 80/86, *Kolpinghuis Nijmegen*, p. 13; Case C-212/04 *Adeneler and Others*, EU:C:2006:443, p. 110; Case C-569/16, *Bauer*, EU:C:2018:871, p. 26.

[21] Unsurprisingly, there are exemptions from this rule. For instance, if a directive merely specifies a principle already established in EU law, as in Case C-144/04, *Mangold*, EU:C:2005:709.

[22] In other words, what is the content of the obligation to interpret national law consistently with EU law? This question has been continuously asked. See LECZYKIEWICZ, D. EFFECTIVENESS OF EU LAW BEFORE NATIONAL COURTS: DIRECT EFFECT, EFFECTIVE JUDICIAL PROTECTION, AND STATE LIABILITY". In: ARNULL, A., CHALMERS, D. (eds.). *Oxford Handbook of European Union Law.* Oxford: Oxford University Press, 2015, pp. 212–248 at 224.

[23] For instance, Art. 8(1) of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

However, the Directive states in Recital 9 that "[f]*ull harmonisation is necessary in order to ensure that all consumers in the* [EU] *enjoy a high and equivalent level of protection of their interests and to create a genuine internal market*. *Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive*." The intention to provide full harmonisation is clear. It is also supported by further wording of the Directive, for instance by Article 10.

Article 10 prescribes what shall be included in consumer credit agreements. A list of twenty-tree pieces of information contains various matters. Two provisions are of particular importance for this article:

i. Article 10 (2)(i) which require consumer credits agreements to contain, "*where capital amortisation of a credit agreement with a fixed duration is involved, the right of the consumer to receive, on request and free of charge, at any time throughout the duration of the credit agreement, a statement of account in the form of an amortisation table.*

   The amortisation table shall indicate the payments owing and the periods and conditions relating to the payment of such amounts; the table shall contain a breakdown of each repayment showing capital amortisation, the interest calculated on the basis of the borrowing rate and, where applicable, any additional costs; where the interest rate is not fixed or the additional costs may be changed under the credit agreement, the amortisation table shall indicate, clearly and concisely, that the data contained in the table will remain valid only until such time as the borrowing rate or the additional costs are changed in accordance with the credit agreement ".

   An amortisation table basically shows which part of each instalment covers the principal sum and which part covers the interest and the additional costs, if applicable. Note that, pursuant to this provision, only the *right* to receive the amortisation table shall be incorporated in the agreement. The agreement does not have to contain the amortisation table itself;

ii. Article 10(2)(h) which states that: "[t]*he credit agreement shall specify in a clear and concise manner the amount, number and frequency of payments to be made by the consumer* […]". Therefore, among the pieces of information which shall be directly incorporated into the agreement is the amount, number and frequency of payments.

Interestingly, the Directive does not provide a clear-cut answer as to the sanction for the omission of a prescribed information. Article 23 of the Directive laconically asks for the penalties applicable to infringements of the national provisions adopted pursuant to the Directive to be "*effective, proportionate and dissuasive*".

3.2. The wording of the Act

The Directive was implemented into the Slovak legal order by the Act. For the sake of further discussion, the article will focus on the implementation of Article 10(2)(i) of the Directive into Section 9(2)(l) of the Act, in the wording as to the 30 April 2018. The reason for this is that, on 1 May 2018, an important amendment[24] of the Act became effective. This Amendment, however, is worth discussing on its own.

Let us focus on the implementation of the two provisions mentioned above. Article 10 (2)(i) of the Directive requires that, on demand, a consumer shall be furnished with an amortisation table containing the breakdown of each payment. The Act clearly defines the amortisation table and the right of a consumer to receive one on demand.[25] Thus, no issues at this point.

However, Article 10(2)(h) of the Directive asks for "*the amount, number and frequency of payments*" to be included in a consumer credit agreement.[26] The Act asks for "*the amount, number and due dates of the payments of the principal sum (capital), the interest and other charges* […]" to be included. Although the difference seemed marginal, it proved to be crucial in practice, as the provision may possibly be interpreted in two ways:

i. the notions "*principal sum (capital), the interest and other charges*" only specify what is included in the payment;
ii. each of the attributes "*amount*", "*number*" and "*due dates*" is linked to each of the elements, i.e. "*principle sum*", "*interests*", "*other charges*". In such case, the provision imposes to incorporate a breakdown of each payment, i.e. a *de facto* amortisation table into a consumer credit agreement.

In short, the second interpretation of the Act requires a *de facto* amortisation table to be incorporated into a consumer credit agreement. This, however, is not required by the Directive.

Unfortunately, this was not the only example of the incorrect implementation of the Directive. The Act required additional pieces of information to be included in the consumer credit agreements, either by new bullets in the list of information which were not prescribed by the Directive at all, or by incorrect wording leading to *de facto* supplementary pieces of information to be required.[27]

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[24] The Amendment was done by the Act No. 279/2017 Coll. on the Amendment of the Act No. 483/2011 Coll. on Banks and on Amendments and Supplements to Certain Acts, as Amended and on Amendments and Supplementations of Other Acts (hereinafter referred to as the "Amendment").

[25] Sec. 9(3) and 9(5) of the Act.

[26] Art. 10(2)(h) of the Directive.

[27] PATAKYOVA, M. T. Application and Implementation of Directive 2008/48/EC in the Slovak Legal Order. In: GLAVANITS, J. et. al. (eds.). *The Influence and Effects of EU Business Law*

In order to be more comprehensive, this article will focus on the one discrepancy mentioned above.

Establishing of new pieces of information has a crucial economic impact on creditors. Omission of a creditor to incorporate the statutory requirements into a consumer credit agreement is penalised by the creditor's forfeiture of entitlement to interest and charges.[28]

4. Euro-conform interpretation of the Directive

It flows from the above that, within its full harmonisation, the Directive asked for less information to be incorporated in consumer credit agreements than were asked by the Act (at least under one of the interpretations of the relevant provision). Consequently, this let to number of cases where creditors did not incorporate the extra piece of information (i.e. the *de facto* amortisation table) into consumer credit agreements, which led to number of disputes between consumers and creditors. Consumers were prone to claim back from creditors interest and charges, in order to have the loan "for free". Naturally, creditors did not surrender easily and they fought fearlessly for the more favourable interpretation, which also happened to be the euro-conform one.

4.1. How the story started

What outcome was supposed to be reached by the euro-conform interpretation in relation to the Act was clarified by the ECJ in *Home Credit*; in this case, the District Court Dunajská Streda asked the ECJ seven questions related to the Directive.[29] For the purposes of this article, the last three questions are of particular significance.

"*By its fifth and sixth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 10(2)(h) and (i) of Directive 2008/48 must be interpreted as meaning that a fixed-term credit agreement providing for amortisation of the capital in consecutive instalments must state, in the form of an amortisation table, the part of each instalment that will be allocated to repayment of the capital and, if not, whether, in the light of Article 22(1) of*

in the Western Balkans. Conference proceedings of the 1st EU Business Law Forum. Gyor: Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences, Department for Public and Private International Law, 2018, pp. 157–173.

[28] Sec. 11 of the Act.

[29] Case C-42/15, *Home Credit*, EU:C:2016:842, p. 27.

the directive, those provisions preclude a Member State from imposing such an obligation under national law."[30]

"*By its seventh question, the referring court asks, in essence, whether Article 23 of Directive 2008/48 must be interpreted as not precluding a Member State from providing, under national law, that, where a credit agreement does not include all the information required under Article 10(2) of the directive, the agreement is to be deemed interest-free and free of charges*."[31]

The ECJ clarified, in essence, that the Article 10(2)(h) of the Directive did not require a consumer credit agreement to state, in the form of an amortisation table, which part of each payment (instalment) will be allocated to repayment of capital and which to repayment of interest. Hence, the breakdown of each instalment is not necessary. Plus, the obligation to include such breakdown into a consumer credit agreement cannot be imposed by the Member States.[32]

This interpretation was considered insufficient by certain Slovak courts. Two years after the ruling in *Home Credit* was issued, Regional Court Prešov asked, in case *Pohotovosť*[33], "*in essence, whether Article 10(2)(h) to (j) of Directive 2008/48, in conjunction with Article 22(1) of that directive, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a credit agreement must specify the breakdown of each repayment showing, where applicable, capital amortisation, interest and other charges*"[34]. In other words, whether only the incorporation of the amortisation table into a consumer credit agreement shall not be required, or whether any breakdown of repayments shall not be required. The ECJ clarified that any breakdown of the repayments is unnecessary.[35]

Furthermore, in *Home Credit*, the ECJ expressed its view regarding an appropriate sanction for a creditor if the creditor failed to incorporate all necessary provisions into a consumer credit agreement. It was ruled that "*a creditor's breach of a vitally important obligation in the context of Directive 2008/48 may be penalised, under national law, by the creditor's forfeiture of entitlement to interest and charges*"[36] Two important findings may be drawn from the quote. First, national legislation may sanction the creditor by depriving him from the profit which the creditor would otherwise have from the agreement. Second, such sanction may be laid for "*a creditor's breach of a vitally important obligation*".[37]

[30] Ibid., p. 51.
[31] Ibid., p. 60.
[32] Case C-42/15, *Home Credit*, p. 59.
[33] Case C-331/18, *Pohotovosť*, EU:C:2019:665.
[34] Ibid., p. 40.
[35] Ibid., p. 51.
[36] Case C-42/15, *Home Credit*, p. 69.
[37] The need for proportionality of the sanction is further elaborated in Case C-42/15 *Home Credit*, p. 63, with a reference to Case C-565/12, *LCL Le Crédit Lyonnais*, EU:C:2014:190, p. 43.

4.2. How the story might get complicated

Although indirect effect of directives may seem simple, it is far from it. In the presented case, it was questionable how the Slovak provision may be interpreted. This was mainly due to the fact that in Section 54(2) of the Act No. 40/1964 Coll. Civil Code, as amended (hereinafter referred to as the "Civil Code"), when in doubt, the pro-consumer interpretation shall prevail. Although the Act is a specific piece of legislation (and not an integral part of the Civil Code), the pro-consumer interpretation is commonly accepted throughout the Slovak legal order. Therefore, several national courts have been convinced that the primary aim of the Act and the problematic provision, i.e. the protection of consumers, is only attained if each of the attributes "*amount*", "*number*" and "*due dates*" is linked to each of the elements, i.e. "*principle sum*", "*interests*", "*other charges*".[38] It seems that for some national courts, the pro-consumer interpretation set aside the other forms of interpretation, thus leading to the need for incorporation of the *de facto* amortisation table into the consumer credit agreement.[39]

Even if some national courts have acknowledged that they are under the obligation to interpret the provision of the Act in the light of the Directive, they insisted that the euro-conform interpretation was not possible in this case as it would be *contra legem*.[40]

Regional Court Žilina[41] provided an interesting reasoning for its ruling that the breakdown shall be included in the consumer credit agreement. In the beginning, it focused on teleological interpretation which led it to the conclusion that, had the legislator wanted to state the same conditions as laid down by the Directive, it would have used the same wording. Subsequently, it pointed out that, although it had been established by the ECJ in *Home Credit* that the harmonisation provided by the Directive is the full harmonisation and that the Directive does not require the breakdown, i.e. the *de facto* amortisation table, this did not mean that such breakdown was not required by the Act. Eventually, if, after the

[38] Regional Court Trnava, 20 June 2016, No. 23Co/303/2015; Regional Court Banská Bystrica, 24 November 2016, No. 16Co/170/2016; Regional Court Košice, 26 October 2016, No. 3Co/716/2014. We may conclude that this view was shared throughout the territory of the Slovak Republic.

[39] It shall be pointed out that the consumer protection was not the only objective of the Directive. The Directive also aimed at reduction of transaction costs of traders. ROTT, P. The EU Legal Framework for the Enforcement of Consumer Law. In: MICKLITZ H.-W., SAUMIER, G. (eds.). *Enforcement and Effectiveness of Consumer Law.* Cham: Springer International Publishing, 2018, pp. 249–285 at 253.

[40] Regional Court Prešov, 30 March 2017, 21Co/104/2016, p. 14; Regional Court Trenčín, 28 February 2017, 27Co/36/2017, pp. 10–14.

[41] Regional Court Žilina, 29 May 2018, No. 5Co/343/2017-168.

ruling of the ECJ in *Home Credit*, national courts were required to "*break the national law*" and let it be replaced by the Directive, it would effectively lead to the direct effect of the Directive which was not acceptable in a horizontal dispute.

It is clear that the reasoning of the Regional Court Žilina is incorrect. At the outset, the intention of the legislator as to properly implement a directive shall be assumed. Subsequently, it is true that the ECJ never interprets national law, however, it provides a compulsory interpretation of EU law, the Directive included, which should be reflected into the interpretation of national law to the utmost extent. Eventually, the mere fact that the indirect effect may lead to the same conclusion as the direct effect of a directive does not mean that the indirect effect cannot be used. On the contrary, it is often the whole point of the indirect effect – to repair a clumsy implementation of a directive into national law.[42]

For some other courts, the interpretation of the relevant provision of the Act, post-*Home Credit* was clear and such courts stopped requiring the breakdown to be part of the consumer credit agreement.[43]

As if the matters were not complicated enough, the Amendment of the Act was adopted. The Amendment changed the provision of "*the amount, number and due dates of the payments of principal sum (capital), the interest and other charges*" into "*the amount, number and frequency of payments*". Thus, the provision after the Amendment represented the full harmonisation with Article 10(2)(h) of the Directive.

The specific part of the Explanatory Note to the Amendment[44] clarified that the Amendment changed the Act in order to take into account the results of *Home Credit*, consequently, to change the necessary requirements of consumer credit agreement. To explain the Explanatory Note and the reasons behind the legislator's willingness to change the Act, it shall be noted that, after *Home Credit*, it became evident that the interpretation and application of the provision was problematic. Moreover, many national courts were not eager to adopt the euro-conform interpretation although the correct interpretation of the Directive was made clear in *Home Credit*.[45]

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[42] As put by Betlem: "*The method involving consistent interpretation seeks to solve a clash between conflicting norms regulating the same issue or between a higher ranking norm constraining the effect of a lower rule by way of choosing between different possible interpretation*." BETLEM, G. The Doctrine of Consistent Interpretation: Managing Legal Uncertainty. *Oxford Journal of Legal Studies.* 2002, vol. 22, pp. 397–418, at 398.

[43] For instance, Regional Court Banská Bystrica, 20 April 2017, No. 16Co/219/2016, p. 15; Regional Court Prešov, 11 April 2017, 11Co/39/2016, pp. 19–20; Regional Court Trenčín, 28 March 2017, 6Co/84/2017, pp. 13–20.

[44] The specific part of the Explanatory Note to the Amendment [online]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=441872, p. 3.

[45] See above.

Nevertheless, the Amendment changed the problematic provision and the things might have been clear from then onwards. However, one may claim that the euro-conform interpretation was possible only after the Amendment became effective. The interpretation of the provision prior the Amendment was supposed to be that the breakdown of each payment, i.e. the *de facto* amortisation table, must have been included in a consumer credit agreement. Put differently, the need for the Amendment confirmed that the Act was contrary to the Directive, consequently, as *contra legem* interpretation is not possible, the provision before the Amendment could not be interpreted in a euro-conform way.

This point of view is visible in *Pohotovosť*,[46] where Slovak District Court Humenné was dealing with a consumer credit agreement concluded in 2015 while the *Home Credit* judgement was delivered in 2016 and the Amendment became effective in 2018.[47] District Court Humenné dismissed an action of the consumer, following which the consumer lodged an appeal.[48] The Regional Court Prešov (the appeal court in this case) asked whether it was permitted to adopt, in a dispute concerning a consumer credit agreement concluded prior to the Amendment, a decision which is equivalent, as to its effects, to the Amendment.[49] The ECJ recalled that its interpretation defined the meaning of acts of EU law as they had supposed to be understood from the time of their entry into force.[50] Subsequently, it was for the referring court to decide whether euro-conform interpretation was possible, provided that a *contra legem* interpretation was not required and that a consistent national interpretation incompatible with EU law could not be a reason why the euro-conform interpretation was not possible.[51]

4.3. Supreme Court cuts the Gordian knot

It was proven above that the indirect effect of directives may be tricky in practice. The provision was interpreted contrary to the Directive in relation to many consumer credit agreements concluded before the Amendment was effective. Fortunately, this issue reached the Supreme Court of the Slovak Republic which showed a different approach.

[46] Case C-331/18, *Pohotovosť*.
[47] Ibid., pp. 13, 21, 22.
[48] Ibid., pp. 18, 19.
[49] Ibid., p. 29.
[50] Ibid., p. 53.
[51] Ibid., pp. 54–56, Case C-566/17, *Związek Gmin Zagłębia Miedziowego*, EU:C:2019:390, p. 49; Case C-414/16 *Egenberger*, EU:C:2018:257, p. 73.

The Supreme Court ruled in *Prima banka*[52] that the euro-conform interpretation, even prior the Amendment, was possible. The Supreme Court acknowledged that the indirect effect was not absolute, but it required national courts to endeavour to reach a solution which would be in line with the aim of the Directive and which would guarantee its full effectiveness.[53] Furthermore, the Supreme Court recognised that the euro-conform interpretation was not only possible, but necessary. The exact breakdown of the debt's amortisation was not required by the Act. In the point of view of the Supreme Court, the notions "*principal sum (capital), the interest and other charges*" were merely specifying what is included in the payment. Moreover, applying the teleological interpretation, it was established that the Explanatory Note of the Act did not support the argument that the legislator wished to go beyond the Directive. The interpretation of the Directive was made crystal clear by the ECJ in *Home Credit*.[54]

The Supreme Court casted light on the issue related to the Amendment mentioned above. As the factual situation was related to a consumer credit agreement concluded in 2013, the wording of the Act before the Amendment was the one to be applied. In essence, the Supreme Court ruled that, as of the date when the Amendment had come into force, the possibility of various interpretations of the provision was erased and, what had been supposed to be done by euro-conform interpretation before the Amendment, was now clarified by the legislator.[55]

4.4. Problem solved?

After the ruling of the Supreme Court in *Prima Banka*, all should be in order. The Supreme Court, being at the top of the general judiciary in Slovakia, should possess enough authority as to *de facto* oblige lower courts to follow its legal opinion. This goes without saying that the Slovak Republic does not have a precedential system, however, Article 2 of the Civil Procedural Code[56] expects the judiciary to rule in line with practice of the highest courts due to legal certainty considerations. Plus, if not for legal certainty, the lower courts should rule in line with *Prima banka* as it showed the way how to interpret the problematic provision in a euro-conform manner. All courts are bound to make the utmost efforts to provide the full effectiveness of EU law. And the Supreme Court explained how it may be done.

[52] The Supreme Court of the Slovak Republic, 22 February 2018, No. 3 Cdo 146/2017, *Prima banka*.
[53] Ibid., p. 24.
[54] Ibid., pp. 26, 27, 28, 29.
[55] Ibid., p. 30.
[56] Act No. 160/2015 Coll. Civil Procedural Code, as amended.

Yet, certain courts were apparently not convinced by either of the two arguments.[57] This led to another preliminary questions to be sent to the ECJ. In *Profi Credit Slovakia*[58], the Regional Court Prešov asked a similar question as the very same court asked in *Pohotovosť*. The dispute in *Profi Credit Slovakia* was concerned with a consumer credit agreement entered into on 30 May 2011, i.e. well before *Home Credit* and the decision of the Supreme Court in *Prima Banka*. In 2017, after having repaid the credit in full, the consumer was informed that the contract was incorrect, following which the consumer brought an action for restitution of the fees which, in his view, were wrongly charged.[59] District Court Prešov dismissed the action and, on appeal, Regional Court Prešov asked several very interesting preliminary question.[60]

For the purposes of this article, the following question(s) was(were) the most relevant. "*By its fifth and sixth questions, which must be examined together, the referring court asks the Court, in substance, how to interpret, in accordance with Union law, national legislation which has been declared incompatible with the requirements under Article 10(2)(h) and (i) of Directive 2008/48, as interpreted by the judgment of 9 November 2016, Home Credit Slovakia (C-42/15, EU:C:2016:842), where the credit agreement at issue was concluded before that judgment was delivered and before an amendment to those national rules made with a view to complying with the interpretation adopted in that judgment*."[61]

The ECJ recalled its judgement in *Pohotovosť* on many instances. The ECJ reminded that, the interpretation of a legislation given by the ECJ must be or ought to have been understood and applied from the time of the legislation's entry into force.[62] Nevertheless, it is for the national court to interpret national law, i.e. the Act, bearing in mind that the "*court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because those provisions have been interpreted by the Slovak courts in a manner that is incompatible with that law*"[63].

[57] One may ask whether this is not a ground for liability for judges. It is considered to be out of scope of this paper to assess this. Yet, should national judges breach Art. 2 TEU values while applying national law, this may lead to certain consequences, as proposed by VON BOGDANDY, A., SPIEKER, L. D. Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges. *European Constitutional Law Review.* 2019, vol. 15, pp. 391–426 at 399.

[58] Case C-485/19, *LH v Profi Credit Slovakia, s. r. o*., ECLI:EU:C:2021:313.

[59] Ibid., pp. 19, 20.

[60] Ibid., pp. 20, 21, 22.

[61] Ibid., p. 68.

[62] Ibid., p. 71.

[63] Ibid., p. 72.

Therefore, it seems that, after binding interpretation of the Directive given by the ECJ in *Home Credit*, supplemented by the ECJ's ruling in *Pohotovosť*, cleared on national level by the Supreme Court in *Prima Banka*, it remained unclear for certain Slovak courts how to deal with the situation.

5. Conclusion – the endless saga bound to end?

Unfortunately, incorrect implementations of directives are very frequent. However, what is broken by a legislator may still be repaired by a judge. EU law has developed several concepts of how individuals can reach their rights arising from an incorrectly implemented (or unimplemented) directive. In horizontal relations, indirect effect is of particular importance.

As it was shown in this article using the example of the Directive and the Act, to apply indirect effect in practice is a real challenge. First, it needs to be established what is required by EU law, i.e. how the Directive shall be interpreted. This was done by the ECJ in *Home Credit*. Second, the euro-conform interpretation is possible only when it is not *contra legem*. The interpretation of the Act seemed to be just on the verge of *contra legem* interpretation. Plus, using arguably the most common method of interpretation in consumer disputes (pro-consumer interpretation), the provision of the Act led to different outcome then required by the Directive. Third, once the legislation changed in order to eliminate the incorrect implementation, it may be even less clear whether the euro-conform interpretation of the original wording was possible. This happened when the Act was updated by the Amendment. Fourth, even if it is cleared by the Supreme Court, as it happened in *Prima Banka*, that euro-conform interpretation of the Act before the Amendment is possible indeed, other national courts may still not be convinced, especially if the ruling of the Supreme Court does not take the quality of a precedence. Fifth, certain national courts may not consider the interpretation of the provision of the Act in a euro-conform manner possible before the Amendment or before the judgement in *Home Credit* was delivered. This was further clarified in *Pohotovosť* and *Profi Credit Slovakia*.

Will the saga regarding incorporation of the *de facto* amortisation table into a consumer credit agreement ever end? Well, the urgency to deal with this matter will cease after all consumer credit agreements concluded before the Amendment were terminated, or rather, if the time-barring period to claim unjust enrichment (consisting in interest and charges) expires, which is in the maximum of ten years from the time when the unjust enrichment occurred.[64]

[64] Sec. 107 of the Civil Code.

Eventually, this saga is bound to end. However, what is not bound to end is the unwillingness of certain national courts to interpret national legislation in light of EU legislation. The question of whether the euro-conform interpretation was possible might have existed up to the ruling of the Supreme Court in *Prima Banka*. After that, every court should have acknowledged that such interpretation was possible, hence each court was bound to interpret the provision in the euro-conform manner. This was not the case, as it is clear from the preliminary questions asked in *Pohotovosť* and *Profi Credit Slovakia*.

Attitude of certain national courts suggested above, i.e. a strong willingness not to interpret a provision in line with a directive, threatens the enforcement of EU law on national level. Moreover, it poses questions on whether court proceedings are governed by the rule of law, if judges are not willing to decide the matter based on the rules they shall apply. Under these circumstances, we remain quite sceptical as to whether the wider saga, the one of a proper euro-conform interpretation of national legislation, will end soon.

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Compatibility of Terminology in Competition Law and Energy Law

Eva Zorková*

Summary: Due to rapid technological development, the sector of energy law is very specific. In many aspects, energy law is strongly linked to the application of competition law rules. The aim of this paper is to evaluate the terminology used in the Czech Energy Act and its compliance with the terminology used in the Czech Act on the Protection of Competition, as well as its compliance with the EU terminology, namely the REMIT Regulation. Problems may be caused by inconsistencies in the terminology used, for example, when defining the relevant market and subsequently identifying a competitor/ an undertaking with a significant market power or when deciding on offenses under the Czech Energy Act.

Keywords: Energy law, competition law, competitor, undertaking, legal terminology, the Office for the Protection of Competition, the Energy Regulatory Office, European Commission.

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1. Introduction

Due to rapid technological development, the dynamically developing energy sector is very specific, for example, in terms of its nature and sectoral regulation of public law. Energy law is strongly interrelated within the application of competition law rules as well. The aim of this paper is to evaluate the use of the term "*competitor*" on a wider range of sectors than "only" competition law. The first question is whether the terminology used in the Czech Energy Act is consistent with the terminology used in the Czech Competition Act. While the

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second question is whether the terminology used in the Czech Energy Act is consistent with the EU terminology, namely the REMIT Regulation.

Indeed, the inconsistency in the legal terminology used could cause practical problems, for example, in defining the relevant market and subsequently in identifying a competitor or an undertaking with a significant market power.

Defining the relevant market and its participants may in fact be different from the perspective of the Czech Energy Regulatory Office, as well as from the perspective of the Czech Office for the Protection of Competition, and ultimately from the perspective of the European Commission.

In order to answer the above questions, I will briefly mention the definitions relevant for the addressees of competition law, including the terminology used by EU and Czech competition law (Chapter I.). Subsequently, I will characterize the area of energy law and its terminology, including its interconnection with competition law and civil law (Chapter II.). In the third chapter I will focus on the Energy Regulatory Office and its specifics in terms of activities that may affect market conditions. (Chapter III.).

I will also try to find out whether the inconsistently used terminology has any (negative) impact in practice, for example, when the Energy Regulatory Office is deciding on the bases of the EU REMIT Regulation or when the Energy Regulatory Office is making administrative decisions on offenses under the Energy Act (Chapter IV. and Chapter V.).

2. A competitor in EU and Czech legislation – definition and terminology used

While EU law refers to "an undertaking" or "an association of undertakings" as the addressees of competition law, the terminology of Czech competition law uses the term "competitor" in the same meaning. However, the term "competitor" is used in EU law in a slightly different meaning. The inaccurate translation often leads to illogical formulations, for example in official Czech translations of EU law.[1] It is therefore clear that the terminology of Czech legislation at first glance differs from EU law, although it may be inferred from the application practice and academic publications[2] that the Czech definition of competitor is compatible with

[1] For comparison see the official Czech translation of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) TFEU to categories of vertical agreements and concerted practices, Article 1 Sub-section 1, Paragraph (a) or (c).

[2] KINDL, J. MUNKOVÁ, J. *The Act on Protection of Competition*. Commentary 3rd Edition. C. H. Beck, 2016, page 51, and also the judgment of the Czech Supreme Administrative Court of 29 October 2017, case 5 As 61/2005 (called ČESKÁ RAFINÉRSKÁ).

the EU definition. The mutual compatibility of two terminologically different concepts at the level of Czech and EU law has been discussed numerous times within various publications,[3] as was the use of the Czech term "competitor" (in Czech "soutěžitel") for the term "undertaking" (in Czech "podnik") in the EU.[4]

In any case, the EU Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market is relatively new. This EU Directive is primarily addressed to any national competition authorities and mentions, inter alia, that the concept of an undertaking (i.e. a competitor in Czech terminology) shall always be interpreted in the light of EU law. The Directive itself contains a definition of an undertaking, in which an undertaking referred to in Articles 101 and 102 TFEU is any entity engaged in an economic activity, regardless of its legal form and the way in which it is financed.

For readers of this paper it is surely not important to discuss in detail the definition of a competitor within competition law, but for the sake of clarity it is necessary to examine it briefly. An undertaking is the addressee of the competition law rules defined by EU case-law as "an entity engaged in an economic activity, regardless of its legal form or method of financing".[5] The Court of Justice of the European Union has repeated this definition in other judgments as well. The first conceptual feature of the term "competitor" is "a unit" or "an entity", which means an economic entity, not a legal entity, i.e. a unit comprising of several separate legal entities, which implies that a unit may be composed of several persons, either natural or legal ones.[6]

Moreover, according to EU case law, even if these units act as single economic units in the relevant market (for example a parent company and its subsidiaries), they shall be considered as one economic unit in the relevant market.[7]

Czech law does not use the term "unit" but speaks rather of natural and legal persons and various forms of association which are not legal persons themselves.[8] In some Czech judgments, the term "entity" is used instead of the term "unit", which might be confusing for its readers.

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[3] PETR, M. Definition of a competitor for the purposes of competition law and unfair competition. *Antitrust. Review of competition law.* 2019, Issue 2, page 44–51.

[4] MUNKOVÁ, J. An Undertaking as an Addressee of the Law within Competition Law. *Právní rozhledy*. 2004, Issue 17, page 625. and also PELIKÁNOVÁ, I. A Competitor and an undertaking in the Czech law. *Antitrust. Review of Competition Law.* 2016, 1st Edition, page 7.

[5] Case CJEU, C-41/19 Höfner, Article 21.

[6] Case CJEU, 170/83 Hydrotherm, Article 11.

[7] Case CJEU T-11/89 Shell, Article 312.

[8] Article 2, Section (§) 1 of Act No. 143/2001 Sb., of 4 April 2001, Act on the Protection of Competition.

The second conceptual feature of the term "competitor" is (according to the EU case law definition) the "economic activity", i.e. offering goods or services in the relevant market.[9] Gaining any profit is not a prerequisite for an economic activity,[10] which means that a competitor might not necessarily be an undertaking. Compared to the Czech term "entrepreneurship", which by definition is an activity pursued for the purpose of making a profit, the pursuit of an "economic activity" is defined more broadly. Thus, the Czech competition law does not use the term "economic activity". According to the Czech competition legislation, it is essential for a competitor to "participate in competition" or to be "able to influence the competition by a competitor's activities". Therefore, any participation in a competition means not only an "entrepreneurship"[11], which, by its definition is run for profit, but also any other activity capable of affecting the relevant market (whether it is a profit-oriented activity or not).

3. Terminology of Czech energy law

As it regards the concept of entrepreneurship, I believe that the Energy Act often makes use of it. For example, the Energy Act regulates the conditions of business and performance of state administration within the energy sectors, which are electricity, gas and heating, as well as the rights and obligations of natural and legal persons within the energy sectors, i.e. electricity generation, electricity transmission, electricity distribution and trade, market operator activities, gas generation, gas transmission, gas distribution, gas storage and trade, and thermal energy production and distribution.[12]

The specificity of the energy area is based on the fact that according to the Czech Energy Act, persons may only do business under the conditions given by the Energy Act and only on the basis of a license granted by the Energy Regulatory Office. Upon request, the Energy Regulatory Office shall also recognize the right to conduct business within the energy sector to a person who intends to do business on the basis of a business license for electricity or gas trade granted by the competent authority of another EU Member State. Furthermore, Energy Act also sets all obligations of natural and/or legal persons whose business is filling of propane, butane and their mixtures into propane-butane bottles, and so on.[13]

[9] Case CJEU 118/85, Commission v Italy, Article 7.
[10] Case CJEU C-67/96 Albaešny, Article 85.
[11] The definition of an entrepreneur is based on Act No. 89/2012 Sb., The Czech Civil Code, Article 420.
[12] Provisions of Section 3 of Act No. 458/2000 Sb., The Czech Energy Act, as amended.
[13] Provisions of Section 3 – 10 of Act No. 458/2000 Sb., The Energy Act, as amended.

In my opinion, the provisions of the Energy Act mentioned above imply that the regulator understands its addressees from the perspective of civil law, for example, the legal provision on natural and legal persons is clearly an expression of the concept of a competitor as a legal, not an economic unit.

However, the important question remains whether the Energy Regulatory Office, from its position of a public regulator (even if "only" within specifically defined markets), should not understand the addressees of its decisions from the perspective of public law or competition law rather than from the perspective of civil law?

For the sake of completeness, let me state that Czech law contains a double definition of the term competitor; one in the Civil Code, which should apply not only to unfair competition law but also to competition law in general. The other definition may be found in the Competition Act and it applies to competition law. The understanding of the term competitor within the Civil Code regime is clearly different from the understanding within the regime of the Act on the Protection of Competition, especially as regards to the definition of a competitor as a legal, respectively economic unit, which is undoubtedly linked to the more economic approach that the European Commission has been promoting in recent years.

According to the Czech Civil Code, a competitor is a person who participates in competition.[14] It is therefore a definition practically identical with the definition according to the "old" Czech Commercial Code, with the difference that the Czech Civil Code no longer designates its addressees as natural and legal persons, but it uses the general pronoun which has a more general meaning[15] The usage of the general pronoun "who" allows an interpretation in the sense of an economic unit. On the other hand, the Energy Act (as described above) still designates its addressees as persons, whether natural or legal.

The coherence of the understanding of individual concepts is not just a question of legal theory. In practice, the above discrepancies may have a major impact on the understanding and correct definition of the relevant market, or more precisely, the correct definition of who does and does not have a dominant position in the relevant market, but also to whom the administrative decision should actually be addressed. In the following part, I would like to briefly introduce some specifics of the Energy Regulatory Office.

[14] Provisions of Section 2972 of Act No. 89/2012 Sb., The Civil Code, as amended.

[15] In addition, the "old" Commercial Code contained the amendment that a competitor does not have to be an entrepreneur; however, the same principle applies under the Czech Civil Code nowadays, although it is not explicitly stated in it, because such an amendment was considered redundant. Cf., for example, ONDREJOVÁ, D. in: HULMÁK, M. et al. Civil Code VI. Law of obligations. Special part (Section § 2055–3014). *Commentary*. C. H. Beck, 2014, pp. 1756.

4. The Czech Energy Regulatory Office and its specifics

There is no doubt that the Energy Regulatory Office is a regulator for electricity, gas, heat and supported energy sources (so called RES). The Energy Regulatory Office was set up on 1 January 2001 under Act No. 458/2000 of 28 November 2000 regulating the Conditions of Business and State Administration in Energy Industries and Amendments to Certain Laws (the Energy Act), as amended as an administrative authority responsible for regulation in the energy sector. The Board of the Energy Regulatory Office has run the Energy Regulatory Office. The Office is based in Jihlava and there are also offices in Prague and Ostrava.

The Energy Regulatory Office operates as an independent chapter in the state budget and does not have any economic activities, any ownership interests in domestic or foreign companies, or any special-purpose transfers; it is not entitled to provide subsidies and returnable financial assistance, it does not have any expenses resulting from licensing contracts and does not have any subordinated organisational components.

Competences of the Energy Regulatory Office in a nutshell:

- price controls,
- support for competition in the energy industries,
- supervision over markets in the energy industries,
- support for the use of renewable and secondary energy sources,
- support for the combined heat and power generation,
- support for the biomethane,
- support for the decentralized energy production,
- protection of the customers' and the consumers' interests,
- protection of licence holders' vested interests,
- protection of the legitimate customers' and the consumers' interests in the energy industries.[16]

Under Section 10(2) of Act No. 526/1990 Sb. regulating Prices and Section 17(6) (d) of the Energy Act No. 458/2000 Sb., the Energy Regulatory Office issues decisions on prices in the Energy Regulation Gazette, available via a public administration website.

In its decisions on prices, the Office sets out the scope and level of support for electricity generation from renewable energy sources, high-efficiency combined heat and power generation and secondary energy sources. Support for this

[16] Provisions of Section 17, Sub-section 7 of Act No. 458/2000 Sb., The Energy Act, as amended.

electricity generation is provided through green premiums on electricity prices or through feed-in tariffs.[17]

5. Decision making of the Czech Energy Regulatory Office based on the Energy Act

The first question I raise in connection with the issuance of administrative decisions by the Energy Regulatory Office (for example, in the case of decisions on price violations) is whether the Energy Regulatory Office addresses its decision correctly, i.e. to the "correct" parties, legal or natural persons.

I will provide an example of a subsidiary and a parent company. It is logical that an administrative decision (for example, the above-mentioned decision on a breach of price regulation) is addressed to the person who breached a specific price regulation, specifically, in this sector it will always be a licensee.

However, both the parent and a subsidiary company may be licensed separately, because (and often it is directly required by the Energy Act) an electricity trader shall not be an electricity producer at the same time. Therefore, in practice, it may happen that the parent company is a producer of electricity and its subsidiary company is a seller of the electricity produced by the parent company. The question is to whom should the administrative decision on a pricing violation be addressed on behalf of the Energy Regulatory Office?

In competition law, the so-called intra-enterprise doctrine (doctrine of one economic unit) is typically applied, on the basis of which competition law does not apply to actions "within" one company (i.e. to relations between persons forming in fact one unit), because as a result it is only the matter of internal allocation of activities on the basis of a decision on who exercises control over persons within one given economic unit.

Thus, for example, if subsidiary companies do not have real autonomy in relation to their actions and decision making and only carry out the instructions of their parent company, Article 101 TFEU does not apply to their mutual relations and cannot therefore conclude a prohibited agreement.

As it regards the legal liability of a parent and subsidiary company, it is generally assumed that all entities within a single economic entity are subject to management from a single "center", typically by the parent company; since such a company controls other entities and determines their competitive behaviour. As a result, the parent company shall be held liable for the conduct of the group as

[17] More information on the website of the Energy Regulatory Office: https://www.eru.cz/cs/o-uradu

a whole, even if the anti-competitive conduct itself was not committed directly by a parent company but by its subsidiary company/companies.

Therefore, for example, the Office for the Protection of Competition does not address its decisions on anticompetitive conduct to all legal entities representing according to the competition law of one competitor (undertaking), but in principle it gives the responsibility for anticompetitive conduct to one specific person. Even in cases where the reasoning of such a decision clearly states that also other persons are part of one competitor for whose actions a specific person is responsible within the decision of the Office for the Protection of Competition.

Why should the Energy Regulatory Office be bound by a presumption, contrary to the doctrine of one economic unit that a subsidiary company (licensee) is also responsible for the actions of its parent company? And why should the infringement for each licensee be anticipated automatically, without taking into account the conduct "within" the undertaking, i.e. the relations between all persons who actually form the unit described above?

I believe that not only courts, but especially administrative authorities (from their position of regulators in the field of public law) should adhere to the concept set by the competition law when deciding on competition matters (even if only in the field of energy). This means that the doctrine of one economic unit should also be applied to the decisions made by the Energy Regulatory Office.

Some research shows that, for example, (civil) courts have often been guided in their decision-making activities by considerations that are not common in competition law, respectively which do not comply with the standard set by the Office for the Protection of Competition or the European Commission through the DG Competition.[18]

However, in my opinion, deviations from the standard set by all the competition authorities mentioned above should not occur in any field of state decision-making activities, not even in the case of the Energy Regulatory Office.

6. Decision making of the Czech Energy Regulatory Office based on the REMIT Regulation

Another question that arises in this context is who is actually considered to be a participant in the relevant market in accordance with the EU REMIT Regulation, meaning to whom the Energy Regulatory Office specifically addresses its decisions in these matters?

[18] PETR, M., ZORKOVÁ, E. Soukromé prosazování v České republice. *Antitrust. Review of competition law*. 2016, no. 2, Volume I–VIII.

First of all, REMIT is EU Regulation No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency. The Regulation was published in December 2011 in the Official Journal of the European Union and entered into force 20 days following the publication, i.e. on 28 December 2011.

The REMIT Regulation puts in place a consistent framework for the entire EU for the first time:

- it defines market abuse in the form of actual market manipulation and attempts to manipulate the market and insider trading on wholesale energy markets,
- it lays down an express prohibition of market abuse in wholesale energy markets,
- it puts in place a new framework for monitoring wholesale energy markets to detect and prevent market abuse,
- it provides for the enforcement of prohibitions and the penalisation for breaches of the market abuse rules at the domestic level.

REMIT prohibits market manipulation and insider trading based on inside information in wholesale energy markets and requires market participants to publish inside information. REMIT has a bearing on everyone who participates in or whose behaviour is influenced by wholesale energy markets.

The fundamental role of the Energy Regulatory Office in the domain of REMIT is primarily to set up a national register of market participants, to cooperate with the Agency for Cooperation of Energy Regulators (ACER) and other national regulatory authorities in the monitoring of wholesale energy markets and, in particular, to exercise its powers of investigation, enforcement and penalisation in the case of breaches of REMIT with respect to market participants.

All definitions in the REMIT Regulation are necessarily adapted to the specificities of electricity and gas markets, the market abuse (in accordance with the REMIT Regulation) means insider dealing and subsequent market manipulation, where wholesale energy markets include both commodity markets and derivatives markets which are vital for energy and financial markets.

Wholesale energy markets include regulated markets, multilateral trading facilities, over-the-counter (OTC) transactions and bilateral contracts, whether direct or brokered.

In essence, the REMIT Regulation directly defines the relevant markets, as it applies to wholesale energy markets, which means any market in the European Union where wholesale energy products are traded. The REMIT Regulation thus, in my view, defines the relevant market relatively clearly, but it remains the responsibility of the Energy Regulatory Office to clearly define who is a participant in the relevant market.

According to the definition given by the REMIT Regulation, wholesale energy products are contracts for the supply of electricity and natural gas with a place of supply in the European Union, as well as contracts for the transmission of electricity or natural gas in the European Union. Wholesale energy products are also derivatives relating to electricity or natural gas produced, traded or supplied in the European Union and derivatives relating to the transmission of electricity or natural gas in the European Union.

However, for the purposes of this article, the most important fact is who is a market participant under the REMIT Regulation. Article 2(7) of the REMIT Regulation defines a market participant as follows: market participant means any person, including transmission system operators, who carries out transactions on one or more wholesale energy market, including the placing of orders to trade.

This definition is important because a market participant is obliged to disclose confidential information in accordance with Article 4(1) of the REMIT Regulation. In addition, in accordance with Article 8(1) of the REMIT Regulation, a market participant is required to provide the Agency for the Cooperation of Energy Regulators all records of transactions in wholesale energy markets, including trading orders and information referred to in Article 8(5) of the REMIT Regulation.

The Agency for the Cooperation of Energy Regulators states in its guidelines[19] that it currently considers *at least the following persons* who could be market participants under the REMIT Regulation if they enter into commercial transactions (including trading orders) in one or more wholesale energy market:

- energy trading companies,
- electricity or natural gas producers,
- natural gas carriers,
- large customers and final customers in some cases,
- operators of transmission systems and natural gas storage facilities,
- LNG facility operators and investment companies.

From the above definition, it seems to me that there will be no distinction between a parent company and a subsidiary company, since the list above includes traders, manufacturers and/or carriers, without any further necessary specification.

The broad and essentially open definition of the relevant market participant anticipates that addressing the decision would not necessarily be problematic for the Energy Regulatory Office, however, this may only be said with certainty if I focus on the Energy Regulatory

[19] More information avaible at: http://www.eru.cz/documents/10540/900270/ERU+Narizeni+REMIT+Otazky+a+Odpovedi+16+07+2013.pdf/d5bb2201-eec4-4cc8-a5be-c9ca71b7e9ca

Office's decision-making practice based on the REMIT Regulation.

However, the Energy Regulatory Office does not issue many decisions on the basis of the REMIT Regulation; in 2019 the first decision was issued, dealing with a breach of the obligation under Article 8 of the REMIT Regulation. It was an undertaking A.E. which was found guilty of committing 34 administrative offenses and the breaching of Article 8 of the REMIT Regulation by failing to provide the records of transactions in wholesale markets of energy.[20]

Most recently, in 2020, another decision was issued on the basis of the REMIT Regulation, however, it has not been published yet, as well as the statistics for 2020 that are usually published on the Energy Regulatory Office website.

7. Conclusion

This paper shows that there is a legal discrepancy regarding the terminology used to define participants in the relevant markets and also a discrepancy in understanding these individual terms, namely in understanding the content of each term, which may be affecting the decision-making processes of the Energy Regulatory Office.

For example, the Energy Regulatory Office may not always distinguish between a parent company and a subsidiary company, whether it is the case of an administrative decision of the Energy Regulatory Act based on the Energy Act or the case of the decisions of the Energy Regulatory Office based on the REMIT Regulation.

This paper is submitted with the conclusion that the Energy Regulatory Office may have often been guided in its decision-making activities by considerations that are not common in regulatory law, although deviations from the standard set by national competition authorities and European Commission should not occur in any field of state decision-making activities, not even in the case of the Czech Energy Regulatory Office.

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Central Bank Independence – From the European Union Law to the Czech Republic Example

Michael Kohajda*

Summary: This article defines the basic kinds of central bank independence as generally accepted by the professional community. Then, for each of the kinds, their content and their fulfilment in the law of the Czech Republic are discussed. Of course, the legal regulation of the Czech National Bank as a central bank of a Member State of the European Union must meet the basic requirements of E.U. law for the independent status of central banks. However, the degree and manner of fulfilling these requirements beyond the basis of E.U. law vary from one Member State to another. The Czech National Bank is endowed with a high degree of independence, partly because of its establishment in the late 1990s. Despite this, some questions relating to its independence remain unanswered. This paper may thus also serve as a source of information for other authors to compare the regulation of the independent status of the central bank of their countries in comparison with the Czech National Bank.

Keywords: Budgetary Independence; Central Bank; European Central Bank; Financial Independence; Functional Independence; Institutional Independence; Independence of Central Banks; Personnel Independence

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1. Introduction

Issues related to the independence of a central bank from state power, especially the executive power, are frequently discussed topics. However, the central bank's

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independent status was not as commonplace at the end of the 20th century as it might seem today[1].

The importance of central bank independence is increasing these days when countries' economic output is declining, but at the same time, inflation is rising. In fact, at these moments, the short-term objectives of central banks and governments differ. The government is mainly concerned with the satisfaction of its electorate, which can be linked to high employment and excellent employee incomes. On the other hand, the central bank must keep in mind the permanence of its objective of price or monetary stability (of course, monetary or price stability is not the only objective of central bank activity, but it is undoubtedly the primary objective[2]). Therefore, the economic attitudes of the central bank and the government may not be the same in the short term. Governments are aware of the consequence of independence, which is why some of them, with the justification of wanting to fulfil the wishes of their electorate best, have resorted to some limitations of independence. However, the extent of interference with central bank independence may vary, and requirements for consultation between the central bank and the government may sometimes be considered acceptable.

From a theoretical point of view, several kinds of central bank independence can be distinguished. The most appropriate classification can be considered as follows: institutional, personnel, functional, financial, and budgetary independence.

By institutional independence, we mean separating the central bank from other powers in the state and prohibiting central bank officials from taking or requesting any orders or instructions. Personnel independence is associated with the method of staffing the central bank's seniors and decision-making officials (in the case of the Czech National Bank, the practice of staffing the Bank Board). Functional independence consists of separating the decision-making processes of the central bank from any other entities or bodies. We speak of financial independence when we refer to the prohibition to finance or grant loans (in the narrower sense of the word, to grant direct loans) to any public entities, particularly the state or municipalities. The term "financial independence" can be understood as separating the central bank's budget from the state budget. The central bank itself should preferably determine the structure and content of the bank's budget; the level of funding for the central bank's activities could be a compelling way of influencing and making the central bank's activities dependent.

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1 See: GOODHART, C. A. E. *The Central Bank and the Financial System*. London: Palgrave Macmillan, 1995. p. 60.

2 See: GOODHART, C. A. E. *The Regulatory Response to the Financial Crisis*. Northampton: Edward Elgar, 2010. p. 34.

2. Institutional Independence

The institutional independence of the Czech National Bank derives directly from the Constitution of the Czech Republic[3], specifically from the provisions of Article 98[4]. However, a simple comparison with the preceding Article 97[5], which regulates the Supreme Audit Office, reveals that Article 98 does not explicitly mention the independence of the Czech National Bank, unlike Article 97 for the Supreme Audit Office. Therefore, it would be a simplification to conclude that the Czech National Bank is not in an independent status by using only this argument.

Historically, this very simplistic argumentation has also appeared in proceedings before the Constitutional Court of the Czech Republic. In his statement[6] addressed to the Constitutional Court, the President of the Chamber of Deputies of the Parliament of the Czech Republic, Václav Klaus, used just such an argument: '… institutions such as the Parliament, the Constitutional Court, and the Supreme Audit Office are endowed with a certain extent of independence, but only the Supreme Audit Office has this attribute explicitly stated in the Constitution…'. "In the system of state power, independence is not absolute; it has its conceptual limitations; moreover, the Constitution is limited to a very general definition of the status and competencies of the Czech National Bank. Some degree of independence is granted by its inclusion in a separate chapter of the Constitution, but the text of the Constitution does not expressly grant independence."

In this case, the Constitutional Court subsequently stated[7] that: "Although the Constitution does not explicitly mention the independence of the Czech National Bank, the historical interpretation of the circumstances of the adoption of the Constitution, the teleological interpretation of the concept of "care for the

[3] Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic (hereinafter referred to as the „Constitution").

[4] Article 98 of the Constitution

(1) The Czech National Bank shall bet the state central bank. Its primary purpose shall be to maintain price stability; interventions into its affairs shall be permissible only based on statute.

(2) The Bank's status and powers, as well as more detailed provisions, shall be set down in a statute.

[5] Article 97 of the Constitution,

(1) The Supreme Audit Office shall be an independent body. It shall perform audits on the management of state property and the implementation of the state budget.

(2) The President of the Republic appoints the President and Vice-President of the Supreme Audit Office base on the nomination of the Chamber of Deputies

(3) The legal status, powers, and organisational structure of the Office, as well as more detailed provisions, shall be set down in a statute.

[6] Comments on the proposal to repeal Act No. 442/2000 Coll., on the Czech National Bank, the resulting judgment of the Constitutional Court was published under No. 278/2001 Coll.

[7] Judgment of the Constitutional Court published under No. 278/2001 Coll.

stability of the currency[8]" and the systematic interpretation of Chapter Six of the Constitution, where the regulation of the Czech National Bank is separated from the regulation of the legislative and executive powers, it can be concluded that the purpose of enshrining the central bank of the state in the Constitution in general and in a special Chapter of the Constitution, in particular, was precisely to create a constitutional framework for its functioning independently of the legislative and executive powers.

Nowadays, the institutional independence of the Czech National Bank is no longer questioned. For example, Klíma says[9]: "In Constitutional terms, it is a constitutional institution equal to the other powers. Therefore, from the point of view of the Constitution, the Czech National Bank can be regarded as the independent banking authority."

3. Personnel Independence

The second type of independence, also the second in order by importance, is personnel independence. Personnel dependence is relatively easy to establish and can also be very effective. If the governing body of the central bank is appointed frequently, if there is the possibility of dismissal of the appointee, and if there is the possibility of reappointment of the same person to the position, then the possibility of creating dependence of the governing body on the appointor is very likely.

For this reason, the method of filling central bank management positions should be as transparent as possible, with the possibility of dismissal based only on serious and precisely specified reasons. Moreover, the term of office is relatively long, and the possibility of reappointment is limited. These are the criteria on which the considerable independence of a central bank can be built.

Let's briefly analyse the legal regulation concerning the Czech National Bank. We find the following: The President of the Republic appoints the members of the Bank Board of the Czech National Bank[10]. The Governor, Deputy Governors, and other members are appointed and dismissed by the President of the Republic[11]. The President of the Republic shall dismiss a member of the Bank

[8] Lately, the main objective of taking care of currency stability was replaced by the aim of taking care of price stability; this objective is still specified in the Constitution today – currency stability is conceptually broader, it includes internal stability, price stability, and external stability, foreign exchange stability.

[9] KLÍMA, K. and Coll. *Commentary on the Constitution and the Charter*. Pilsen: Publishing house Aleš Čeněk, 2005, p. 503.

[10] Article 62(k) of Act No. 1/1993 Coll., The Constitution

[11] Article 6 (2) of Act No. 6/1993 Coll., on the Czech National Bank

Board; if he begins to perform a function incompatible with membership of the Bank Board[12] or if he loses his integrity[13]; or on the date on which a judgment by which he has been deprived of legal capacity or by which his legal capacity has been restricted enters into force[14]. Furthermore, the President of the Republic may dismiss a member of the Board if he has not held office for more than six months[15]. Members of the Board are appointed for a term of 6 years[16] which fulfils the condition of Article 14 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank[17]. No one may serve more than twice as a member of the Board.[18]

It is clear from the above that the fundamental premises of the personnel independence of the central bank are respected in the Czech legislation – although it is possible to have some objections about the regulation.

The prohibition to hold the position of a member of the Bank Board more than twice (this is an absolute value, not a disproportionately more frequent regulation prohibiting holding a post more than twice in a row) should be considered positive.

It is also necessary to discuss the issue of appointing and dismissing members of the Bank Board. Appointments are regulated by the aforementioned provisions of the Constitution and the Act on the Czech National Bank. Based on the previous case law of the Constitutional Court, the regulation of the appointment of the members of the Bank Board, including the appointment of the Governor and Deputy Governors of the central bank, does not cause any problems. The President of the Republic appoints the members of the Bank Board without counter-signature.

The President of the Republic also appoints the Governor and Deputy Governors without counter-signature (it should be emphasised that these are also

[12] Article 6 (6) of Act No. 6/1993 Sb., on the Czech National Bank: „Membership of the Board is incompatible with the office of a member of the legislature, a member of the government, membership in the management, supervisory and controlling bodies of other banks and business entities, and the exercise of self-employed activity, except scientific, literally, journalistic, artistic and pedagogical activity and the management of one's property. Furthermore, membership of the Board shall be incompatible with any activity which may give rise to a conflict of interest between the pursuit of that activity and membership of the Board."

[13] Article 6 (8) of Act No. 6/1993 Coll., on the Czech National Bank „For the purposes of this Act, integrity means a person who has not been convicted of a criminal offence."

[14] Article 6 (11) (b) of Act No. 6/1993 Coll., on the Czech National Bank.

[15] Article 6 (12) of Act No. 6/1993 Coll, on the Czech National Bank.

[16] Article 6 (5) of Act No. 6/1993 Coll, on the Czech National Bank.

[17] Article 14.2. of the Protocol: „The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years."

[18] Article 6 (4) of Act No. 6/1993 Coll, on the Czech National Bank.

members of the Bank Board). This power is explicitly granted to the President by the Act on the Czech National Bank but not by the Constitution. This problem can be viewed from two sides. Either we take the appointment of the Governor and Deputy Governors to be a procedure that is contained in the phrase "appoints members of the Bank Board"; or we take the appointment of the Governor and Deputy Governors to be a distinct power of the President which is established by the Czech National Bank Act and as such is subject to counter-signature[19]. In my opinion, I am inclined to the former view, but mainly because of the existence of a constitutional custom to do so.[20]

The question of the possibility of dismissing a member of the Bank Board isn't simpler. It should be remembered that the possibility of dismissing a member of the central bank's management can be very significant interference with the bank's independence. Therefore, this issue must be approached with caution. It is not difficult to deduce that under the current, aforementioned regulation, the President must or may dismiss a member of the Bank Board for the reasons set out in the Act on the Czech National Bank. However, it is questionable whether he can do so only with the counter-signature of the Prime Minister.

It should be noted that there is no provision in the Constitution for the dismission of a member of the Bank Board. Therefore, the obligation or possibility to dismiss a member of the Bank Board is to lay down only in a legal regulation with lower legal force – the Act on the Czech Nation Bank. It is precisely because of the dismissal regulation only in the Act that the counter-signature should be necessary. Although the right of the dismissed Governor to defend himself against his removal from office is not mentioned in the Czech law, it must be stated that the dismissed Governor has the right to seek protection before the European Court of Justice on the grounds of infringement of the TFEU or any rule of law relating to their application[21].

One more aspect of the appointment of Board members needs to be emphasised – the selection of their personnel. There is no provision in the Constitution or the act on the Czech National Bank that deals with selecting persons for the

[19] Article 63 (2), (3) of Act No. 1/1993 Coll., The Constitution.

[20] If it were not for what I believe to be an already existing custom, I could not but disagree with the dissenting opinion expressed in the judgment of the Constitutional Court under No. Pl. ÚS 14/01, i. e. that there is no maxim that would imply that the power to appoint board members would ipso facto imply the power to appoint the officers of such aboard.

[21] Article 14.2. of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank: „A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application."

Bank Board. According to the current Czech legislation, the President of the Czech Republic selects the members of the Bank Board only at his discretion and appoints the Governor and Deputy Governors from among the members of the Bank Board. This situation is still a matter of concern today.

It is necessary to mention once again Václav Klaus's argument from the statement to the Constitutional Court as mentioned above: "The appointment of Bank Board members by a single body[22] is quite unusual not only in the E.U. countries but also in other developed countries in the world. Moreover, the Czech Republic is a parliamentary republic, and according to Article 54(3) of the Constitution, the President of the Republic is not accountable for the performance of his duties. Therefore, according to some expert opinions, the idea that he could appoint bank officials who are unaccountable to anyone at will is incompatible with the concept of a democratic parliamentary republic."

Because of the history of Czech legislation, it is worth recalling the original draft of the Czech National Bank Act, which the Czech National Council approved in late 1992. It dealt with the appointment of members of the Bank Board in a different way. The Governor was to be appointed and dismissed by the President of the Czech Republic on the proposal of the Government of the Czech Republic, the Deputy Governors were to be appointed and dismissed by the President of the Czech Republic on the proposal of the Governor in consultation with the Government of the Czech Republic, and the other four members of the Bank Board from among the senior staff were to be appointed and dismissed by the President of the Czech Republic on the proposal of the Governor in consultation with the Government of the Czech Republic. This method of appointing the Bank Board was not adopted because the current Constitution of the Czech Republic was adopted the day before this bill was passed. Some Members of Parliament pointed out that this provision was inconsistent with the text of the Constitution, which does not mention any nomination. For this reason, the Members of Parliament deleted these provisions from the draft law, and the Czech National Bank Act, therefore, makes no mention of any nomination of members of the Bank Board.

A proposal to change the procedure for appointing members of the Bank Board was also submitted to the Chamber of Deputies of the Parliament of the Czech Republic in 2000. It was proposed that the number of members of the Banking Council shall be increased from seven to nine, with 1/3 of the members of the Banking Council to be appointed by the President based on proposals from the government, 1/3 based on proposals from the Chamber of Deputies and 1/3 based on proposals from the Senate. However, this proposal was rejected.

[22] Note: Václav Klaus meant the President of the Republic.

4. Functional Independence

A central bank's functional independence consists of the central bank's autonomous decision-making about its activities, whereby it determines the objectives of its activities, the instruments for achieving the goals, and the timing of their use, within the scope of its regulatory powers. Monetary policy is the essential activity of central banks, which is why some authors prefer to refer to these institutions as "monetary authorities" rather than "central banks"[23]. As with the European Central Bank[24], the primary objective of the Czech central bank is to maintain price stability. It should be noted here that the Czech central bank is both a central bank and an integrated supervisory authority for the financial system. Thus, in the case of monetary policy, the Czech National Bank is autonomous in determining the instruments used to achieve the monetary policy objectives, the degree to which they are used, and the timing of their activation and deactivation. This position of the central bank is entirely in line with the requirements of the Treaty on the Functioning of the European Union[25].

In addition, however, the Czech central bank also carries out its secondary regulation and supervision of the financial system[26]. In this capacity, it is entrusted with the powers of an administrative authority. However, it carries out administrative proceedings independently, and the central bank again decides on ordinary and extraordinary appeals against its decision. Therefore, even in administrative procedures, no other authority interferes with the functional independence of the central bank.

However, the Czech legal regulation of the central bank lacks a more detailed regulation of the functional independence of the Czech National Bank in the meaning of prohibition provisions. Instead, the law states that the mutual

[23] See: WOOD, J. H. *A History of Central Banking in Great Britain and the United States*. Cambridge: Cambridge University Press, 2005. p. 117.

[24] Article 127 (2) TFEU: „The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability."

[25] Article 130 TFEU: „When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks."

[26] On the relationship between supervision and the central bank see: GREEN, D. The Relationship between Micro-Macro-Prudential Supervision and Central Banking. In: WYMEERSCH, E., HOPT, K. J., FERRARINI, G. (eds.). *Financial Regulation and Supervision: A Post-Crisis Analysis*. Oxford: Oxford University Press, 2012. p. 57–68.

relationship between the Czech National Bank and the government consists of mutual information[27].

5. Financial Independence

Financial independence between the central bank and public budgets is related to the prohibition of monetary financing of public budgets (in the narrower sense, the prohibition of direct monetary funding). The prohibition of monetary financing is based on a neoliberal worldview where money is not to be created by the state or by the central bank for the state. Private banks primarily create money, and the role of the central bank is to refinance commercial banks (not the state). Over time, however, governments bonds have become a welcome source of investment returns for commercial banks. Simply put, monetary financing means financing government spending with central bank money. The aim of monetary financing may be to provide sufficient funds for the operation of the state, possibly in combination with an increase in the monetary base.

It should be stressed that the explicit prohibition of monetary financing refers only to direct financing; indirect financing, i.e. the purchase of government bonds from commercial banks, is no longer prohibited. Yet even this practice can (and does) have negative consequences for the economy.[28]

This kind of central bank independence is explicitly mentioned as one of the requirements for the European Central Bank and the national central banks in the Treaty on the Functioning of the European Union, specifically in Article 123, Paragraph 1[29].

Following the relevant E.U. legislation, the Czech legislation explicitly prohibits direct monetary financing[30]. The essence of the prohibition of direct monetary financing is the prohibition to provide overdraft facilities or any other type of credit to the authorities, institutions or other bodies of the European Union, central governments, regional or local authorities or other public authorities,

[27] Article 9 (2) of the Act No. 6/1993, on the Czech National Bank.

[28] See: SILVIA, J. E. *Financial Markets and Economic Performance: A Model for Effective Decision Making*. Cham: Palgrave Macmillan, p. 411.

[29] „Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments."

[30] Article 34a (1) of the Act No. 6/1993, on the Czech National Bank.

other public bodies or public undertakings of the Member States; the direct purchase of their debt instruments is also prohibited.[31]

6. Budgetary Independence

The last kind of central bank independence is budgetary independence. This independence is related to the separate budgetary financing of the central bank's activities. This separation from the national budget can take various forms, ranging from a separate part inside the state budget to a separate budget for the central bank. It is also crucial who approves the budget in question, whether it is influenced by a body other than the central bank itself.

I believe that the degree of the budgetary independence of the Czech National Bank is even higher than that of the European Central Bank, whose budgetary independence is also guaranteed to a certain extent in the primary law of the European Union[32].

In the case of the Czech National Bank, there is a rather extreme situation where the Czech central bank has an entirely separate budget from other public budgets, especially from the state budget. All the parameters of the annual budget are determined exclusively by the Bank Board. This budget is used both for operational matters and for investment activities. Similarly, in the case of the Czech central bank, the budget is used for monetary policy, regulatory, and supervisory activities.

7. Conclusion

These days, with inflation rising sharply and this trend unlikely to be short-lived, more than usual depends on central banks' monetary policy decisions and performance. Central banks must remain independent of national governments and the decision-making of political parties. It is precisely at times like the present that the interest of central banks in ensuring price and monetary stability diverges

[31] Regarding the latest attempt to change the law to allow monetary financing compare: KOHAJDA, Michael. Amendment of the Czech National Bank Act as a way to monetary financing? *Acta Universitatis Carolinae – Iuridica*. 2020, Vol. LXVI, č. 3, s. 43 – 51.

[32] Article 282 (3) TFEU: „The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances.

Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence."

from the interest of the political leadership of countries in high economic growth and high employment, but also, in these days of highly indebted countries, in low interest rates that ensure low servicing costs for sovereign debts.

There is now no longer any doubt that a high degree of independence of a particular central bank is a prerequisite for the orderly and autonomous conduct of monetary policy. Independent central banks achieve better monetary policy results than central banks that are more dependent on the executive branch of government.

For this reason, it remains an essential issue to look at the legal regulation of central bank independence in individual countries to compare the way central bank independence is ensured and the degree of independence from the executive. Also, the treatise mentioned above presenting the different types of central bank independence and their related legal regulation in the Czech Republic should be a source of information for such international legal comparison.

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REVIEWS

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Naděžda Šišková. *Lidskoprávní mechanismy na úrovni EU a otázky související* [The Human Rights Mechanisms at the level of the EU and the Related Questions]. Prague: Wolters Kluwer, 2021, 316 p – ISBN978-80-7598-623-8

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Reviewed by

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At the end of the year 2021 we got a pleasure in the community of the Czech and Slovak academics, lawyers, students and in general of all who deal in any perspective with the human rights protections in the EU and wider in Europe. The reason is that the new book by Naděžda Šišková was released.

The book did not appear out of sudden as its author is for long well know both in the Czech and Slovak expert public and beyond. She has published a number of articles as well as books concerning EU regulation of human rights protection during last two decades both in the Czech Republic and abroad. Among others, we could refer to her publication in the very first volume of this journal[1] focusing on issues, which are now – after several years – reflected and re-thought in individual chapters of the newly released book. The same is valid about her other later papers focusing on the EU concept of the rule of law and evaluation of procedures available for its enforcement,[2] a thorough analysis of protocol no. 30 to the EU Charter of Fundamental Rights (further referred as EU Charter)[3] as

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1 ŠIŠKOVÁ, N. New Challenges for the EU in the Field of Human Rights (Focusing on the Mechanism of the Charter). *European Studies: The review of European Law, Economics and Politics*. 2014, vol. 1, pp. 12–21.

2 ŠIŠKOVÁ, N. The EU Concept of the Rule of Law and the Procedures de lege lata and de lege ferenda for its Protection. *International and Comp.tive Law Review*. 2019, vol. 19, iss. 2, pp. 116–130.

3 ŠIŠKOVÁ, N. Charter of the Fundamental Rights of the EU in the context of Protocol no. 30 to Lisbon Treaty. *Danube.* 2011, 2011, issue 2, pp. 55–60.

well as in other publications. This is a promising news for the new book itself as its structure as well as content is well thought out and "ripened in time". As a reviewer thereof I may fully confirm this conclusion.

Structurally the book is divided in seven parts. **The first part** is conceived as introductory to the whole book and the author sets human rights in the construction of EU integration both in relations to the historical developments and individual instruments for protection of the rights of individuals. She describes the "classic" instruments such as infringement or damages actions as well as post-Lisbon developments with a special focus on art. 6 of the EU Treaty.

The reference to art. 6 TEU in the introductory part serves as a bridge to **the second part** which deals in detail with the EU Charter of Fundamental Rights and its enforcement mechanisms. The author describes both history of this document, its legal status, content and structure. A special attention is paid to its enforcement in respect of which the book gives an analysis of the official explanations to the EU Charter and so called horizontal provisions of the Charter, including their interpretation by the EU Court of Justice (CJEU). The author concludes that, on one hand, the EU Charter formulates a number of rights of individuals, on the other, the extensiveness of the content became a hurdle for its full acceptance of all EU Member States. From that perspective it may be evaluated as quite an ambitious instrument. She then in detail deals with the explanations to the EU Charter focusing especially on the differences between rights and principles as they are formulated in the EU Charter as well as horizontal provisions of its art. 51 para 3 (with a special reference to CJEU case Fransson[4]) and protocol no. 30. The latter is explained in relation to the position of the Czech Republic with a focus on its effects. The author concludes that protocol 30 can be conceived as a sort of safeguard against the possibility of too extensive use of the EU Charter and is a message of the governments concerned that they are not ready to fully accept the EU Charter. In connection to other provisions of EU Charter the author believes that the effects thereof are not as they could have been expected. In this regards she calls for clarification of the use of the EU Charter, especially the change of the Explanations or protocol no 30.

In the third part of the book the author focuses on the human rights as part of the mechanisms for the protection of common European values and rule of law. This part is opened by the analysis of art. 2 TEU according to which the EU is set upon 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. The author does not conceive this article as

[4] C-617/10 Åkerberg Fransson, ECLI:EU:C:2013:280.

solely a legal norm but also a general moral and value concept on which the EU is based. She also deals comparatively with the term "rule of law" based on the work of Venice Commission as well as other relevant concepts and authors. She emphasises that the concept of the rule of law comprises not only relations among Member States, internal dimension of the EU and internal dimension of each Member State, but also the external dimension of EU relations to third countries. Among others, one of the preconditions for accession to the EU (art. 49 TEU) is the rule of law and respect for human rights and these are also under review in the accession process with any EU candidate state.

Specifically in a separate chapter in part 3 the author analyses current tools for strengthening the rule of law. She in detail covers the infringement proceedings under art. 258 TFEU, especially its limits in enforcement of the rule of law based on the cases *vis-à-vis* Hungary.[5] The pre-condition for the use of 258 TFEU procedure is the breach of a certain provision of EU law. The procedure can cover only certain misbehaviour of Member States and only certain breach of EU values. The author closes in this regard that this procedure can serve more as a "backdoor" to cover in a fragmented way the aims of the rule of law. Therefore, more important does seem the 7 TEU procedure which is conceived from the beginning as an exclusive legal tool to protect democracy, human rights and the rule of law. This instrument is conceived as highly political. Still, this special instrument has its drawbacks as its use is rather complicated and longish including possible heavy implications for the rights of the Member State concerned and the political climate of the EU.

Last but not least, the author refers to the proposal of the EU Commission contained in the Communication from 2014.[6] This new mechanism precedes the activation of art. 7 TEU and the aim thereof is to deepen the dialogue with the Member State that presumably breaches the EU values. The author reflects the critique of this new mechanism as it was created outside the framework of current treaties and lacs a clear legal basis. It is not fully set up what is its nature and relations to other procedures (258 TFEU and 7 TEU). She notices that the first use of this procedure in relation to Poland was not successful and led into the use of the formal procedure under art. 7 TEU.

Forth part of the book covers the protection of human rights as general principals of law. It reflects the development of the doctrine in the case-law of the CJEU starting the famous Stauder case[7] and further judicial developments. She categorizes human rights as they developed in the case-law of the CJEU

[5] C-288/12 *Commission v Hungary*, ECLI:EU:C:2014:237.

[6] Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final.

[7] 29/69 *Stauder v Stadt Ulm*, ECLI:EU:C:1969:57.

and, thus, fulfilled the gap in the EU regulation in this area. A special attention is then paid to the relations between the CJEU case-law and other judicial bodies or acts of international organisations. Primarily important is the relation to the jurisprudence of the European Court of Human Rights and its interpretation of the European Convention on Human Rights. The book in detail compares the convergent attitude of both courts in certain areas and compares initial disparities of the case-law to present tendency to minimize the disparities. A similarly detailed attention is paid to the Solange saga which concerned the relationship between CJEU and the German Constitutional Court, now being a firm part of the EU constitutional developments, or Kadi saga[8] concerning relation of EU law to United Nations regulations via the prism of the right to be heard and right to effective judicial review.

The **fifth part** of the book deals with the mechanism for protection of fundamental rights set up by the European Convention on Human rights adopted in the framework of the Council of Europe. The author deals in detail about the historical developments of the Convention and its scope of application. A separate chapter focuses on the Convention control mechanism including recent trends (protocol 14, 15 and 16).

Part six covers the opinion of the CJEU 2/94 on the accession of the EU to the European Convention[9] and its significance to the development of the doctrine on the protection of human rights in the EU. The author in detail deals with the pros and the cons of the potential accession to the Convention and legal implications connected therewith. Correspondingly, she evaluates the new opinion 2/13[10] the consequence of which is another delay in the accession process. She deals in detail with individual conclusions of the CJEU in the opinion and academic debate that followed. She concludes that current situation does not show any potential for developments and seems blocked. However, the author also opens the issues which seem challenging in relation to individuals and the accession, namely the length of proceedings which would probably negatively change in case there would be the accession. At the same times she notices that there could be also significant constrains on the side of the Council of Europe that have not been fully covered in the debate, yet.

[8] C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461 and T-85/09 *Kadi v Commission*, ECLI:EU:T:2010:418, C-584/10P *Commission and Others v Kadi*, ECLI:EU:C:2013:518.

[9] *Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.

[10] *Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

Finally in **part seven** the author focuses on other documents for the protection of social and economic rights under the auspices of the Council of Europe. Namely she deals with the European Social Charter including its revised version, and the EU Charter of Fundamental Social Rights.

The overall **conclusions** of the book are comprehensive and summarise outputs of individual parts.

As is clear from the previous paragraphs the book is wide-ranging and gives an overall picture how the human rights protection is structured in the EU and how individual mechanism work and interact. Even though the book covers a number of issues related to the topic, at the same time it is sufficiently detailed and refers to a number of literature and doctrinal views. Moreover, it not only refers to various opinions, but also gives its own evaluation and recommendations to improve individual mechanism for human rights protections. The content of the book shows that the author is well acquainted with the topic and can finely enrich the debates in the field.

I myself found the book interesting to read for its complexity as well as depth of analysis. I believe that it is valuable both for experienced scholars who just need to refresh their knowledge in the field and to remind of doctrinal views and CJEU case-law as well as for law and political science students as a very good study material. Thus, I may fully recommend it for all interested in the dynamic and complex topic of human rights protection in EU and wider Europe.

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