Promotion of Scientific Research and Education in European Integration and Policy

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INTRODUCTION

The integration of the South East European (SEE) countries into the European Union is a major political and economic goal designed to assure stability and development in the region. The accession towards the European Union is a complex process in which various actors have crucial roles. Besides the capacity of the public administration, the academic and scientific institutions can also strongly affect the process of accession towards European Union and the readiness of the society to handle the challenges arising from the EU membership.

The South East European Law School Network (SEELS), consisting of thirteen members, public Law Faculties from Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, and Serbia, implemented the project on „Promotion of Scientific Research and Education on European Integration and Policy“, initiated by the Faculties of Law of Skopje, Rijeka and Tirana. Its implementation is supported by the project “Open Regional Fund for South East Europe - Legal Reform (ORF-Legal Reform)” implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry of Economic Cooperation and Development (BMZ).

The main objective of the project is to extend regional scientific research in SEE countries on European integration and policy issues, to carry out joint researches in the respective area and to increase international cooperation with academic institutions, research centres and networks for research and education in EU Law, EU integration and policies, especially in the field of researcher’s mobility, joint research activities and events.

In this respect, nine regional experts from the Faculties of Law of Tirana, Zenica, Mostar, Split, Rijeka, Skopje, Podgorica, Belgrade and Niš, and two international experts from the University of Graz, Centre for Southeast European Studies and University of Vienna, Institute for European Integration Research (EIF) are assigned to carry out the research divided into four specific research areas: 1. A new EU approach to the Enlargement and to the Western Balkan region; 2. Enhanced capacity of the rule of law in the EU; 3. Fundamental rights and freedoms in context of the EU accession to the ECHR and the novelties foreseen with the EU Charter on Fundamental Rights; and 4. Policy of competitiveness and sustainable development and the EU 2020 Strategy.

The results from the research on EU integration related issues were presented at the Regional Conference held at the Faculty of Law in Rijeka on 27th and 28th of May 2014.

This publication represents a compilation of the research papers and findings of the experts on various aspects of European integration and policy, as well as conclusions adopted at the Conference in Rijeka.

The editors are confident that the publication will play a major role in exciting and motivating the readers to gain a broader perspective of the European integration as a result of the efforts made by the authors.

Skopje, September 2014.

Prof. Dr. Goran Koevski
Manager
Centre for the South East European Law School Network (SEELS)

Dr. Veronika Efremova
SEELS Sub-Project Manager
Open Regional Fund for SEE - Legal Reform Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)

Dr. Christian Athenstaedt
Fund Manager
Open Regional Fund for SEE - Legal Reform Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)
PART ONE

THE NEW EU ENLARGEMENT APPROACH
NEW APPROACH TO THE EU INTEGRATIONS – RECONSIDERING THE RULE OF LAW CONDITIONALITY

Marko KMEŽIĆ *

Abstract

The EU rule of law conditionality has proved to be powerful incentive for reform in the Western Balkans (potential) candidate countries. Nevertheless, deficiencies in the existing EU’s approach coupled with cultural predispositions and prevalent influence of domestic veto players - lead to capacity related and short term outcomes rather than transformative change in this field. Furthermore, 13 years after the launch of the Stabilization and Association process with the EU the region is still far away from EU accession for the foreseeable future, with several of the aspiring countries completely blocked. This is why it is timely to consider possible alternatives to the existing integration strategy.

Key words: EU Integrations, Western Balkans, Rule of Law, Judiciary Reform, New Approach

1. Introduction

This article explores the EU-integration process in the Western Balkans (WB) region during a period of enlargement-abstinence. The aim of this study is not only to expand knowledge and scholarship in this area, but also to influence policy-led discussions in order to reinvigorate the EU integration process. So, instead of viewing enlargement as the fulfillment of formal criteria, this article will focus on how and if the enlargement process can overcome the ’enlargement fatigue’ and growing skepticism towards the EU membership of the WB whilst maintaining its transformative effect. More precisely, this study will focus on the effectiveness of the rule of law conditionality towards the remaining WB (potential) candidate countries in an attempt to answer the critical question: whether the EU should employ new approach to the rule of law conditionality in order to accelerate the process of EU integration, and how the new approach could sustain EU’s transformative power.

With regard to the methods used, this study is based on a neo-institutional approach, which attempts to overcome the separation of research by EU legal scholars, lawyers, and political scientists and to re-integrate the different aspects of legal and political analyses through the logic of “functional interdependence.” Hence, the normative and empirical analyses have used the same written documents, i.e. legally binding and non-binding EU law, ‘soft law,’ declarations, etc., while applying their respective methods of description, analysis and interpretation not only to texts, but also to the empirical research. With regard to the comparative method applied, I made a selection of WB countries according to their status in the EU accession process.

2. Background

At the Thessaloniki summit in 2003, the European Council declared that “the future of the Balkans is within the European Union.” This political commitment taken by heads of states and prime ministers of EU member states was a clear promise and provided for a strong incentive to the

* Marko Kmezić, Lecturer and senior researcher at the Centre for Southeast European Studies at the University of Graz, Austria, e-mail: marko.kmezic@uni-graz.at


societies of the region from the EU and seemed to entail the promise that the future of the region will be stable, prosperous, and within the EU.

Since then, the WB has experienced more than a decade without armed conflict. In addition to the challenges of political and economic transformation, Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia remain weak states with dysfunctional institutions, notwithstanding the considerable diversity among them. Interplay of these problems significantly influenced the region's ability to catch up in terms of the democratization processes that began a decade earlier in the rest of post-communist Central and Eastern Europe. As a result, out of the countries termed the "Western Balkans" only Croatia managed to join the EU in 2013 and this some 13 years after the Stabilization and Association process (Sap) was launched. It took Croatia six years to conclude formal negotiations after it started them back in 2005 and it took nearly another two years for the final accession phase before the full membership. Even Montenegro and Serbia, who commenced their formal negotiations in 2012 and 2014 respectively, are not likely to join before 2020. Citizens of the WB, with the exception of Croatia, thus will have to wait for more than 20 years since the launch of the SAP in 1999 and 30 years since the end of Communism to join the EU — in the case of Bosnia and Herzegovina and Kosovo, it is likely to be closer to 40 years. This means that the WB region remains still distant from accession for the foreseeable future while some countries remain blocked altogether.

At the same time the EU continues to play a strategic game of conditionality stretching or moving the goal posts. This suggestion, of course, plays into the hands of domestic 'gatekeeper elites' who are not interested in quick EU membership. While governments identify themselves with the EU and their countries' accession, a large number of formal and informal economic and political elites continue to manipulate ethno-nationalist mobilization for their own private economic interests and the preservation of political power. In conclusion, the momentum generated immediately following the democratic changes in the region in 2000 has stalled and the current situation can be best described as the consolidation of unconsolidated democracies.

In addition to the continuing enlargement fatigue in many member states, EU institutions are currently preoccupied with the economic and financial crises and the very survival of the Eurozone. Many EU member states only seem to pay lip service to enlargement and make use of their veto powers to delay the accession process.

Bearing this in mind, one of the bigger challenges in the region in the years to come will be to keep elites and citizens motivated to continue the reforms process. If the EU accession continues on autopilot amidst the crisis, it is not clear if it will be able to integrate the countries of the region fast enough or even if it does, whether it will be able to have a transformative effect as previous enlargements have had.

2.1 Rule of Law as Essential Element of the EU’s Conditionality Strategy

In contrast to the previous “southern enlargement,” when Greece, Spain and Portugal became full members on the basis of a feeling of “solidarity”, the well-known Copenhagen and Madrid Council's criteria from the early 1990s linked accession and membership in the EU to political conditionality as concerns the stability of institutions guaranteeing democracy, rule of law, and protection of human and minority rights. In addition, the ability to fulfill the obligations of membership by implementation of the EU legal order, i.e. the Acquis Communautaire, is basically seen – in legal discourses – as a ‘technical’ conditionality requirement.

However, when examining the specific strategies and instruments used by the EU and posing the question which of them are most effective, it becomes obvious that rule adoption and the implementation of the *Acquis Communautaire* is not only a technical matter, but a highly political affair. The *Acquis* is not only a formal body of law, but a “framework in which shared policies and values are established and through which they are implemented.”

Democratic consolidation is intimately linked with the effectiveness of rule of law, but, at the same time, the concepts of democracy and rule of law are not identical. This can be seen from the different historical development of the English common law tradition on the one hand, and continental European civil law traditions on the other. Yet, as Kochenov describes for the Eastern enlargement process, “the structure and substance of the Copenhagen-related documents does not make any distinction between the assessment of democracy and the Rule of Law. In the course of the pre-accession, the Commission opted for fusing their assessment,” with the effect that it gained political maneuvering space for more specific policy prescriptions in the process. Moreover, rule of law as a constitutional principle and institutional mechanism in legal textbooks’ descriptions is quite different from practical requirements with regard to the conceptualization and operationalization of benchmarks for monitoring processes in the SAP, as can be seen from applied research.

Nevertheless, the most recent “Enlargement Strategy and Main Challenges 2013-2014” in the Communication from the Commission to the European Parliament and the Council spells out that “The rule of law is now at the heart of the enlargement process […]” and that “[…] countries need to tackle issues such as judicial reform and the fight against organised crime and corruption early in accession negotiations.”

### 3. Operationalization of the Rule of Law Conditionality

During the monitoring process of the (potential) candidate countries’ compliance with the effective rule of law and democracy principle, the EU Commission tests and criticizes the “effectiveness” of rule of law in the judiciary. The European Commissioner for Enlargement, Štefan Füle, when presenting the Enlargement Strategy in 2010, underscored that “the EU expects a convincing track record in the fulfillment of (..) benchmarks, in particular regarding judiciary and fundamental rights. Accession negotiations do not simply involve ticking boxes about legislative approximation. Countries must build a credible track record of reform and implementation, in particular in the area of rule of law.” Rule of law and the judicial sector reform as important elements of the EU integration are highlighted by recent reports on the negotiations for the accession of the Republic of Croatia to the EU. As Turkalj argues, Chapter 23 on ‘Judiciary and Fundamental Rights’ has been considered to

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be “crucial” for the outcome of the entire negotiation process. The recent document, as well as the address of the Commissioner, thus highlight again the importance of rule of law implementation and judicial sector reform for overall progress in the SAP.

However, as can be seen from these documents, rule of law and judicial sector reform remain vaguely defined concepts due to “the lack of a coherent theory of judicial independence, and the difficulty to measure the performance of the judicial system,” as has been observed with regard to the monitoring activities in the Eastern enlargement process. This is why the EU has developed a set of conditionality benchmarks in order to analyze political, economic and ethnic challenges to judicial independence that needs to be balanced with accountability against the danger of a “gouvernement des juges.”

Thirdly, independence and accountability are of no effect if judges and prosecutors are not efficient and effective.

Before starting membership negotiations with candidates, the EU focuses on the general principles of EU governance described in the Art. 49 (TEU) – the political criteria of freedom, democracy, protection of human and minority rights, and the rule of law. Conversely, once the accession negotiations are open, the focus shifts to more specific rules of EU governance, i.e. the independence, accountability, efficiency and effectiveness of the judiciary.

Nevertheless, strengthening of the rule of law and the accession to the EU have been fraught with difficulties in the Balkans for over 20 years. Following the EU’s blueprint, Romania and Bulgaria were successful in their legal and institutional reform efforts and joined the EU with the accession in 2007. However, despite the far-reaching reforms enacted in preparation for EU membership, these two countries still have some way to go in the adaptation of their legal systems to guarantee an effective system of rule of law. To ensure that these reform efforts continue beyond accession, the Commission has established a package of transitional measures within the Cooperation and Verification Mechanism to ensure the smooth integration of Bulgaria and Romania. Hence, both countries are still subject to a specific post-accession monitoring system. Croatia managed to avoid the post-accession monitoring instruments concerning the rule of law imposed by the EU on Bulgaria and Romania. Bearing in mind the experience from the 2007 enlargement, the EU took a more austere negotiating position with Croatia on closing Chapters 23 and 24 pertaining to ‘Judiciary and Fundamental Rights,’ and ‘Justice, Freedom and Security’, respectively. While one could argue that Croatia escaped the post-accession monitoring because it was forced to do a better job than Bulgaria and Romania of implementing the effective rule of law, the fact is that the EU officials became aware of the “questionable effects of the Cooperation and Verification Mechanism,” and therefore decided to rely more on “soft pressure” to ensure the effective implementation of the rule of law in Croatia. This shows that not only EU candidate countries, but even the EU member states did not manage to resolve all the problems with regard to a functioning system of rule of law, which leads us to raise the question about the efficiency of the existing EU’s approach in this field. In the following part of the text I will briefly explore five vital failures of the EU integration process to address the rule of law reforms in the aspiring member countries.

11 Ibidem.
12 A. Mungiu-Pippidi, The EU as a Transformation Agent. Lessons Learned from governance reforms in East Central Europe. cit.
4. What is Wrong with the Current Framework

4.1 Lack of Credible Promise

Conditionality remains at the heart of EU relations with the WB countries. The ‘credible’ prospect of full membership has been the ‘golden carrot’ steering the process of Europeanization of candidate countries. In principle, EU conditionality and the rewards attached to it are expected to function as an incentive for national authorities to pursue reform, and also to “provide an excuse for national governments to proceed with unpopular policies.” However, while EU incentives contain an important role in facilitating reforms, a sustainable reform process requires certain domestic conditions to prevail. First and foremost, the reforms proved to be impossible without the civic pro-reform political parties, and second, “a broad consensus among the political, economic and social elites and the citizens as to the necessity of EU-guided democratization.” Despite academic and popular mythology, the distant prospect of membership has proven to be incapable to mobilize civic politics advocated by the EU and local NGO activists for the past two decades in Bosnia-Herzegovina, Kosovo, and Macedonia. Not neglecting various external factors, it is still the democratic deficit that keeps the gatekeeper elites incumbent in the WB, effectively blocking the rule of law reform. Lack of commitment on the EU supply side reflected in the deficit of actual membership perspective for the WB countries, and the non-existence of interim rewards tied to a gradual prospect of rule of law implementation, is part of the problem instead of the solution in the WB. Furthermore, it is necessary to recall that the promise of EU integration actually holds the WB together, and alternatively, postponing the accession into the indefinite future undermines hard-won peace and stability in the region.

4.2 An Institutional Approach to the Reforms

Despite the recent promise made by Commissioner Füle, that the accession negotiations will not simply involve ticking boxes about legislative approximation, the EU’s rule of law conditionality still translates into an institutional checklist, with a primary emphasis on the judiciary. Moreover, the terms judicial reform and rule of law are frequently applied interchangeably in various national and EU strategic documents. Although the EU practitioners define the rule of law as their ultimate goal, they implicitly identify it by its institutional attributes as the most conveniently measurable ends. However, institutional approach does not work beyond the norm-adoption phase, i.e. it does not lead to the expected normsocialization of the adopted normative solutions. Furthermore, in WB’s semi-consolidated democracies, where I include Bosnia-Herzegovina and Kosovo, an institutional approach to the rule of law promotion policy does not necessarily contribute to the creation of an effective rule of law system. Instead the institutional approach actually might further stabilize clientelistic rulers by providing them with additional tools to exercise their authority.

4.3 Overemphasized Governments’ Role

The EU accession negotiations are conducted with national governments, whose role in the implementation of legal and political reforms is without a doubt pivotal for the success of the whole process. Yet it seems that the EU practitioners have overemphasized the extent of governments’ part in the rule of law reform process. Due to the perceived high level of corruption prevalent among government officials, lack of expertise, lack of technical capacities, or lack of cooperation


16 Ibidem.
between highly fragmented levels of government in Bosnia and Herzegovina and in Kosovo, WB governments are not always able, or even willing, to implement the reform process. Furthermore, WB governments even in countries in more advanced stage of the accession, fall short of providing a satisfactory level of political transparency in their work and accountability towards their citizens. Therefore, inclusiveness of expert public and civil society is the key to overcoming the potential problems accompanying a governmental approach.

**4.4 New Laws are the Answer**

No matter how good the legislative solutions adopted by national parliaments are, they are not able to compensate for the lack of quality of the judicial authorities. In other words, even the best laws make little sense if law enforcement bodies are incompetent. The application of law is conducted by judges and lawyers, and by their competence we understand that they must have sound judgment, professional erudition, and skill to prosecute or render judgments effectively in accordance with the law. In order to achieve this goal, the judiciary is reliant on law schools, judicial academies, paralegal training, learning through experience by soliciting advice from NGO personnel, and expert exchange programs. Clearly, the lack of judicial capacity to implement adopted legislation efficiently and effectively cripples compliance with the EU rule of law conditionality in the pre- and post-accession periods alike. Hence, capacity-building of the judicial sector and strengthening the effectiveness of its administrative mechanisms deserve more attention during the EU accession process. Particular focus should be placed on the capacity building of the newly established Judicial Academies. Furthermore, the effects of capacity building would be increased by the inclusion of non-state actors in the process, and hence by employing the mechanism of socialization to complement the efforts invested in the conditionality.

**4.5 Lack of Clarity of EU Conditionality**

Clarity of EU conditionality presupposes that the target governments know precisely what they are expected to do should they decide to comply with the EU conditions. Nevertheless, aspiring member governments are experiencing great deal of uncertainty regarding the rule of law conditions set upon them by the EU. Problems surrounding the clarity of EU demands may be found in the ever-growing body of EU law and the absence of a single European model of judiciary. Notoriously, the EU does not hold any jurisdiction over the judicial systems of its member states, which remain sovereign in shaping the organization of the courts system. However, with the 2004 enlargement of the EU toward the ex-communist East, “a spectacular variety of standards, recommendations, opinions, peer reviews, have been developed by the EU and Council of Europe.”

Although not legally binding, this collection of norms paved a way for the development of a soft power over European judicial governance “based on moral suasion and communicative action, rather than regulation.” Additionally, the benchmarks related to the negotiations on the Judiciary and fundamental rights and Justice, freedom and security Chapters, unlike those for any other chapter, place more importance on the political principles and constitutional values than to the ‘hard’ Acquis Communautaire. Finally, the European Commission sometimes includes additional benchmarks even during the negotiations process. This all adds to the lack of clarity regarding the EU’s rule of law demands, and consequently affects the effectiveness of the reforms.

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18 Ivi.
5. The Way Forward: Recommendations for the New Approach

The EU’s strategy to promote effective rule of law consists of the progressive development of contractual relations and institutional ties based on an enhanced political dialogue and monitoring process, supported by financial assistance and technical aid, and guided by the demand to comply with clear set of political conditions. Over the past decade it has proved to be powerful incentive for reform and progress towards EU membership in the WB. However, deficiencies in the EU’s approach coupled with cultural predispositions and influence of veto players in aspiring member states- lead to capacity related and short term outcomes rather than transformative change in this field. This is also acknowledged in the latest edition of the Freedom House Nations in Transit report that record stagnation and backsliding in all key governance indicators across the countries of the region. At the other hand, as elaborated in the first part of this text, EU membership remains distant for all remaining aspiring members from the region. This is why it is timely to consider possible alternatives to the existing integration strategy. I propose the following improvements:

First, the EU needs to have better understanding of the situation of the judiciary in the candidate country ahead of the start of the accession process, and not only ahead of the opening of negotiations, particularly bearing in mind legacies of the past that influence the independence of judiciary. Namely, taking into account legacies of the past allows for better understanding of the current problems in the field of the judiciary and enables the European Commission to prepare a specific country-tailored strategy in order to effectively export rule of law norms.

Second, the apparent thinness of the Acquis Communautaire in the field of the judiciary contrasts with the centrality of this issue in the accession negotiations process. For a smoother process of the pre-accession reforms, candidate countries should know when and how they are considered to be progressing. In this regard, the EU has to distil particular criteria and indicators on the basis of which candidate countries’ progress will be graded. Otherwise the reforms are driven by an ad hoc prepared country strategy that faces the potential risk of diminishing the effects of already achieved progress with every change of the ruling elite in the target country. Besides defining the progress benchmarks, EU practitioners should continue their efforts to reach a definitional consensus on the concepts of ‘Rule of Law’ and ‘Judiciary Reforms.’

Third, soft socialization mechanisms are not used equitably enough during the accession process. Under the ‘rule-of-law orthodoxy,’ civil society is at best adjunct to the institution building process. There is a need of a more inclusive bottom-up approach to the EU rule of law promotion, in which civil society actors will be empowered to play a rights-holder’s role vis-à-vis public authority in order to push for compliance of key laws, monitor their implementation and influence behavioral reform.

Finally, the EU should accelerate the integration process. In contrast to the existing ‘business as usual’ strategy all countries of the region should be offered accession talks and they would negotiate simultaneously for membership similar to the countries of the 2004 enlargement. According to the “leverage and linkage” theory proposed by Levitsky and Way, the EU’s influence is conditioned by high leverage as manifested in an asymmetrical power relationship between the EU and the target state, and dense linkages through density of ties between the negotiating parties. Hence, the more the target country becomes ensnared in institutional ties with the EU, the more vested interests will consolidate on both sides, ultimately leading to the natural desire of the holders of vested interests to preserve such ties. The greater determinacy of the EU in combination with the consolidation of vested interests on both negotiating sides will eventually lead to limitation of the maneuverability of veto actors in the WB countries and lead to the sustainable rule of law reform in the region.
PART TWO

ENHANCED CAPACITY OF THE RULE OF LAW IN THE EU
Abstract

Member State liability for damages caused by the breach of EU law, developed in the CJEU practice, obtained the significance of the general constitutional EU law principle. Consistent application of this principle strengthens the rule of law in different ways. It contributes to the principle of effectiveness and uniform application of EU law, coerces the use of state power and leads to the increased protection of individual subjective rights. Very desirable, although not yet achieved impact of this principle would be a stronger influence on national rules on state liability.

Key words: rule of law; principle of full effect; infringement of EU law; liability

1. Introduction

The rule of law is internationally recognised as a fundamental legal principle of any democratic society striving to promote and safeguard political, civil, social, or any other rights. In the constitutional framework of the European Union (EU) and its Area of Freedom, Security and Justice the rule of law is established as a basic principle and often referred to as a „founding principle“ or a „basic value“. Although initially founding Treaty did not explicitly refer to the principle of the rule of law, in 1986 Court of Justice of the European Union (CJEU) in a celebrated judgment Les Verts1 for the first time qualifies European Community as a „Community based on the rule of law. “2 Amsterdam Treaty (1997)3 inserted explicit provision (Art. 6(1)) on the rule of law as one of the EU “founding principles”(along with the liberty, democracy, respect for human rights and fundamental freedoms) and “principles which are common to the Member States”.4 The Constitutional Treaty of the Lisbon Treaty (TEU) reproduced in Art. 25 provision of Art. 6 (1), but referring to the rule of law and other principles as the founding “values.”5 The Preamble of the EU Charter of Fundamental Rights also recognizes the rule of law as a founding EU principle. 6 Under the provision of Art. 7 Member States can be subject

1 Silvija Petrić, PhD, Full Professor and Chairman of the Institute of Civil law at the Faculty of Law, University of Split, e-mail: spetric@pravst.hr
4 Maastricht Treaty refers to the principle of the rule of law in the Preamble of the TEU, and in the context of the EU’s foreign and security policy and the EC’s policy of development cooperation (Art 11 TEU; Art 177(2) EC).
5 About some divergences between national understandings of the concept of the rule of law in the most influential European legal traditions, British, German and French, see: Pech, 2009, 22-47.
6 “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. 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.”
7 This vocabulary change has been criticised in legal theory as it may imply the difference between legally enforceable principles and foundational but non justiciable values. So these terms are understood as synonymous. See: Pech, Laurent, “Rule of Law as Guiding Principle of the European Union’s External Action”, CLEER Working Papers 2012/3, 10, accessed January 12, 2014. http://www.asser.nl/default.aspx?site_id=26&level1=14467&level2=14468&level3=8&textid=40218 (Pech, 2012)
8 “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”
to EU monitoring and even sanctions if they were found guilty of “a serious and persistent breach … of values mentioned in Art. 2”.

2. The rule of law

Besides the internal dimension of the rule of law as a foundational EU value common to all Member States, it has also an external dimension as a foreign EU policy guiding principle and objective (Art. 21 TEU), and as a core benchmark for accession by candidate countries (Art. 49 TEU). Any candidate country must respect principles on which Union is founded. Before it became constitutional political criteria for accession (Amsterdam Treaty), the respect for the rule of law was established as one of the so-called “Copenhagen criteria” for EU accession.

Although the rule of law is EU founding principle and has constitutional character, until today it has not been precisely defined, neither as a concept in national legal systems, nor as “Europeanized” notion. Widespread and explicit support for the rule of law by national governments and international organizations didn’t help much in clarifying its meaning, scope of application and normative effect. In EU context discussion on the rule of law opens a considerable number of cross-cutting questions of theoretical and practical nature. To mention just a few, firstly the problem of relationship between the understanding of the rule of law in the national constitutional traditions and the EU rule of law. Regarding the differences between national concepts can it be said that EU rule of law “emanates” from the common constitutional traditions of Member States, or is it completely autonomous concept? In reality EU concept is strongly inspired by national understandings of the rule of law, but at the same time, as is usually true for EU legal principles, EU institutions and especially CJEU tend to conform its content to the distinct characteristics and needs of EU legal and political order. Secondly, since the introduction of the Copenhagen criteria in 1993 the rule of law has always been treated as a part of triangular scheme, together with democracy and human rights. Like the rule of law, the other two concepts still lack sufficiently precise definition, and the mutual relations and interactions between these three dimensions are still open to conceptual dilemmas and uncertainties. Often in EU documents the rule of law is coupled with democracy and the protection

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8 This is the most important (although not yet used!) preventive and punitive legal instrument provided by the TEU for protection of the rule of law, fundamental rights and democracy in Member States. See: Sergio Carrera et al., “The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism”, CEPS, November 2013, accessed January 08, 2014, http://www.europarl.europa.eu/studies.

9 Art. 21 TEU obliges EU to be guided in its actions on the international scene by the founding principles, including the rule of law, and to advance and promote those principles through common policies and actions. Although those provisions do not impose strict legal obligations on EU institutions when acting in international relations, but merely guiding principles, EU has developed sophisticated and effective net of instruments for the promotion of the rule of law. See: Pech, 2012, 13-28; Metais, Raphaël, Thépaut, Charles and Keukeleire, Stephan, eds., “The European Union’s Rule of Law Promotion in its Neighbourhood: A Structural Foreign Policy Analysis”, EU Diplomacy Paper 04/2013.

10 “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.”

11 European Council in Copenhagen, Conclusions of the Presidency, 21-22.6.1993, DOC 93/3, defined accession criteria: “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.”

12 Although founding Treaties are international agreements, they are widely accepted as EU material Constitution and so their general legal principles are constitutional in nature. In the tradition of constitutionalism founding principles are understood as general legal concepts relating to or assessing, as a broad normative frame of reference, all legal order. See: Von Bogdandy, Armin, “Founding Principles of EU Law: A Theoretical and Doctrinal Sketch”, European Law Journal, Vol. 16, No. 2, March 2010, 95-111.


of human rights is treated as a separate requirement. That may imply that democracy (democratic procedure) is not only one of the prerequisites but sufficient condition for attainment of the rule of law. On the contrary, even non-democratic systems can uphold the rule of law, and the democracy by itself is no guarantee for the full accomplishment of the rule of law. So, three requirements should be treated as separate, but mutually overlapping and interwoven elements. In other words, the rule of law should not be understand as mainly “procedural” or “anatomic” or “state-oriented” concept concentrated on the characteristics of the state institutions and law. Such approach gives precedence to the means instead to the ends, failing to see that the real accomplishment of the rule of law is not in appropriate formal institutional arrangements, but in valid addressing the actual socio-political conflicts, which means the functional democracy and effective protection of rights in practice. As pointed out in legal theory, EU is in the context of enlargement during last few years accepting “the second generation” of the rule of law concept, rearranging the criteria for its assessment. Or, the rule of law should be understand,....as democratic rule of law with fundamental rights, the legally based rule of a democratic State, which delivers fundamental rights.”

3. **Principle of Member State liability**

3.1 **General remarks**

One of the simplest explanations of the essence of the rule of law is that it is about the relationship between the ruler and the ruled, that the use of power must be subject to certain constraints defined by the law, namely, the rule of law instead the rule of men. But it is not enough that the exercise of the governmental powers, legislative, executive and judicative, is arranged by the law and conducted according to that law. Limiting the rule of law on the concept of legality and compliance with procedural guarantees means acceptance of formalistic instead of substantive approach. The substantive concept of rule of law requires, in addition to formal and procedural legality, specific quality of the content of legal rules as moral and just prescriptions for social behaviour. If the functioning of the legal system narrows down to the formalistic concept of rule of law, regardless of its compliance with the requirement of legality, it can generate unjust consequences. As the core of the rule of law is limiting the government, one of its most notable features is responsibility of the rulers for the consequences of their conduct. Besides other forms of responsibility it includes tort liability for the damage inflicted by wrongful breach of rights in exercising governmental powers. Most of the modern legal systems recognize liability of public authorities for loss caused in execution of public powers, but it is generally limited to executive branch of government, and restrained by severe preconditions. So, development in the practice of CJEU of the principle of Member State liability for damage caused by breach of EU law constitutes important contribution to the realisation of the ideal of rule of law. Although it is limited on liability for breaches of subjective rights derived from EU legal order, established conditions are more lenient compared with the most of national rules on liability of public authorities, in general, liability is broader and stricter. This does not only mean better protection of EU rights but will inevitably lead to rising up of a level of protection of purely national rights against the infringements of public authorities.

15 Such understanding of the rule of law focuses on criteria like: democratic elections, functioning of legislature (e.g. representativeness of all groups, rights of opposition etc.), functioning of the executive and judiciary.
16 Nicolaidis, Kleinfeld, 15.
17 Carrera et al., 10.
18 See: Nicolaidis, Kleinfeld, 7.; Kochenov, 9.
4. Evolution of the principle of the Member State liability

Implementation and efficiency of EU law mainly depends on the activity of Member States. As signing parties of the founding Treaties, they must comply with the provisions of primary and secondary EU law, but often they fail to do so. Treaties provide for public remedy by infringement procedure (now Art. 258-260 TFEU), initiated by the Commission or Member State. But, over the years the procedure revealed numerous shortcomings and weaknesses, endangering the principle of full effectiveness of EU law and the rule of law. In that light the so-called private enforcement mechanisms: the doctrine of direct effect and the principle of Member State liability for infringements of EU law, developed in the CJEU practice, may be regarded as a sort of remedy or complement for the infringement procedure. In other words, the purpose of these mechanisms is not only to protect individual rights, but also to achieve greater compliance with EU law by Member States.

There is no rule in the EU law determining the notion or the conditions for Member State liability, it is solely the product of CJEU practice. In the cases before the seminal case Francovich, CJEU admitted the right of private party for reparation of damage, but considering the doctrine of direct effect and the principle of full effectiveness sufficient for the protection of the rights emanating from EU law, ruled that private party claim for recovery of damages had to be executed on the basis of national law.

In Francovich 33 plaintiffs brought proceedings against Italian Republic for failure to implement Directive 80/987/EEC on the protection of employees in the event of their employers’ insolvency. Italian courts requested a preliminary ruling on the direct effect and on the existence and extent of Member State liability. CJEU ruled that not all the provisions of the directive were unconditional and precise to produce direct effects, but that Member State is obliged to make good loss sustained by individuals as a result of its failure to transpose a directive. As to the legal foundations Court stated: Community legal system grants rights to individuals, not only expressly but also by virtue of obligations that the Treaty imposes on individuals and on Member States and the Community institutions; effective protection of individuals’ rights, since the full effect of Community rules would be undermined if individuals were unable to obtain redress for damage sustained from breach of Community law by Member State; Article 10 EC Treaty (Art. 4. TEU).

Three conditions for Member State liability for a failure to implement a directive were determined: - the result required by the directive should grant rights to individuals; the content of those rights must be clearly identifiable from the directive; causal link between the breach of the State’s obligation and the loss suffered by the individuals. Concerning procedural conditions, Court held that in the absence of the Community legislation, procedural rules of the national law should be applied. But, in doing so national court should comply with principles of effectiveness (national rules

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21 Case 26/62 Van Gend en Loos (1963) ECR 1.
22 As CJEU expressed in Case 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891, para 13.: “…the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 226 and 227 to the diligence of the Commission and of the Member States”
must not render the reparation virtually impossible or excessively difficult) and non-discrimination (applied rules cannot be less favourable than those relating to similar national situations).

In the following practice CJEU further developed the principle of Member State liability and resolved some open issues, especially concerning the conditions for liability.26 In joined cases Brasseerie du Pêcheur and Factortame27 claimants sought damages from the State for the loss suffered from national legal provisions breaching primary EU law (Treaty) having direct effect. Invoking the ruling in Francovich case, national governments claimed that the action for damages would only be available for infringement of non-directly effective directives, but CJEU rejected this argument stating that the right of the individuals to rely on directly effective provisions of EU law is only a minimum guarantee, and the Member State liability is the necessary corollary of direct effect.28 Also, Court stated that the Member State is liable irrespective of which branch of the government or state organ is responsible for the breach, namely the internal constitutional division of powers has no effect on its liability.29 But if the breach is committed by a public law entity with a considerable degree of independence and autonomy from the central State, such entity may be liable,30 provided that such national allocation of responsibility should not impose compelling difficulties on the individual preventing him from obtaining the redress.

Clarifying the first condition for liability – the infringed rule of EU law must intend to confer rights to private parties, CJEU shows that a vast number of EU law provisions confer rights to individuals, especially those related to fundamental EU freedoms. In legal theory is accepted that the notion of the subjective right in the context of the Member State liability is the concept of EU law and national courts have to interpret it according to EU law.31 Liability encompasses even so-called indirectly conferred rights, rights arising from the obligations of third parties.32

In most cases sufficiently seriousness of the breach is crucial question and often the most difficult to prove. In Brasserie Court stated that a breach will be sufficiently serious “if the authority of a Member State concerned manifestly and gravely disregarded the limits on its discretion.” If there is no discretion or it is considerably reduced, a mere infringement of EU law may constitute sufficiently serious breach.33 In cases where the discretion is wider the plaintiff must prove the seriousness of the breach. But, the limits of discretion are defined primarily by the UE, not national law, meaning that in the cases of the Member State liability the limits of discretion designated to the national authorities by the national law are irrelevant.34

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26 Although national court determines whether the conditions for liability are met, the CJEU practice defined a number of circumstances which national courts should take into account. Those opinions of the CJEU were in great deal inspired by the national legal norms regulating on liability of public institutions, but also by CJEU decisions in EU non-contractual liability cases (Art. 340 (2) TFEU obliges EU to make good damages caused by its institutions or its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States).


28 In other words, Member State liability is a general principle applicable to all cases of infringement of EU primary or secondary law.

29 CJEU made analogy with the liability of the state in the public international law where a State is treated as a single entity regarding liability (Brasserie, para 32.).

30 Court stated in Case C-302/97, Konle v. Austria [1999] ECR I-3099., para. 63.: “Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory”.


To facilitate national courts in evaluation of seriousness of the breach CJEU provided a list of relevant factors that may be considered:

- the clarity and precision of the rule breached;
- the measure of discretion left by that rule to the national authorities;
- whether the infringement and the damage caused was intentional or involuntary;
- whether any error of law was excusable or inexcusable;
- whether the position taken by a Community institution contributed to the omission;
- the adoption or retention of national measures or practices contrary to Community law.

In any case, the breach will be regarded sufficiently serious if it has persisted despite a prior CJEU judgment finding that such conduct constitutes an infringement of EU law.

In the early cases the establishment of direct causal link between the infringement and the damage CJEU usually has been leaving to national rules, but until today there is a number of cases where the Court ruled on this condition itself. The reason is probably the danger of "nationalization" of conditions of liability considered by the Court as a remedy which constitutes a general principle of EU law.

In the Köbler case CJEU for the first time established the Member States liability for breaches of EU law committed by their national courts adjudicating at last instance. Foundation for such decision Court seeks firstly in international law on state responsibility for breach of an international commitment, where the state is viewed as a single entity. Secondly, national courts of last instance are the last judicial body before which individuals may protect the rights they derive from EU law. So, CJEU concludes: "...Since an infringement of those rights by a final decision of that court cannot thereafter be normally corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights." As to the conditions of liability, the Court applied the Factortame conditions, but in evaluation of the seriousness of the breach the specific nature of the judicial function and the requirements of legal certainty should be regarded and liability could only be incurred “in the exceptional case where the court has manifestly infringed the applicable law”. An additional criteria would be whether the court had complied with its obligation to make a reference for a preliminary ruling under Art. 234. In Traghetti Court ruled that “Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.” Also, it precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State where conditions set out in Köbler were fulfilled.

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36 About the Member State liability as a general principle of EU law see: Rotkirsch, 6-11.
37 Case C-224/01, Gerhard Köbler v. Austria, [2003] ECR I-10239.
38 National governments objected on: principle res iudicata; legal certainty; judicial independence.
39 Court held that state liability was not incompatible with the principle of res judicata since the claim for compensation need not lead to the invalidation of the decision. The independence of the judiciary is not threatened since “the principle of liability in question concerns not the personal liability of the judge but that of the State.”
5. Conclusion

The responsibility of the rulers for the wrongs done in the conduct of governmental powers constitutes a significant part of the very essence of the principle of the rule of law. In many national legal systems there are strong residues of the old maxim “The King can do no wrong” and state liability for a damage caused by the breach of law is often restrained or even non-existent, especially for judicial and legislative errors. Development of the principle of the Member State liability for infringement of EU law therefore gives private parties much stronger possibilities to obtain damages than in the case when national rules have been breached. CJEU established substantive and procedural conditions for State liability, affirming that the value of a right is not only in its content, but even more in effectiveness of a remedy for its breach. Positive effect of this principle is not only in better protection of subjective individual rights drawn from EU law, but in the very probable spill-over effect on national rules on state liability.
ENHANCED CAPACITY OF THE RULE OF LAW IN THE EUROPEAN UNION
- CHALLENGES AND POSSIBLE NOVELTIES OF THE RULE OF LAW
Mechanism and Review of Delicate National Tax Issues

Natasa ŽUNIĆ KOVAČEVIĆ

Abstract

This paper explores the announced novelties in the rule of law mechanism in the European Union and examines the ways in which considerations of tax policies and tax legislature may effect and contribute to the development of the rule of law. Particular attention is paid to describe and compare a different approaches on the offered steps in building the new regime of safeguarding the rule of law as the core and constitutional principle of European Union. As it is in the same time a fundamental constitutional and national legal principle author gives an review of national tax issues in the rule of law context.

Key words: the rule of law principle, novelties of rule of law mechanism, taxation, balance.

1. Introduction

The rule of law is the base of democratic societies and modern constitutional democracies. As Article 2 of the Treaty on European Union (TEU) and the Preamble to the Treaty recall it is one of the main principles on which the European Union is founded. The rule of law is also a prerequisite for the protection of other fundamental values listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties. It is also important to notice that the exact meaning of the rule of law differs from Member State to Member State since this principle has traditionally been reserved to nation states. It is possible to outline some essential features of the rule of law principle: it usually means a system where laws are applied and enforced in which no one is above the law; it means also equality before the law, with fairness and due process; in such system everyone have guarantees that laws will not be abused or retrospectively changed; important component is independent judiciary.¹

In that context the rule of law has explicit significance for the European Union. It is obvious since the rule of law is also a pre-condition for EU Membership.² The particular importance of the rule of law was underlined in famous statement in the ruling “Les Verts” in 1986 when n Court of Justice said: “[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither the Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.”

Therefore, it is possible to conclude about the European Union as a particular creation that is based on and by the strength of the rule of law. Nevertheless, it seems that in a recent time, during

¹ Natasa Žunić Kovačević, PhD, Associate Professor, Head of Department of Financial Law and Vice Dean for Graduate University Study Affairs at the Faculty of Law, University of Rijeka, e-mail: zunic@pravri.hr
the economic and financial crisis specially, we have been confronted with a “rule of law” crisis. Name-
ly, in several cases, the Commission intervened and acted on the basis of the competences given
by the Treaties and secondary EU legislation adopted under the Treaties. Such an interventions
confirmed guiding principles of the rule of law mechanism – legitimacy and the equality of Mem-
ber States. Possible policy options requires the analyse of measures that could be taken in order
to develop an improved mechanism of rule of law.

2. The development of a (new) rule of law mechanism for the European Union

As it was pointed in political arena³ it is possible to discuss several ways in developing of
a new rule of law mechanism. As the first step in order to develop an improved mechanism for
handling a future rule of law crisis it is suggested to exploit the potential offered already by the
existing Treaties. It means that is possible to take a similar approach for Article 7 procedures as in
Commission infringement proceedings, by giving “formal notice” to a Member State where is reason-
able to believe that a systemic rule of law crisis is on the way to developing. A second step to
build a more far-reaching rule of law mechanism includes more detailed monitoring and sanction-
ing powers for the Commission, but with prior necessary amendment of the Treaty. It includes
extending the powers of the Fundamental Rights Agency, or abolishing Article 51 of the Charter of
Fundamental Rights, by making all fundamental rights directly applicable in the Member States.⁴

The Union institutions and the Member States are subject to the principles and
rules which have been agreed to in the Treaties that can be effectively enforced, by means of judicial
review and by independent courts. In the mentioned case Les Verts, it was made clear that in the
European Union, the rule of law is not only upheld by the Court of Justice in Luxembourg, but also
by national courts as, in such cases, decentralised “Union courts”. It means that the rule of law is
not preserved only by the EU institutions and the Court of Justice. It is a duty of each Member State
national legal system to support and defend the rights granted under the EU Treaties. Therefore, the
enforcement of the rule of law at national level is the prerequisite for the successful enforce-
ment of the rule of law as basis of the European Union. It means that suitable functioning of
national legal and court systems, with independence of national courts are essential for the
functioning of the European Union. It also means that rule of law matters are not a “domaine reservé” of Member State.

An evolving common policy in the field of justice and home affairs, called the „third pillar” of
the Union, has led to an increasing integration of European judicial instruments and systems.
Thus, it is obvious that European Union is not only an internal market with economic and mone-
tary union, but also an area of guaranteed freedom, security and justice.

2.1 The guiding principles of enhanced rule of law mechanism

During the period of the economic and financial crisis which the European Union and its
Member States faced since 2009, there were signs of the some kind of crisis of the rule of law. Some
politicians mention here the Roma crisis in France, summer 2010; the Hungarian crisis from the

³ European Commission - SPEECH/13/677 04/09/2013,(Viviane Reding, Vice-President of the European Commission, EU Justice Com-
⁴ Carrera, Sergio, Guild, Elspeth, Hemanz, Nicholas, Rule of law or rule of thumb? A New Copenhagen Mechanism for the EU, Justice
end of 2011; 5 and the Romanian rule of law crisis, the summer of 2012. 6 In these cases the Commission intervened and enforced its own role and duty given by the Treaties. The results of those interventions were: free movement legislation has been changed in France; Hungary has respected the judgement of the Court of Justice which confirmed the Commission’s view that the anticipated mandatory retirement of 10% of the Hungarian judiciary was not in line with EU law; as for Romania where the intervention of the Commission helped to restore the authority of the constitutional court and to bring the constitutional conflict to end. 7 These cases emphasized the number of limitations in the tools available to remedy a true rule of law crisis. From this perspective it is possible to determine the limits of the existing institutional arrangements for safeguarding the rule of law and to recognize the need for a new or improved rule of law mechanism. This new mechanism should fill the space that exists at present between the Commission’s infringement role as guardian of the Treaties, and the Article 7 procedure, which is very heavy to handle as it requires, in the end, unanimity in the European Council and the consent of a two-thirds majority in the European Parliament, representing at least a majority of its members. All this makes the procedure in practice almost impossible to use. In other words, “(T)he dual structure for democratic legitimation through the Council and Parliament only exists under the competences of the EC Treaty, and judicial review by the ECJ, paramount for the rule of law principle, is limited or even precluded in important domains.” 8

The eleven Foreign Ministers debated in the so-called “Future of Europe” group about the next steps in European integration. They included in their final report, adopted in September 2012, the following paragraph on the rule of law: “[A] new, light mechanism should be introduced enabling the Commission to draw up a report in the case of concrete evidence of violations of the values under Article 2 of the TEU and to make recommendations or refer the matter to the Council. It should only be triggered by an apparent breach in a member state of fundamental values or principles, like the rule of law.” 9 Therefore, it is possible to conclude that there is the consensus on the need for a future new rule of law mechanism. It might be an important and integral part of the EU’s development to a more closely integrated political union. But, it is also interesting to be aware of the existence of different opinions on such quasi-judicial authority of the Commission. The proposed guiding principles of a novelties in a rule of law mechanism are: the enhanced legitimacy of any future rule of law mechanism as fundamental since the proper functioning of the rule of law in one of member States goes to the core of national sovereignty; the necessary expertise, since the comparative knowledge of national rule of law - legal systems is required; the equality of Member States; the special role of the Council of Europe.

As there is possible to find various options for the development of an improved mechanism of the rule of law in crisis, it is regularly offered as possible a two-step approach. 10 In that sense the first step is based of activities directed to find the potential offered already by the existing Treaties, including in relation to the use of the Cooperation and Verification Mechanism. 11 There is also scope for developing a process to effectively address a rule of law crisis through formal procedures under

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5 The questions of independence of the judiciary.
6 The issue of non-respect of constitutional court judgements.
9 See, Redings Speech, loc.cit.
10 Carrera, Sergio, Guild, Elspeth, Hernanz, Nicholas, Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism, 2013.
Article 7. The wording of Article 7(1) TEU suggests that such a process is possible, as it gives the Commission the right to issue a “reasoned proposal” at the start of an Article 7 procedure. “Reasoned proposal” – this can remind us of the “reasoned opinion” that the Commission issues in Treaty infringement proceedings under Article 258 TFEU. By giving “formal notice” to a Member State where is found reason to believe that a systemic rule of law crisis is on the way it should be laid down as a new manner of proceeding in a new policy Communication of the Commission.

A second step is consisted of building a more far-reaching rule of law mechanism, which would include more detailed monitoring and sanctioning powers for the Commission, in an amendment of the Treaty. One of the possible routes might be to expand the role of the Court of Justice in any future mechanism on the rule of law. Currently, the Court can only check whether the procedural rules of Article 7 TEU have been adhered to. It could be developed further, by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU against Member States by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice. It is also possible to consider greater role of the Fundamental Rights Agency (FRA), that currently can only analyse fundamental rights issues at EU level and is barred from analysing national situations. Nonetheless, a Treaty amendment in that case is necessity.

A very ambitious Treaty amendment was also proposed as the abolishing Article 51 of Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States, including the right to effective judicial review (Article 47 of the Charter). This would open up the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law. Such an action could be considered as a big federalising step.

Nevertheless, there are some different approaches to the proposed enhancing rule of law. It is possible to address some main controversies raised by politicians’ statements on the challenges of rule of law through different standpoints that were shown since some of the above mentioned proposals might be understood as giving excessive power of the judicial institutions of the European Union and effecting the sovereignty of Member States.

Finally, it is generally pointed out that new rule of law mechanism is necessary for the EU in order to prevent national governments from violating the EU’s common values. Such an mechanism should “bridge the gap” between the normal infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU) – as too “soft” –, and the procedure set in Art 7 of the Treaty on the European Union (TEU) – as to rigid and heavy to handle. It means that the opponents of new mechanism apologists identified only the new procedure for the Commission to control Member States.

2.2 The rule of law in the national perspective of the taxation in the global economic crisis

The global economic crisis has led to a substantial decline in government revenue relative to gross domestic product in many countries. It caused, inter alia, legislative changes with new strat-
egies although it is generally not advisable to implement comprehensive tax reform in a midst of crisis. The new strategies were priorities in the area of combating tax evasion and non-compliance.\(^{15}\)

In responding to the crisis, several governments intervened in their public revenue systems. In the same way, Croatia introduced important tax legislative reforms. But recent reforms triggered some questions, e.g. a need for advance ruling system, the statute of limitation in tax matters, the retroactivity, the relation between the sources of law - the adoption and application of tax regulations, etc. The mentioned questions and current debates confirm the influence of tax issues in the realization of the rule of law values. Even though, in a number of other, mostly EU jurisdictions, recent tax reforms illustrate the positive impact on the same, since they have advanced the realization of the rule of law.\(^{16}\)

In the taxation field, it is convenient to underline the importance of the prohibition of retroactive effect of legislation. Pursuant to the provisions of Art. 89 of Croatian Constitution, laws and regulations cannot act retroactively. The Constitution allows only to certain provisions of the law to have retroactive effect, but it has to be due to extremely and exceptionally justified reasons. The formulation of constitutional rule is simple and clear and it reads “The laws and regulations of governmental bodies and bodies vested with public authority shall not have retroactive effect.” Thus, it is clear that retroactivity is not allowed in respect of regulations and other types of secondary legislation that is enormous in the tax matters. Retroactive effect of the law is solely within the jurisdiction of the legislator, and therefore the possible interpretation of the court on the basis that the law applies retroactively to the provisions of which the legislator did not mandate retroactive action constitutes a violation of Article 3 Constitution, the rule of law - legal certainty. In the national context especially important point are the legal opinions of Croatian Constitutional Court, which refers to the obligation of the legislature and other addressers of legal norms in Croatia and the Court took the view (Decision No. U-I-659/1994) according to which the requirements of legal certainty and the rule of law require a legal norm should be accessible and predictable, i.e., such that addressers can really and concretely know their rights and obligations in order to they can act accordingly. Thus, the legal standards must be sufficiently definite and precise because such elements are constitutive parts of the rule of law. While the legislator can independently develop the fundamental rights and freedoms itself executives must have clear legal and regulatory standards for its decision. The Constitutional Court therefore reminded that the definiteness and precision of legal norms is not only semantic demand, but it demands that the basic criteria for the normative regulation of all cases in which the question arises of finding and interpreting the relevant law where we emphasize that the requirements for definite and precise legal standards as part of the rule of law are valid in the territory of all branches of law. However, we believe that there is a special significance in the tax law area since the nature of the relation that arise in taxation and its occurrence which has its basis in the law. Request for definite and precise legal norms means that citizens must be able to understand its wording, and really specifically know their rights and obligations so that they can adjust their behaviour. Contentious interpretation of legal norms, which result in unequal practice of administrative and judicial bodies, is an indication that it lacks definiteness. The legislator can in different ways avoid ambiguity and imprecision of legal norms, including that special statutory definitions determine the content of certain legal terms. One of the possible ways are inevitable interpretation of the regulations. One of the basic principles regarding the interpretation is that the power to interpret has the body which is authorized to make it. If the subordinated, secondary tax regulations are the

\(^{15}\) As it is stressed out taxpayers who face economic stress, e.g. as the risk of bankruptcy sometimes perceive the downside risks of tax evasion (penalties) as minimal compared with the potential upside gains. In a same time, in a crisis and recession taxpayer also may perceive that other people are evading taxes more, making it less risky or more socially acceptable to evade taxes themselves. Brondolo, John, International Monetary Fund, Fiscal Affairs Department, Collecting Taxes During an Economic Crisis: Challenges and Policy Options, IMF Staff Position Note, July 14, 2009., p. 5-6.

case, that would be the Ministry of Finance regarding the interpretation of the regulations concerning different taxes. Compulsory nature of the authentic interpretation of decision is established in the case law. With regard to the formulation of a clear and a precise legal norms and constitutional article 89 Para 4, retroactivity in respect of regulations or subordinate legislation is not allowed. Obviously, authentic interpretation of those regulations cannot have retroactive effect. This can be deduced from the judgment of the European Court of Human Rights that the subsequent legislative and other legislative intervention in the existing legal relationships holds contrary to the principle of the rule of law. The important vehicle for achievement the legal certainty in tax matters – the advance ruling system, unfortunately has not yet been implemented in Croatian tax system.

3. Concluding observations

The current political proposals for the enhanced rule of law mechanism could be summarized as follows: extending the jurisdiction of the Court of Justice of the European Union (CJEU) to Article 2 TEU which sets out the objectives of the European Union, allowing the Court to hear cases on alleged breaches of the rule of law principle; extending the mandate of the EU Fundamental Rights agency (FRA), abrogating Art. 51 of the EU Fundamental Rights Charter (FRC), which limits the scope of application of the Charter “to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. The new all-encompassing supervisory mechanism should be gradually established through the complemented monitoring tool. It is well highlighted that by the removal of Article 51 of the Fundamental Rights Charter the Charter would become applicable to whatever Member States do within the scope of their own exclusive competences. In same time, extending the CJEU’s jurisdiction to Article 2 TEU would mean that the Court could hold Member States accountable not only for the breach of concrete provisions of EU law, but also of imprecisely defined “values”, not only the rule of law.17

In a same time, in responding to the global and economic crisis legislators and governments are developing various strategies and legislative reforms that should be aligned with fundamental principles. A delicate balance between the legitimate needs of revenue authorities and the legitimate rights of taxpayers might be disturbed, jeopardising the rule of law values. There is always a exceptional need to maintain the principle of the rule of law in the tax area. A better substantive tax rules and higher legislative requirements will contribute to the realization of the rule of law.

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Bibliography


PART THREE

FUNDAMENTAL RIGHTS AND FREEDOMS IN CONTEXT OF THE EU ACCESSION TO THE ECHR AND THE NOVELTIES FORESEEN WITH THE EU CHARTER ON FUNDAMENTAL RIGHTS
NOVELTIES WITH REGARD TO THE PROTECTION OF HUMAN RIGHTS: THE EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Evis ALIMEHMETI*

Abstract

Protection of human rights through legally binding provisions adopted within the framework of the two main European organizations, namely European Union and Council of Europe is now a reality. The adoption of a human rights bill in the EU, the Charter of the Fundamental Rights with the Lisbon Treaty in 2009, represents the formalization of a long process of sporadic but still obvious efforts to enhance the human rights dimension within the EU. The adoption of the Charter also contributed to bringing the individuals closer to the EU regime through a formal recognition of their rights and freedoms in relation to the acts of the Union. It became thus the second European legally binding treaty in addition to the European Convention on Human Rights, adopted by the Council of Europe in Rome on 4 November 1950 and entered into force on September 1953.

Whilst the EU was created for the purpose of economic, social and cultural integration of the European countries, the Council of Europe's primary concerns related precisely to the protection in an international level of human rights. The relationship between the two instruments has triggered many discussions, especially with regard to the jurisdiction of the European Court of Human Rights and the Court of Justice of the European Union. Both instruments, the European Convention on Human Rights and the Charter of Fundamental Rights, deal with human rights issues, while formally the two courts observing the implementation of the two instruments are not bound by the case-law of each other. The Charter foresees the Convention rights as the minimum protection recognized and the Treaty of Lisbon also provides that the EU will adhere to the Convention. Is accession the answer to the formalization of an effective relationship between the two jurisdictions? Will it contribute to the achievement of a coherent and consistent interpretation of the human rights guarantees shared between the two instruments? This paper aims to elaborate on the above issues, not necessarily to provide answers, but to foster the debate with regard to the controversies of the process.

Key words: European Convention on Human Rights, EU Charter of Fundamental Rights, European Court of Human Rights, European Union Court of Justice.

1. Scope of application of the European Convention on Human Rights and the EU Charter of the Fundamental Rights

The European Convention of Human Rights was adopted mainly for the purpose of affording protection to civil and political rights of the individuals under the jurisdiction of the state parties to the Convention. Thus, at the beginning the Convention sanctioned only a small number of rights, mostly civil and political rights, such as, the right to life, the right against torture and inhuman or degrading treatment or punishment, the rights against slavery and forced labour, the right against arbitrary and unlawful detention, the right to a fair trial, the right not to be punished without law, the right to respect for private and family life, freedom of expression, etc. More rights were added with Protocols 1, 4, 6, 7, 12 and 13. The Convention provides for the establishment of the European Court of Human rights (ECHR) as a mechanism to guarantee the observation of the provisions of

* Evis Alimehmeti, PhD, Associated Professor at the Faculty of Law, University of Tirana, e-mail: Evis.Alimehmeti@unitir.edu.al
the Convention by the member states in practice. The Court can be accessed by each state member, individual, NGO or group of individuals under the jurisdiction of the member states.

The Charter on the other hand aims to improve the protection of human rights from the EU member states when applying the EU law. It builds upon the constitutional traditions and international obligations common to the EU member states, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the European Union Court of Justice (CJEU) and of the ECtHR. The Treaty of Lisbon formalized the Charter of Fundamental Rights as a Human Rights Act of the European Union with binding effects, and of the same value as the Treaties. According to Article 6(1), as amended by the Treaty of Lisbon, the Charter 'shall have the same legal value as the Treaties.' It ranks thus at the highest rank of the legal norms of the Union.

The charter contains 54 articles, including the civil and political rights that find regulation also in the Convention and its protocols, such as the right of life, right to vote, freedom of thought and expression, right to organization, right private and family life, banning of torture, etc. The wording of the corresponding provisions of the Charter is not however identical with those of the Convention. The Charter includes also a considerable amount of rights of economic and social nature, forming, thus, a larger catalogue of human rights compared to the one of the Convention. Hence, the Charter includes provisions on children's rights, disabled persons, elderly, protection against trafficking, etc. The focus of the Charter is naturally stronger with regard to the economic and social rights, given the scope of the activities of the Union as a platform of European cooperation to develop an internal market supporting the freedom of movement of individuals and goods, free competition, etc.

The goals and scope of the activities within the two organizations remain different and the CJEU and the ECtHR operate accordingly in two different areas. From this perspective, many argue that the binding effects of the Charter do not however transform the CJEU into a human rights court. From this perspective, there is no danger with regard to the collision of the competencies between the two courts, as their scope of activities and jurisdictions are clearly defined. Thus, Rosas argues that the Lisbon Treaty, although it did make the Charter of Fundamental Rights a part of Union primary law, it did not fundamentally alter the status of fundamental rights in the EU constitutional order. The EU did not become a human rights organisation, with a human rights competence detached from the competences conferred upon the Union in the basic Treaties. Nor did the Union Courts not become human rights courts, with jurisdiction to adjudicate human rights matters regardless of the limitations imposed by Union law. Rosas argues that this is reflected notably in Article 6(1) TEU, which provides that the provisions of the Charter of Fundamental Rights 'shall not extend in any way the competences of the Union as defined in the Treaties,' and in Article 51 of the Charter, which provides that its provisions are addressed to the Member States 'only when they are implementing Union law' and that the Charter 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

Supporting argument is also to be found also in the provision of article 53 of the Charter according to which in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. Still, the two legal instruments rank in the same international law level and focus on the area of human rights protec-

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1 See the Preamble of the EU Charter of Fundamental Rights, Official Journal of the European Union C 83/399, 30.3.2010.
2 Allan Rosas, When is the EU Charter of Fundamental Rights Applicable At National Level? President of the Chamber Court of Justice of the European Union, Mykolas Romeris University, 2012 ISSN 1392–6195 (print), ISSN 2029–2058 (online), p. 1276.
2. Controversial positions of the ECtHR and the CJEU

Although elements of cooperation and acknowledgment of the limits of jurisdiction appear frequently in the jurisprudence of both courts, practice shows also inconsistencies and unsettled positions. Several cases have been presented to the ECtHR challenging legal acts of the EU or actions of the states acting upon them, as in violation of the human rights guarantees provided in the Convention. The Convention’s institutions seem to have intentionally tried to avoid a conflict of jurisdiction and have generally shown prepared to consider the observance of human rights within the EU amounting to an equivalent protection with that provided by the Convention.

Thus, in M. & Co. v. Germany, the applicant complained against the issuance of the writ of execution of a judgment of the European Court of Justice by Germany, arguing that the State’s obligation to secure the rights guaranteed by the Convention has absolute priority over any other treaty obligations. The applicant claimed that the competent Minister, before issuing a writ of execution, should examine whether or not the judgment of the CJEU had been given in proceedings respecting the guarantees set out in Article 6 of the Convention. The Commission argued that although it was not competent ratione personae to examine proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention on Human Rights, however, by granting executory power to a judgment of the CJEU the competent German authorities acted as national bodies and not Community organs and therefore their actions fall within the scope of control exercised by the Convention organs. According to the Commission the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection. The Commission argued that Institutions of the European Communities attach prime importance to the protection of fundamental rights, as derived in particular from the Constitution of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court of Justice of the European Communities has developed a case-law according to which it is called upon to control Community acts on the basis of fundamental rights, including those enshrined in the European Convention on Human Rights. The Commission concluded that for these reasons protection of human rights within EU must be considered as equivalent protection and therefore declared the case inadmissible. 3

The ECtHR takes an important turn with regard to the EU primary legislation in the case Matthews v. the United Kingdom. It recognized the right of a British citizen, resident of Gibraltar to vote for the election of the European parliament, as provided by article 3, Protocol 1 of the Convention. The applicant claimed that the absence of elections in Gibraltar to the European Parliament contained in the provisions of Annex II of the EC Act on Direct Elections of 1976 was in violation of her right to participate in elections to choose the legislature, under Article 3 of Protocol No. 1 of the Convention. The Court repeated the argument that acts of the European Community as such could not be challenged before it as the European Community was not a Contracting Party however Contracting States remain responsible for ensuring that Convention rights were guaranteed. According to the Court, the European Parliament is sufficiently involved in the specific legislative processes and general democratic supervision of the activities of the European Community, to constitute part of the “legislature” of Gibraltar for the purposes of Article 3 of Protocol No. 1. By denying the applicant the opportunity to express her opinion in the choice of the members of the European Parliament,

the very essence of the applicant’s right to vote to chose the legislature, as guaranteed under Article 3 of Protocol No. 1, had been denied. 4

The landmark case, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland is another case where the ECtHR was again faced with the task of scrutinizing the EU legislation from the perspective of the Convention. More specifically, it was questioned whether a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether the act or omission in question was a consequence of the necessity to comply with international legal obligations. It concluded that the state’s actions were not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law. The Court referred again to the clause of equivalent protection in abstract, avoiding specific analysis of the compatibility between the challenged rule and the Convention and argued that the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system. By “equivalent” the Court stressed that it meant “comparable”; any requirement that the organisation's protection be “identical” could run counter to the interest of international cooperation pursued. 5

The case has marked significantly the position of the ECtHR with regard to human rights protection in the EU regime, although the difference in the position of the Court, as compared to Matthew, is seen as related to the nature of the challenged EU legislation, i.e. primary legislation in Matthew and secondary legislation in Bosphorus. As the Court argued, Matthews should be distinguished from Bosphorus as the acts for which the United Kingdom was found responsible were “international instruments which were freely entered into” by it.6 Arguments of Bosphorus were relied upon also in Michaud against France, where the Court acknowledged that, according to its previous decision in Bosphorus, the protection of human rights by Community law is in principle “equivalent” to that of the Convention system. However, as Court clearly stressed in Bosphorous, the lack of discretion by the State when implementing the EU law is important. 7

As regards the jurisprudence of the European Union Court of Justice, despite the lack of specific and elaborated provisions of human rights guarantees in the basic treaties of the EU which motivated initial hesitation to act upon human rights grounds in relevant cases, it has nevertheless gradually taken a notable position with regard to the importance of the protection of individuals rights within the EU framework. In its early decision in Stauder case, the Court supported the position that fundamental human rights are enshrined in the general principles of Community law and are protected by the Court.8 In Rutilli the Court explicitly refered to the obligation not to violate the ECHR rights.9 In Nold case, the Court argued that the protection of property ownership constitutes without any doubt Community law which, in this connection, is based on the constitutional traditions of Member States and on acts of public international law, such as the Convention for the Protection of Human Rights and Fundamental Freedoms.10

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5 Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland [GC], no. 45036/98, 30 June 2005.
7 Michaud against France, appl. no. 12323/11, judgment of 6 December 2012.
However, upon the adoption and the entry into force of the Charter, efforts have been noticed on the side of the CJEU to substitute the jurisprudence of the ECHR with its own with regard to rights contained in the Charter that correspond to rights provided in the Convention. In European Union v. Otis, the CJEU was faced with the issue of the relevance of Article 6 of the Convention in the proceedings of the Commission bringing an action on behalf of the EU, before a national court for damages in respect of loss sustained by the EU, as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC. With regard to the claims of the applicants made in relation to the components of article 6 of the European Convention of Human Rights, the CJEU argued the following:

It must be borne in mind in that regard that the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter (see Case C-279/09 DEB [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 Chartry [2011] ECR I-0000, paragraph 25; and Case C-69/10 Samba Diouf [2011] ECR I-0000, paragraph 49).

Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (Case C-386/10 P Chalkor v Commission [2011] ECR I-0000, paragraph 51).

The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.

With regard, in particular, to the right of access to a tribunal, it must be made clear that, for a ‘tribunal’ to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it.11

The Court makes efforts to construct the principles of the right to access to a tribunal, the right to be defended, equality of arms, (all components of Article 6 of the Convention), based on its own case-law, regardless of the jurisprudence of the ECHR that has a solid background on article 6. The elaboration of the provisions of the Charter by the CJEU is still desirable; however should it be considered expectable that the CJEU develops its own jurisprudence with regard to the interpretation of the Convention’s rights instead of submitting itself to the jurisprudence of the ECHR? As far as the EU is not legally bound by the Convention, as the Court clearly stated, the CJEU it is not bound by the jurisprudence of the ECtHR. However, while the EU it is not a member to the Convention, the member state are and therefore it is only fair that the burden of observance of both instruments in a coherent and sustainable manner be borne not only by them.

In the case Schindler Holding and Others v Commission, the actions of the European Commission with regard to the imposition of fines were challenged to the CJEU, amongst others, also as against the provisions of article 6 of the ECHR. The CJEU argued that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union’s law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.12

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11 Case C-199/11 Europese Gemeenschap v. OTIS NV and Others, Judgment of 6 November 2012, para. 46-49.
Accession is seen by many as the way to avoid the conflict in the elaboration of the human rights guarantees between the two courts to develop coherent jurisprudence with regard to claims related to human rights that have equivalence in the provisions of the Convention. Other arguments in support of the accession relate to the nature of the international organization such as the EU, where states have transfer part of their sovereignty to the international bodies in the organization level. Thus, according to Tulkens the development of international organisations, and more particularly the creation of the European Community in 1957 (now the European Union), has led to a gradual transfer of a number of competences from the States themselves to the latter international/supranational entity, and to a dependence of the national decision making to decisions taken outside their territory and jurisdiction. As a result the 27 Member States of the Union, which, at the same time, are all parties to the Convention either have lost altogether their capacity to control decisions, hitherto belonging to their jurisdiction, or at least their jurisdictional freedom has been diminished. This loss of jurisdictional capacity is not, most of the times, without incident for the protection of human rights.

Another argument could also be that the CJEU has not the profile of a human right court, while the ECtHR has a considerable and successful experience with human rights issues. Acknowledgment of such a difference is important to support the development of an efficient relationship between the two courts. Formal accession is regulated by the provisions of Article 6/2 of the Treaty of Lisbon, which provides that the Union shall accede to the ECHR. On the other hand, Article 17 of Protocol 14 of the ECHR that entered into force on 1 June 2010 provides for the possibility of accession of the European Union to the Convention.

3. Causes for concern?

Procedural aspects related to the accession of the EU as an international organization to the Convention as a treaty, such as the representation of the EU in the ECtHR, obligations to support financially its functioning, role of the Committee of Ministers with regard to executions of the ECtHR decisions, exhaustion of the internal remedies, etc., are in the focus of the Draft Accession Agreement, aiming to afford the EU a special status with regard to the requirements related to the membership to the Convention. The autonomous status of the EU, as developed by the jurisprudence of the CJEU is to be observed, as supported also by Protocol 8 of the Treaty of Lisbon according to which the accession agreement will include provisions to preserve the specific characteristics of the EU.

The accession will fill the formal gap with regard to the submission of the EU to the ECtHR's jurisdiction with regard to rights provided in the Convention. After the accession, the EU will be a party to the Convention and the Convention will be part of the legal regime of the EU. The EU institutions will be faced with the task of the interpretation of the provisions of the Convention, as any


other state party to the Convention, when evaluating claims of violation of human rights that correspond to the rights of the Convention. Cases like Otis, above, support the argument that contrasting positions could be expected in situations where the two courts will be interpreting corresponding provisions from the Charter and the Convention. Let's bear in mind that the EU was established primarily for economic and social purposes, human rights did not fall within its ambitions. The Charter makes it also clear that its observance will be strictly related to the application of the EU Law that again relates to economic and social issues. Following the same logic, the CJEU performs as a judicial institution within this ambit and has developed the respective profile. It is logical to argue that its interpretations of the provisions of the Charter, including those that have a correspondence with the articles of the Convention, will be more of the approach related to the purposes of the EU. Should such aspects be considered as part of the specific characteristics of the EU that should be preserved?

Issues related to the autonomy principle developed by the CJEU's case law with regard to the supremacy of the EU law and the direct application in the legal system of the member states are to be considered. Lock argues that the most prominent obstacle for international agreements is the autonomy of the European Union's legal order, which some past draft agreements have failed to overcome. This was again highlighted by the CJEU in the recent Opinion 1/09 where it held that the EU may submit itself to the decisions of an international court, but that an agreement must nonetheless not violate the Treaties.16

Nevertheless, accession is necessary and it is fair to expect that courts will build upon the past relationship by developing a practice of an effective and consistent positions in the cases related to human rights provided in the Convention and the Charter.

4. Conclusion

The ECtHR has been prepared to accept the observance of human rights guarantees within the EU as equivalent protection to that provided by the Convention. Also, article 52(3) of the Charter provides the link between the two jurisdictions of the ECtHR and the CJEU, guaranteeing that the rights of Charter corresponding to the rights provided in the ECHR will be given the same meaning as those laid down by the ECHR. However, EU it is not a party to the Convention therefore, formally concerns regarding the coherence and development of shared concepts with regard to human rights remain.

If accession takes place, ECtHR will supervise the CJEU with regard to the claims that Convention has been violated. Still concerns with regard to the nature and the specific characteristics of the EU need to be addressed. The draft accession agreement is seeking to find a response to all the concerns. However, the efforts to find solutions for the efficient functioning of the two courts, through a mechanism that does not endanger the nature and the functioning of the EU institutions on one side and the authority of the Convention on the other side should be made in pursuit of the ultimate goal that it the enhancement of the human rights protection for the individuals under the jurisdiction of member states.

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THE HUMAN RIGHTS AND FREEDOMS IN THE EUROPEAN CONVENTION FOR HUMAN RIGHTS AND EU CHARTER FOR FUNDAMENTAL RIGHTS IN THE FIELD OF FAMILY LAW, WITH SPECIAL REFERENCE TO FAMILY LAW IN BOSNIA AND HERCEGOVINA

Suzana BUBIĆ

Abstract

Object of study in this paper is an analysis of one group of the human rights – rights in the field of family law, recognized in European Convention for human rights and fundamental freedom and in the EU Charter of fundamental rights, in addition their exercising in the practice of European Court on human rights. Each of these rights author observes also from the aspect of national legislative and the practice of national authorities. On the basis of this research she assesses the degree of mutual harmonization of the three national family acts and the degree of theirs harmonization with Convention, Charter and European practice. In the fields in which she found a mismatch and the possibility that the Court holds a violation of some provision of the Convention, she suggests the proposals de lege ferenda and recommends the way of acting of the competent authorities in order to eliminate the possible violation. By the changing legislative, eliminating of the political impact and providing the financial conditions for the implementation of the legislative, it should be possible to achieve harmonization, internal and external, and enable more efficient protection of all recognized rights.

Key words: children’s rights, fair trial, family life, persons with disabilities

Introductory Remarks

Acquis communautaire have not direct effect on the law of Bosnia and Herzegovina (further: B&H). However, the obligation of B&H, assumed by signing The Stabilisation and Association Agreement, is the harmonization of national with European law. By the implementation of law, the competent authorities may take into account acquis communautaire and determine the meaning of national law in accordance with it.¹

Special importance for the field of human rights has the EU Charter of fundamental rights (further: Charter). Following the adoption of the Treaty of Lisbon, the Charter became legally binding. As the first EU document that incorporates fundamental civil, political, economic and social human rights already recognised by the Community Treaties, the European Convention on Human Rights and fundamental freedom (further: Convention) and other document of EU, Council of Europe and UN, the Charter shall contribute to the harmonisation of legal systems in the EU Member states and in the candidate countries.² The rights recognized in all these documents are founded on the same principles.

Unlike the documents of EU, the acts of Council of Europe have direct effect.³ International agreements on human rights, signed by B&H, have binding effect on both as well as the national

¹ Suzana Bubic, PhD, Professor at the Faculty of Law, University "Džemal Bijedić" Mostar, e-mail: suzana.bubic@unmo.ba


legislators and the judicial or administrative authorities in the cases and proceedings in these fields. Great number of these acts are incorporated in the anexs of the Constitution of B&H and the Constitution of Federation B&H (further: FB&H). The competent authorities are bound also by the decisions of the European Court on human rights (further: Court).

Convention is set aside by the force from other agreement enshrined in the Constitution of B&H. Under the Art. II of the Constitution „the rights and freedoms set forth in this Convention and its Protocols shall apply directly in Bosnia and Herzegovina and these shall have priority over all other law,“ while for the other Human Rights Agreements it is regulated that they apply in Bosnia and Herzegovina. Art. 3 of the Constitution of FB&H (in part VII) regulates: “International treaties and other agreements in force in respect of Bosnia and Herzegovina and the Federation (and the general rules of international law), shall form part of the law of the Federation. In case of any incompatibility between a treaty and legislation, the former shall prevail.” Therefore, the provisions of this Convention have, under the Constitution of FB&H the force of constitutional provisions, and according to the Constitution of B&H higher force than the constitutional provisions.

The national constitutions, as well as the most laws, regulate and guarantee all rights recognized in the Convention and Charter (and other instruments on human rights). However, neither it nor the constitutional obligation for the B&H and both Entities to ensure the highest level of internationally recognized human rights (Art.I) does not provide adequate protection on human rights for the citizens of B&H. The great number of these rights is violated on a daily basis, so there is a big difference between legislation and practice. The state has to provide effective mechanism to protect rights and to create the conditions for its application. That is, inter alia, the condition for EU membership.

Harmonization of national family law with the Convention and with the Charter

The standards and requestes from the acts of Council of Europe, firstly from the Convention on protection of Human Rights and the Convention on the exercise of children rights, as well as in UN Convention on the rights of the child, were respected in regulating family and great number of family relationship in national law.

The legislators respected the practice of the Court. Therefore, the national family legislation is mainly harmonized with the Charter, considering that the Charter brought together the rights contained in these documents. However, the harmonization has been achieved to a greater extent in the Family Law of FB&H (further: FL FB&H) and Family Law of Brčko District of B&H (further: FL BD) than in Family Law of Republika Srpska (further: FL RS). The existing differences complicate and hinder the process of harmonization: it is necessary to achieve it not only with the European law, but also inside of national law.

The Convention recognizes following rights relevant in the family law: respect for private and family life, right to marry and to found a family and non-discrimination, and the Charter adds the rights of the child and integration of persons with disabilities.

The right to respect for private and family life

This right, regulated in Art. 8. of the Convention and Art. 7. of the Charter, is recognized in the Constitution of B&H, in the Family Law of FB&H and FL BD. The Constitution of FB&H regulates the right to privacy.
Notion of family life. Definition of family life is done in practice of the Court. In addition to family life, to which focuses, the Court referred to the family, although it speaks of her only as regards the application of Art. 8. The notion of „family life” is understood broadly, under which implying the family consisting out of the spouses, as well persons that live in cohabitation no founded on marriage, but also, beside the parents and children, grandparents and grandchildren, uncles and aunts, adopter and adopted child.

Under “family life” the Court considers the family life de iure and de facto (Elsholz v. Germany, 2000; Mikulic v. Croatia, 2002). In many decision it reiterates its opinion that “in respect of different-sex couples, namely that the notion of family (...) is not confined to marriage-based relationships and may encompass other de facto ‘family’ ties where the parties are living together out of wedlock” (Schalk and Kopf v. Austria, 2010). Therefore, this notion includes the relationship created between the spouses by a lawful and genuine marriage, as well as cohabitation not based on marriage. However, the Court more strictly weighed the existence of „family life” by deciding on it in the de facto relationships before the birth of the child (relevant factors may be: the common life of the partners, the length of their relationship and their demonstrated commitment to each other by having children together; Kroon and Others v. Nederland, X, Y and Z v. the United Kingdom, Emonet and Others v. Swizerland, 2008).

Regarding the relationship between parents and minor children born in the lawful and genuine marriage, the Court considers it as a bond amounting to family life from the moment of the child’s birth and by the very fact of it, even if the parents are not then living together (Berrehbab v. Netherlands, 1988).

The Court assesses different the relationship between parents and children born out of wedlock. It considers that the tie between the minor child and her mother comes within the definition of family life (Keegan v. Ireland, 1994; Hokkanen v. Finland, 1994; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006). However, for the existence of family life between child and his/her father, beside the filiation founded by the child’s birt, it is requested aditional factors, for instance the cohabitation of parents and children (Emonet and others).

The further extension of the notion “family life” has been made in the practice of the Court on cohabitations and on the marriages bounded with transsexuals. De facto ties linking a female to male transsexual, his female partner and her child born by AID were sufficient to establish family life between them (X, Y and Z v. UK, 1997). By recognising to transsexual the right to marry and to respect of family life, this notion has been extended on the marriage of transsexuals (I. v. UK and Christine Goodwin v. UK, 2002).

Under impact of evolution of social attitudes towards same-sex couples in many member States and provisions of EU law, the Court has by the notion of family life encompassed also a stable homosexual cohabitations, considering that “it is artificial to maintain the view that (...) a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8”(Schalk and Kopf).

The Court interprets broadly the notion of family, considering also the relationships between relatives as relevant. Thus, it considers as family life, with the certain additional conditions, the relationships between ascendants and descendants (Marckx v Belgium, 1979), between uncle and nephew (Boyle v. UK, 1994), between siblings (Olsson v. Sweden, 1988; Boughanemi v. France, 1996). Family life encompasses also the relationship founded by adoption (between adopter and adopted child, in Söderbäck v. Sweden, 1998), but the relationships between step parents and step children has been located in private life.

4 The Court reiterated his opinion from the decision in the case Haas v. the Netherlands (2004), that no “family life” existed because the applicant had never lived with his son and had only ever had sporadic contact with him.
These Court’s attitudes on family life, adopted also by European court of justice, have to be taken into account by interpreting and implementation of Charter. The national law is harmonized with those.

National legislators have defined *de facto* cohabitation and recognized to it some effects. These effects produces heterosexual, monogamous and long term cohabitation (FL RS) or longer than three years (FL FB&H and FL BD), with the possibility that the birth of common child replace the element of duration. However, in practice partners have encountered difficulties in exercising their rights recognized on the basis of unregistered living out of wedlock. The courts incorrectly qualifying *de facto* (extramarital) cohabitation as a fact (instead as a legal relationship), rejected the lawsuit to establish its existence. The Constitutional Court of B&H, acting on appeal, concluded that it is violated the right to a fair trial (under Art. II/3.e of the Constitution of B&H and Art. 6 para. 1 of the Convention) by the competent courts arbitrarily applied the relevant procedural provisions, establishing of the existence of cohabitation considered establishing facts instead legal rights. (Decision of 13.6.2012. AP-2900/09 and the Decision of 10.10.2012, the AP-2860/09).

The right to marry

The Charter (Art. 9) and the Convention (Art.12) regulate in different way right to marry. The provision of the Charter is gender neutral, it omits the reference to men and women from the provision of the Convention. It left to national legislator the possibility to recognize same-sex marriage, providing that this right “shall be guaranteed in accordance with the national laws governing the exercise of these rights”. Regard being had to Art. 9 of the Charter, the Court hold that would no longer consider that the right to marry contained in Art. 12 must be limited to marriage between two persons of the opposite sex. Despite this, it concluded “that Art. 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage” and that the state are still free to restrict access to marriage to different-sex couples and that the lack of regulation of the same-sex marriage is not violation of Art. 12. (*Schalk and Kopf*).

Therefore, that it does not recognize the right to marry to persons of the same sex, national legislators, by not legalizing same-sex marriage, does not violate this right and it have not the obligation to amend the Law.

The Court had recognized also the right to marry for transsexuals. It held that it is no longer persuaded that the gender must refer to a determination by purely biological criteria (*Christine Goodwin*). Guided by the removing from Art. 9 of the Charter the reference to men and women, the Court did not leave the freedom to prohibit the marriage of transsexuals to the states. It left the possibility to determine, inter alia, “the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages”.

Under such Court’s practice, and in order to enable the exercise of right to marry to transsexuals, the national legislators have been accepted new provision. Thus new Law on personal name of FB&H regulates the possibility to change the name after the gender change (Art. 9/2), and new Law on Registers of the FB&H and of RS regulate the possibility of registration of the gender change (Art. 44 and Art.12).

The rights of the child

All rights of the child recognized in the Charter are not regulated precisely as in UN Convention on the rights of child and Convention on the exercize on children rights. Legislation of FB&H

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5 The decisions are accessible on web page of the Constitutional court: www.ustavnisud.ba.
and BD are harmonized with these two conventions, and therefore also with the Charter. FL of RS does not expressly regulate all these rights. The legislators took into account also the attitudes of Court, specially those ones in the cases regarding the exercise of parental custody and the contacts the child with parents. However, in this field is most prominent previously mentioned discrepancy between the normative and the actual state. Due to lack of necessary funding sources to exercise these rights, unwillingness of mainly competent authorities and sometimes political obstruction, impact and interference in their work, these rights are left aside unprotected and not respected.

Registration of births. The provision of Art. 24/1 of the Charter is, by nature, general and encompasses all rights recognised in the documents concerning the rights of child: “Children shall have the right to such protection and care as is necessary for their well-being.” The condition for exercise of all rights is registration of births and existing as an entity. However, the registration of the birth (and the right on the name) left without protection for some children in B&H. As it noted Committee on the Rights of Child (further: the Committee), difficulties in birth registration exist for children born outside of hospitals, children living in remote areas, refugees and children belonging to minority groups (specially of Roma ethnicity). The state had endorsed the Zagreb Declaration (2011) and adopted new legislation on birth registration, but that is not sufficient to eliminate the problems. The competent authorities have to undertake activities in order to implement the adopted documents and to ensure to all children born in our territory to be registered at birth. Unregistered children experienced significant obstacles in accessing social, educational, and health benefits.

The right to education. This right is recognized in national legislation, but by the exercising of it, it is carried out discrimination on different ground (the most common is discrimination of Roma children). In order to eliminate the numerous problems in this field, the state have to undertake action in accordance with art. 2 of the Convention, and also stated by Committee in the concluding observation: to harmonise legislation with the requirements of 2009 anti-discrimination law; to end the segregation of children in schools by so-called “two-schools-under-one-roof” and mono-ethnic schools; to ensure the education of Roma and Members of Other National Minorities; to develop a code of conduct to eliminate stereotyping and stigmatization of minority and/or ethnic groups in the media.

Right to express children views freely. In the Charter is regulated right to express children views freely and that such views shall be taken into consideration on matters concerning them in accordance with their age and maturity “(Art 24/1). This provision is assumed from the Convention on the rights of the child (Art.12), so the attitude of the Committee and also the practice of the Court may be useful in its interpreting. Our national legislators have been introduced this right (Art.125. FL FB&H and Art. 108. FL BD), but also other rights of the group of procedural rights enabling child to active participate in the judicial and administrative proceeding, rounding off the status of the child as subject sui generis, as the person which have autonomous status. However, in the practice, in the work of national authorities are omissions. As the Committee has been noted, implementation of legislation recognizing this rights is rarely undertaken. The state has to take measures for strengthening the right of the child to be heard.8

The best interest of the child. The principle the best interest of the child is also assumed in Charter from the Convention on the rights of child: „In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consid-
eration” (Art. 24/2). Its importance is same in both documents - as the principle, it applies to interpret and implement all rights of the child.\(^9\)

The best interest of the child have „a primary”, and only in several situations „superior” importance. „Primacy” does not mean that the decision makers (judiciary or administration) have to take it over all the other interests (of the parents, other children, adults or the state). The rights of the child are superior to the rights of other members of society only in specific situations where the individual interest precedes the collective interest.\(^10\) The Court reiterates in the decisions that national authorities have to take into account the interests and the rights and freedoms of all concerned, and more particularly the best interests of the child and his or her rights under Art. 8 of the Convention and stresses theirs obligation to strike a fair balance between them by deciding (Hokkanen v. Finland, 1994; K. and T. v. Finland, 2001; Gluhakovic v. Croatia, 2011; Pontes v. Portugal, 2012). Therefore, the Court does not give absolute importance to the best interest of the child.

This standard is accepted in all relevant domestic legislation, which obliges that the best interest of the child must be primarily considered by the competent authorities by making all decisions and other actions concerning child. All decision makers have to attach a particular importance to the best interests of the child, consider it and the impacts of the decision. In order to eliminate a risk of arbitrary and subjective interpretation of this broadly and vague standard, it has to be concretized and objectified, by guidance for determining it.

The right to alimentation. It is one of the basic rights of the child. In national legislation the parents are obligated to support the child and to ensure to him/her the living conditions necessary for his/her development. In the exercise of this obligation to the minor child, they have to use all its possibilities and abilities. If the children do not may realize the support from them, this obligation exists for the relatives: step parents and grandparents to minor step child and grandchildren, and between the siblings.

When the court finds that parents and the relatives are not able to meet the needs of a child support, the court will inform guardian authority which is obligated to provide funds for child support from the budget. However, in the budget does not have the sources for this purpose and consequently the child is supported by only of the parent with whom he/she lives. In the recent time there are some initiatives in order to establish an alimony fund or the institute of advances of maintenance payments. That is not best solution because the sources in budget are not sufficient for the exercise already existing obligations in the children social protection system. It is best to use the existing mechanisms in legal system to ensure the support from the irresponsible parents. It is needed to make the condition for guardian authorities to intervene when the parent, whit whom the child lives, fail to initiate the court proceeding regarding the deciding or the increasing or the enforcement of the decision of the support (if the parent who is committed custody of the child is unjustifiably not exercising that right). The exercise of these obligations could decrease the number of situations in which exists the need for the support financed from the budget.

The right to contact. In the field of parental custody and its exercising, the national legislators guarantee exercise of the great number of the child's rights, inter alia, the right to contact, recognized in the conventions relevant to the children and in the Charter, in Art. 24/3: „Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both


his or her parents, unless that is contrary to his or her interests”. Rich practice of Court in this field may contribute to correct interpretation and implementation of this provision. At the same time, it have to be used by national authorities in order to eliminate problems for which they were violates the rights of the child or the right of the child and parents on respect for family life. The state, in principle, has to take any measures to enable the development of the relationship and reunification of the family - the parent and children, but bearing in mind that the child’s best interest must be the primary consideration (Pontes v. Portugal). In these cases are frequent violations of the right to fair trial and within it the right to a reasonable time.

The protection the child from the violence. The rights of child are breached in practice also by violent behavior of adults, primarily their parents, against them. In order to protect the child from domestic violence and its other forms, the state takes the measures, but so far did not achieve a significant result. Last year it is adopted new federal Law on protection of the family violence.

The protection of persons with disabilities

The persons with disabilities have the right „to benefit from measure designed to ensure their independence, social and occupational integration and participation in the life of the community”. In the Charter it is stressed that the Union recognizes and respects this right (Art. 26). In national family law this right is not protected appropriately: it does not exist the protective mechanism to prevent any abuse of interest and rights of these persons. Instead of an assistance in exercising their legal capacity, in the practice the courts usually deprive it and so these persons lose their independence. As the Partie of the Convention on the rights of persons with disability, B&H has to reform the legislation relevant for these persons. In the field of family law it is needed to change guardian law. In practice, it should abandon the residing in institution of persons who are capable for independent living, if housing and resources are available.

The right to fair trial

The inconsistency of national family laws with the Convention and Charter exists regarding some of the rights in conjunction with the right to access to court, as one aspect of the right to fair trial. So, in the field of divorce, under Art. 43 of FL FB&H, the husband has not the right to the lawsuit for divorce during the pregnancy of his wife or until third year of their child, and, under FL RS until first year from the birth. This solution is not in accordance with non-discrimination on the foundation of sex, and to access to court regulated in the Convention, Charter and in Constitution of B&H. The Constitutional court of B&H have found these violations, stressing that the ordinary courts, applying this legal provision, failed to apply the international standards for the protection human rights, what is their constitutional obligation (Decision in the case AP 369/10, 24.5.2013). Because of these reasons, the legislator has to eliminate this temporary limitation to lawsuit.

The violation on the right to access to court is violated also by regulating the obligated participation of both spouses in the proceeding of family mediation and its suspension in the case of their unjustified absence (except the absence of violating spouse), resulting in the rejection of the application for divorce (Art. 49 FL FB&H). It is needed to change this solution by regulating voluntary mediation.
Concluding remarks

In the field of human rights in context of family law, as in all others, problem expressed in B&H, is the great discrepancy between the legislation and the practice. Due to lack of appropriate legislative and necessary funding sources to exercise some of these rights, unwillingness of mainly competent authorities and sometimes political obstruction, impact and interference in their work, these rights are left aside unprotected and not respected. The state has to ensure amending the family acts as well as adequate human, technical and financial resources.

On the basis of the research of national legislative and practice, as well as theirs comparison with Convention, Charter and practice of the Court, it may to present following recommendation and proposals (already stressed in the paper):

1. In order to harmonize national legislative with the considered documents and practice, amend the legislative:
   - in the field of best interest of the child, concerning the objectification and concretisation of this standard;
   - in the field of divorce and family mediation, concerning the right to fair trial;
   - in the field of education, concerning elimination of the discrimination;
   - as far as the persons with disabilities, concerning regulation the protective mechanism.

2. In order to eliminate or reduce obstacles to respect considered rights in the practice, ensure appropriate working conditions for the competent authority and take the measures:
   - in the field of family life, concerning the lawsuit to establish the existence of *de facto* (extramarital) cohabitation and the right to fair trial;
   - in the field of parental custody, concerning the development of the relationship and re-unification of the family, i.e. the parent and children;
   - in the field of procedural rights, concerning the right to express views freely
   - in the field of the child's maintenance, concerning the intervention of guardian authorities instead the parent with whom the child lives;
   - in the field of the birth's registration;
   - in the field of the domestic violence.
Bibliography


FROM UNRELATED TO COOPERATIVE TRIPLE PROTECTION OF HUMAN RIGHTS IN THE EU
Zlatan MEŠKIĆ and Darko SAMARDŽIĆ*

Abstract

The transformation from an unrelated to a harmonized triple protection of fundamental rights in the EU is normatively determined by the Lisbon Treaty. Most relevant are Art 6 TEU (Treaty on European Union) and Arts 51-54 ECFR (European Charter of Fundamental Rights). The normative triple protection approach causes questions of competition, collision and hierarchy, but the solution is not a classical division of competencies and jurisdictions. Following the purpose of fundamental rights within the ECFR, ECHR (European Convention on Human Rights) and constitutional traditions common to the member states, all these laws are related to ensure highest level of protection. Crucial for interpretation and application of these laws is not the classification within a formal hierarchy, but the impact. This normative evolution follows the cooperative approach of the EU Court of Justice and the European Court of Human Rights respecting each other’s jurisdictions.

Key words: Charter of Fundamental Rights; European Convention on Human Rights; triple protection of human rights; ‘Solange-decision’ of the German Constitutional Court; transfer clause; juridical cooperation.

1. Evolution

The fundamental rights protection has been incorporated into the constitutions of the EU member states after the fatal experiences of the Second World War. The constitutional courts as institutions have been established even later, in some states of Eastern Europe after the fall of the Berlin Wall 1989. Responsibilities for the protection of fundamental rights were with the member states until the middle of seventies of the last century.¹ The Union was very much recognized as an economic community. A paradigm change was initiated by the ECJ in the seventies of the last century taken the opportunity to access the relationship between the different legal systems in favor of the supremacy and direct effect of EU law.² Individuals could seek legal protection for the four (economical) freedoms but not for constitutionally guaranteed human rights and freedoms. A catalogue of such rights did not exist. Initially the ECJ established the fundamental rights as general legal principles which form an integral part of the founding treaties. In its decisions Stauder³ and Nold⁴ the ECJ asserted that the EU is obliged to protect fundamental rights. EU competences were widen with every reform of primary law and the danger occurred that fundamental rights protection may be avoided by transferring competences from the member states to the EU, while EU law has supremacy over all national law. The Constitutional Court of Germany indicated that a formal hierarchical solution is not needed in a community of legal values. Instead of pointing to the conflict of jurisdiction between the national constitutional courts and the Court of Justice, the German court

¹ Zlatan Meškić, PhD, Professor at the Faculty of Law, University of Zenica, e-mail: zmeskic@hotmail.com
Darko Samardžić, PhD, Assistant Professor at the Faculty of Law, University of Zenica, e-mail: darko.samardzic@conti.de
focused to the goal and the level of protection of fundamental rights. The court compared the levels of protection of fundamental rights according to the national constitution and the primary law. The Germany court emphasized in its decision ‘Solange I’ of 1974 the need for a catalog of fundamental rights on EU level.\(^5\) It stated that ‘as long as’ (ger. ‘solange’) the fundamental rights in the EU do not enjoy adequate protection as in the member states (in this case the Constitution of Germany), the Constitutional Court of Germany reserves its rights to access the level of protection in particular cases. Other constitutional courts followed this view.\(^6\) This understanding of an ‘evocation right’ or an ‘ultra-vires-control’ is based on own constitutional obligations national constitutional courts have to respect. The development of the argumentation can be followed through the main decisions of the German Constitutional Court Solange I,\(^7\) Solange II,\(^8\) Maastricht,\(^9\) Banane\(^10\) and the Lisbon decision of 2009\(^11\).

2. Art 6 TEU

The EU has adopted several declarations to guarantee basic rights since 1977,\(^12\) but all not legally binding, even not the ECFR when implemented in 2000.\(^13\) The ECJ and the courts of the member states did not refrain from demanding a binding catalog of fundamental rights.\(^14\) Primarily fundamental rights understanding was formed as general legal principle as established in the member states. Only single regulations such as Art 21-24 or 157 (1) TFEU or the four freedoms serve as a kind of fundamental rights.\(^15\) Since the Treaty of Lisbon, the protection of fundamental rights is related to three sources, the ECFR (Art 6 (1) TEU), the ECHR\(^16\) (Art 6 (2) TEU)\(^17\) and the constitutional traditions common to the member states (Art 6 (3) TEU). The ECJ rather heterogeneously uses all three sources in its legal practice. Generally Art 6 (3) TEU states that basic rights –as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states – shall constitute general principles of EU law.\(^18\) All member states of the EU are as well members of the ECHR. Furthermore, by the Treaty of Lisbon the EU has agreed to access to the ECHR, Art 6 (2) TEU.

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5 German Constitutional Court 37, 271.
7 German Constitutional Court 37, 271.
8 German Constitutional Court 73, 339.
9 German Constitutional Court 89, 155.
10 German Constitutional Court 102, 147.
11 German Constitutional Court 123, 267; German Constitutional Court, 6. 7. 2010, 2 BvR 2661/06, para. 58.
12 Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights And The ECHR, OJ EC 1977 C 103, 1; European Parliament, Resolution adopting the Declaration of fundamental rights and freedoms, OJ EC 1989 C 120, 51.
In the past the ECJ already followed the legal practice of the ECtHR well before the Treaty of Lisbon.\textsuperscript{19} In 1999 the European Council named a Convention to elaborate the ECFR, but the declaration of the ECFR in 2000 was not legally binding. Nevertheless, the ECJ and the courts of the member states considered the Cherta when interpreting basic rights.\textsuperscript{20} The Cherta became a binding legal source with the Lisbon Treaty and according to Art 6 I TEU it shall have the same legal value as the treaties.\textsuperscript{21} Before the TEU and the ECHR have enabled the EU to access the ECHR, the deficit in the protection of fundamental rights was harshly criticized, because the member states were able to transfer competences to the EU not being member of the ECHR. Art 51 ff. ECFR and Art 6 TEU symbolize the cooperative understanding of the ‘Solange’-jurisprudence of the German Constitutional Court. Thus, the normative pluralism of fundamental rights protection is recognized with all inconveniences of a non-hierarchical primary structure. Following Jarass the equality of law can be assumed with the need of harmonized interpretation.\textsuperscript{22} The German Constitutional Court names this understanding as ‘jurisdictional cooperation’ (ger. ‘Kooperationsverhältnis’). The ECJ considers national values as part of constitutional pluralism. By taking Art 6 (3) TEU into consideration, the Court can recognize the fundamental rights of single member states as general principles in the EU.

At a first glance the triple protection causes questions of competition, collision and hierarchy. But according to their function within primary law, ECHR and constitutional traditions common to the member states, the fundamental rights function cooperatively following the goal of highest level of protection analogue to the ‘most-favored-nation-principle’ (ger. ‘Meistbegünstigung’).\textsuperscript{23} This understanding derives from the structure of Art 6 TEU and Arts 52 et sqq ECFR, especially from Art 52 (3) ECFR which fully respects the ECHR, but allows a higher level of protection. Furthermore Art 53 ECFR clarifies that provisions do not affect human rights and fundamental freedoms as guaranteed by the ECHR or other international agreements, as well as national constitutions, which leads to the conclusion that the legal basis which provides for the highest level of protection shall apply.\textsuperscript{24}

Art 6 TEU needs to be examined in close relationship to Arts 51-54 ECFR, because herein the EU stipulates general principles of interpretation and application. An extensive protection by European law stoked fears among the member states that the EU could extend its competences. Such fears were supported by the experiences made with the ECJ. Over the last decades the ECJ acted as a motor of integration by establishing supremacy of European over the law of the member states and by expanding human rights protection. That is why Art 6 (1) TEU together with Art 51 (2) ECFR prohibits the establishment of any new powers or tasks of the EU on the grounds of the ECFR. This prohibition has more declarative or political character, because the division of competences is already protected by the principle of conferred competences in Art 5 (2) TEU and the principle of subsidiarity in Art 5 (3) TEU.\textsuperscript{25} Additionally Art 52 (5) ECFR clarifies for principles that provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of member states when they are implementing

Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.

In Art 6 TEU and Arts 52-54 ECFR the legal technique of ‘transfer clauses’ (ger. Transferklausel) has been used. It is by its nature comparable with ‘horizontal clauses’ (ger. Querschnittsklausel). But the transfer clause is valid not only over different fields of law but also cross over different legal systems. The transfer clause represents a cooperative form through respect and recognition. The first transfer clause is contained in Art 52 (2) ECFR and refers to intra-union legal systems. The Convention for the set up of the Draft of ECFR had the goal to make the fundamental rights already contained in primary law as visible as possible by transferring them into a uniform codification in the ECFR. At the same time, the duplication of rights in ECFR shall not lead do different interpretation or application of provisions. Therefore Art 52 (2) ECFR provides that the rights contained in ECFR, for which a provision is made in the Treaties, shall be exercised under the conditions and within the limits defined by the Treaties. Thereby the ECFR as lex posterior respects previous rights of the TEU and TFEU by the transfer clause. Another question is, whether such conservative clause is appropriate.

Another transfer clause is provided by Art 52 (3) ECFR. Rights contained in the ECFR, which correspond to the rights of the ECHR, shall have the same meaning. However, the EU is allowed to provide a higher level of protection. This normative idea embodies the innovative understanding of the Constitutional Court of Germany as expressed in its ‘Solange’-jurisprudence, because it does not aim to draw lines of jurisprudence among the courts but to establish cooperation with the goal of highest level of protection. The transfer clause symbolizes the principles of uniformity of primary law, effectiveness and coherency. At the same time, it sets the fundament for a uniform protection of human rights in the EU. Art 52 (3) ECFR allows the EU to provide a higher level of protection than the ECHR. Thus, the ECHR does not have the function to limit the protection, but to ensure the level of protection which is already provided by the ECHR. Here the EU is stricter with regards to the guarantee of the standards of protection set by the ECHR, that the ECtHR demands. Namely, according to the practice of the ECtHR it suffices that there is no ‘manifest deficiency’ of the protection of ECHR, which means that within the scope of application of EU law not any deficiency is enough to constitute a breach of the ECHR.

The general provision for limitation of fundamental rights is contained in Art 52 (1) ECHR. Fundamental freedoms and rights may be limited, if it is provided for by law and with respect of the essence of those rights and freedoms, if the limitation follows objectives of general interest recognized by the EU and fulfills the requirements of proportionality. The general provision of Art 52 (1) does not apply, when one of the transfer clauses is applicable as lex specialis, because it could lead to a different understanding of that right or freedom as it is provided by primary law or ECHR. Nevertheless, the structure of the limitation of fundamental rights and freedoms, as it is set in Art 52 (1) ECFR with regards to its basic elements corresponds to the requirements of justification according to the ECHR.

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2.1 Art 6 (1) TEU

Art 6 (1) TEU is devoted to the ECFR. The EU has recognized the need for a written catalogue of fundamental rights and in 1999 it adopted a Convention consisting of 15 members of governments of member states, 30 members of national parliaments, 16 members of the European Parliament and one member of the Commission. This Convention finished the ECFR in 2000, which was proclaimed in the same year. The ECFR did not become legally binding, hence it was published in part C of the Official Journal of the EU. Although the ECFR was not applicable as a legal source, since its proclamation it served as a source of legal findings. The ECFR was not traditionally established by a parliament or a constitutional creator but the Convention method. This method is based on cooperation of parliamentary and social powers with public meetings and participation. The Lisbon Treaty essentially accepted the ECFR in its original version, but the ECFR is not an integral part of the TEU itself. Instead Art 6 (1) UEU explicitly incorporates the ECFR into primary law with legally binding effect.

According to Art 6 (1) TEU, the EU recognizes the rights, freedoms and principles set out in the ECFR. The ECFR shall have the same legal value as the Treaties indicating that the ECFR remains an independent catalogue. The sole position of the legal basis of the ECFR in the first para. of Art 6 TEU shows that the EU targets the goal of highest protection of human rights on the basis of the ECFR. The preamble of the ECFR in its second para. describes the basics of ECFR. These are the indivisible universal human dignity, freedom, equality and solidarity on the one hand. On the other hand, it enumerates democracy and rule of law as leading principles. Beside the preamble, Arts 51-54 are of general importance for the interpretation and application of the ECFR as well as the legal protection (Art 47-50 ECFR). The other five chapters are divides into different categories of fundamental rights, namely the human dignity, freedom, equality, solidarity and citizens’ rights. The ECFR mostly corresponds to the ECHR and to the protection fundamental rights as set in the national legislation. Some fundamental rights which are expressly determined in the ECFR, but not in the ECHR, are covered by the extensive interpretation of the ECtHR. Thus, the protection of personal data (Art 8 of the ECFR), ECtHR applies under Art 8 ECHR, and the freedom of arts and scientific research (Art 13 of the ECFR) under Art 10 of the ECHR. In addition, some provisions of the ECFR contain a deviation in formulation which individually leads to a much wider protection in relation to the ECHR.

33 OJ EU 2000 C 364/1.
36 OJ EU 2007 C 303/1.
38 Ibid.
2.2 Art 6 (2) TEU

The ECHR is an international convention from 1950. All additional protocols contain later adopted provisions of the same legal value. The member states have not all ratified the protocols, thus, there is a fragmentation in protection. Art 6 (2) TEU provokes the qualification of the ECHR within the legal hierarchy of EU law. It belongs to the primary law, if the incorporation on the basis of Art 6 (2) TEU is regarded analogue to the qualification of the ECFR on the basis of Art 6 (1) TEU.43 However, such a systematical interpretation contradicts clear wording of the provisions that only puts the ECFR at the level of primary law. Art 52 (3) ECFR aims to synchronize materially the ECFR and the ECHR, not to put formally laws from different legal systems into one hierarchy.44 Analogue to other international agreements within EU law the ECHR is beneath primary law, but above the secondary EU law. Although Art 6 (2) TEU provides the legal basis for the accession of the EU to the ECHR, the EU does not become a member of the Council of Europe, does not have to access any additional protocol or any other convention. The ECHR is an international convention whose parties are states, and the EU is not a state but a supranational organization *sui generis*.

To enable the accession of the EU a change of the ECHR was necessary. The ECJ gave its opinion already in 199145 and 1996.46 Now Art 6 (2) TEU is specified in Protocol Nr. 8 to the Lisbon Treaty.47 Respectively Art 17 Additional Protocol Nr. 14 of the ECHR was adjusted and entered into force 2010 after the long awaited ratification by Russia, demanding the adaptation of Art 59 ECHR. It states now in its para. 2. that the EU may accede to the ECHR. The conditions of the accession are determined by the accession agreement on which the negotiations are still open. The EU relies in the negotiations on Protocol no. 8 TEU/TFEU trying to ensure the specific status of its supranational character, not to touch the agreed division of competences within the EU, to prevent any transfer of obligations from the member states to the EU (‘spillover’-effect), not to modify the existing obligations of its member states under the ECHR, and to keep the exclusive right of the ECJ to interpret EU law under Art 19 TEU, 263, 344 TFEU.48 For the Council of Europe it is important that the EU does not enjoy privileges in comparison to the other members of the ECHR. Individuals have to be treated equally and changes of the ECHR have to be limited to a minimum.49

For EU citizens the accession to the ECHR primarily enables individual applications in accordance with Art 34 ECHR against acts of the member states within the scope of application of EU law. Under Art 263 TFEU it was possible only in a very limited manner. State applications shall be excluded only insofar as they are covered by Art 344 TFEU.50 In order to ensure that the ECtHR does not dismiss applications *ratione personae*, because a citizen did not file its claim against the correct

party, as well as to give the EU or the state party, which will at the end be obliged to implement the judgment, the opportunity to participate in the proceedings, the accession agreement shall introduce a new 'co-respondent'-procedure especially created for the EU as new party. The Court upon the request of a party, either a member state or the EU, may allow co-respondents under the conditions formulated in Art 3 (2) and (3) of the draft accession agreement, if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law/ the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments. Further on, in the proceedings to which the EU is a 'co-respondent', if the ECJ has not yet had the opportunity to assess the compatibility with the rights at issue defined in the Convention, either because the individual did not request a preliminary decision or such request was denied by the national court, the ECJ shall be afforded sufficient time to make such an assessment before the ECtHR adopts the final decision. This so called 'prior involvement'-mechanism shall be introduced on the basis of Art 6 (3) of the draft accession agreement.

The relationship between the ECtHR and ECJ was subject of several decisions made by both courts. The ECtHR has made a general statement in the Bosphorus case that within the scope of application of EU law with regards to its member states acts there is a rebuttable presumption that they offer equivalent protection to the ECHR. Such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. However, the ECtHR ruled that 'equivalent protection' does not mean 'identical' but rather “comparable” and not any deficiency is sufficient, but only manifest deficiency, which leads to the conclusion that lower standard than the one provided in ECHR is allowed. The newest decision in the Michaud case shows that ECtHR on the basis of its Bosphorus doctrine did not give up to assess the conformity of EU acts with the ECHR. In the Michaud decision, the ECtHR took into consideration that it is about an EU Directive, and thus the member state ‘in complying with its obligations resulting from its membership of the European Union, had a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection’ and that the national court did not refer the question to the ECJ, although the ECJ previously did not have the opportunity to take its position on the issue. Thus the ECtHR deviated from its presumption established in the Bosphorus case, and although rather in a shy manner, assessed the conformity of the measures taken by France with the ECHR. The Michaud decision shows that the introduction of the ‘prior involvement’-mechanism would be a step in the right direction.

52 CDDH (2011) 009.
53 ECtHR, Bosphorus case, supra note 20, para. 155-157.
55 ECtHR, No. 12323/11 (Michaud/French Republic).
56 ECtHR, No. 12323/11 (Michaud/French Republic), para. 113 and 114
2.3 **Art 6 (3) TEU**

Art 6 (3) TEU, as well as Art 52 (4) ECFR, refers to fundamental rights as they result from the constitutional traditions common to the member states. This source of legal findings was an important legal basis for interpretation of fundamental rights before the Lisbon Treaty entered into force. Now the common constitutional traditions play a less important role beside the ECHR and ECFR, although they keep its interpretative function on the basis of Art 6 (3) TEU. Nevertheless, Art 6 (3) TEU may contribute to the further development of the fundamental rights and their unification on EU level through the practice of the ECJ, because they are not directly linked to the reservations and exceptions expressed or accomplished in the ECFR or ECHR.58

3. **Conclusion**

The transformation from triple to uniform protection of fundamental rights in the EU continues. While Art 6 (3) of the TEU lost on importance, the ECFR and the ECHR remain as double protection whose relationship needs to be determined. In the spirit of the ‘Solange’-jurisprudence of the German Constitutional Court, only open and trustful cooperation of the courts will lead to the highest guarantee of fundamental rights. Ambitions towards the division of competences between the ECtHR and the Court of Justice may cause collisions and further fragmentation. Upcoming questions are e.g. which court has to be contacted first, is the principle of subsidiarity effective and who has the right of final verdict? Finally, the purpose is to establish the highest acknowledged legal level of protection in the EU. All interpretation and application of fundamental rights is subject to the scope of protection illustrating the importance of using clear dogmatic approaches and coherent methods of interpretation.

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Tanja KARAKAMISHEVA-JOVANOVSKA*

Abstract

Although there are numerous dilemmas and the different interpretations of the EU accession to the European Convention for Human Rights (ECHR), undoubtedly this is considered as a major step forward for the human rights within the EU. This is an issue to which the EU has paid significant attention already in the seventies of the 20th century. Today, the need for the EU accession to the ECHR is practically unanimously accepted. This finds its legal grounds in the Article 59, paragraph 2 of the ECHR, which states that “The European Union may accede to this Convention”, in context of the Protocol 14 of the ECHR, put into force on 1 June 2010. Although the fundamental rights, as a general principle of the EC Law, i.e. the EU Law, are recognised and enjoy protection by the European Court of Justice (ECJ), already in 1960, through the cases of Stauder and International Handelsgesellschaft¹, consideration came forward that the Union should strengthen their protection through the Treaty for the Functioning of the EU (TFEU). Namely, according to this Treaty, and according to the Charter for Fundamental Rights of the EU, the human rights are deeply enrooted as essential values of the EU. The new level of protection of the fundamental rights in Europe opened some important issues and dilemmas regarding the legal order in the EU, the EU Charter and the ECJ, on one hand, and the European Convention on Human Rights (ECHR) and the European Court on Human Rights on the other, which led to a pretty complex links between the ECJ and the ECHR. The areas such as the social security, gender discrimination, right to migration, the four freedoms, the right to strike and collective action etc., although, in some cases, treated in a similar fashion by the European Court on Human Rights and by the ECJ, these two institutions still demonstrate differences, especially with regard to how they approach these issues. This can partly be explained with the economic background of the EU vis-à-vis the human rights protection background of the ECHR. This paper will analyze the current state of affairs and the ongoing dilemmas regarding the established relations between the two courts, in context of the protection of the human rights in the EU, as well as the influence that the protection of the human rights has on the process of “Europeisation” of the constitutions of the candidates-states to join the EU.

Key words: Charter for Fundamental Rights in the EU, ECHR, the European Court for Human Rights, the European Court of Justice, the “EU Constitution”

* Tanja Karakamisheva-Jovanovska, PhD, Full Professor at the Faculty of Law “Iustinianus Primus”, University Ss. “Cyril and Methodius” Skopje, e-mail: tanja.karakamiseva@gmail.com

1. A Few Key Points on the Existing Dilemmas and Challenges

The necessity for the EU to accede the ECHR was determined already in 1970. It became current with the entry into force of the Lisbon Treaty by the end of 2009. Namely, with the Article 6(2) of the Treaty for the Functioning of the EU, the EU provided legal grounds for the Union to accede the ECHR, and here it lists not only the commitment of the EU Member States to allow this acceding within the framework of the EU legal system, but also, within their membership in the Council of Europe as signatories of the ECHR to also adopt the Protocol 14. In addition, brief chronology of this process. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an ad hoc mandate to its own Committee for Human Rights to talk to the EU regarding the legal instrument that should be used for the EU to accede the ECHR. On the EU side, the EU Ministers for Justice gave a mandate to the European Commission on 4 June 2010 to lead the talks on the EU behalf. The official talks for the EU’s acceding to the ECHR started on 7 July 2010 between Thorbjørn Jagland, Secretary General of the Council of Europe, and Viviane Redding, then Vice-President of the EC. The Committee for Human Rights gave the task for elaborating the accession instrument to an informal group composed of 14 members (seven coming from EU Member States, seven from non-EU Members), elected based on their expertise. In the period of July 2010-June 2011 this informal group held a total of eight working meetings with the EC, constantly reporting on the progress and the achieved goals. In context of the working meetings, the informal group also held two meetings with the civil society representatives who continuously submitted their remarks to the group. In June of 2011 the working group finished its work and submitted the draft accession agreement together with its report. In January of 2011, delegations from both Courts, the ECJ and the European Court on Human Rights, discussed the EU’s acceding to the ECHR, putting the emphasis on the future cooperation between the two courts in context of certain concrete cases against the EU, in the framework of the ECHR system. In October 2011, the Committee for Human Rights discussed the draft instruments and the transmission agreements of the report and the draft-instruments. On 13 June 2012 the Committee of Ministers allowed the Committee for Human Rights to continue the talks with the EU within the ad-hoc group “47+1”, in order to finalize the accession instruments without delay.

This ad-hoc group has so far held four meetings in Strasbourg. On 5 April 2013, the negotiators coming from the 47 Member States of the CoE and the EU finalized the Draft Accession Treaty for the EU’s accession to the ECHR, and the next step was to obtain an opinion from the ECJ on the text of the Treaty. Having in mind the legal grounds for the official EU accession to the ECHR and having in mind the compulsory application of the EU Charter for Fundamental Rights, it becomes undoubtedly clear that two legal regimes are differentiated in the part of protection of the rights and freedoms in the Union, manifested through two different legal institutions: the European Court on Human Rights in Strasbourg and the ECJ from Luxemburg. It is well-known that the first court is the court of the Council of Europe whose main competence is to protect the human rights and freedoms in Europe and its competence primarily concerns issues that refer to the quality of realization.


and protection of the national rights in these states. Unlike this Court, the ECJ is not considered as a watchdog for the human rights per se, but as a legal EU institution whose main task was first of all to support the process of economic integration between the different Member States, and later it expanded its mandate on issues concerning the application of the EU Law, or the national laws in context of the EU Law. This competence certainly also includes the fundamental freedoms and rights under the scope of the EU law. The overlapping functions of these two institutions are often very complex due to the fact that both courts involve different mechanisms and methods to solve the cases. Although there is no formal connection, there is still a certain level of overlapping in the part where the EU Members are also Members of the Council of Europe. When the Charter entered into force, the EU Member States undoubtedly became subject of triple system of human rights protection: 1. the system developed under the Charter in the Union; 2. the system developed by the European Court on Human Rights in Strasbourg and the direct application of the ECHR and 3. The national legal systems of the Member States. It is believed that this plurality in the human rights standards and the mechanisms that intermingle, and in certain cases overlap, can have certain positive effects.

Firstly, from an aspect of their content, the three systems are basically complementary, they can provide wider scope of protection of the human rights in Europe and, secondly, from an aspect of the implementation of standards, the joint work of the ECJ and the European Court on Human Rights can serve as a double watchdog for the human rights, not only at national, but also at supra-national level. On the other hand, this plurality can serve as a basis for greater insecurity about the European standards on the human rights. For example, the two institutions can have a diametrically opposite positions about the application of certain rights and can view them from a different perspective and in a different manner, thus sending out different, in some cases, contradictory messages to the Member States. This is a very real threat due to the fact that, unfortunately, there is no legal connection and hierarchy between these two institutions. A case that involves the right to private and family life, and in which Luxemburg has decided that this right shall not be applied for companies (Hoechst AG v. Commission), the Strasbourg Court later decided that the same can be applied (Niemietz v. Germany); this is a direct example that shows that such difference in opinions is possible. Although this example is an exception and not a rule, still the fact that it exists shows that similar cases are possible in the future. The different standards in the human rights protection definitely influence the work of the two courts. Therefore, the need for further respect of their boundaries is underlined when it comes to their different functions. On the other hand, there is the need of mutual monitoring of the joint actions in order finding a balance among the different standards for protection of the human rights that exist in the Member States, in context of avoiding possible conflicts in their interpretation. For the sake of the truth, both institutions are faced with real problems when it comes to the case law, which is the reason why they have made several attempts to solve these challenges through so-called forms of “informal cooperation in the legal cases”. The Strasbourg Court and its supreme law have already been mentioned in the decisions of the EU Court of justice as “source of inspiration”. The same practice is also applied by the Strasbourg Court. This court, although it primarily applies the ECHR, on several occasions it has also called upon the EU Charter and the Decisions of the ECJ. This form of compromise can partially fill in

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10 http://sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/4a8709d98f6facf5c125664004c19eb?OpenDocument
the gap that realistically exists when it comes to the connection between the two courts, but it can certainly not serve as main solution to the problem, which is the lack of external forms of control over the work of the two courts that would provide harmonized and complementary application of the law. Without clear setting of the boundaries when it comes to the link between the ECHR and the ECJ, there is an open possibility for new conflicts in their work.

2. Dilemmas and challenges in the relations between the ECHR and the ECJ

Despite the fact that the original mandate of the ECJ, in the years when the European Community was created, was mainly focused on protection of the economic integration of the EC, today this Court has much broader range of competencies. In the ECJ practice, especially in the field of gender discrimination, the EU Court, in combination with its own case law and the activism of the European institutions, which is visible through the number of directives that concern this area, has developed a more elaborated concept for non-discrimination than the ECHR. It is an undeniable fact that the EU Court of Justice, in its case law so far has offered the European citizens better protection in the field of non-discrimination, unlike the ECHR through the application of the European Convention on Human Rights. However, there are different opinions in practice that oppose the conclusion above. Here we shall point out the theory of Veldman, according to which the fundamental rights to strike and collective action receive much greater protection from the ECHR than they do from the ECJ. According to this theory, the ECJ is much more concentrated on the protection of the integrity of the Union single market and the four economic freedoms, which, as he says, are still in the core of the EU legal system and which are still threatened by the practicing of the fundamental social rights of the citizens. Pennings shares the same opinion and speaks about the different approaches of the ECHR and the ECJ when it comes to the principle of non-discrimination, particularly with regard to the treatment of the social security of the citizens of the third countries, which in fact explains the different characteristics of the two institutions. In addition, the author raises a dilemma on whether these two different interpretations can lead to possible future conflicts between the ECHR and the ECJ after the EU officially accede the European Convention on Human Rights. This dilemma is still very current, having in mind the fact that when it comes to the single EU market, the ECJ case law demonstrates direct domination of the economic freedoms when they directly collide with the fundamental rights. The position of Rawls is also very interesting; he gives a possible way out from this situation. According to him, the way out is in reaching a conclusion that only when the freedoms determined in the Treaty are used to protect the equal possibilities for the citizens they should be viewed as fundamental rights. For the sake of the truth, the ECJ in certain cases has managed to achieve a balance between the freedoms and the rights without to subordinate the fundamental rights under the economic freedoms. In other words, the fundamental rights can be given priority, even in the context of the single EU market, as it was the case before. However, there are still many issues left open when it comes to the different understanding of the fundamental rights under the ECHR and under the EU Charter, the complex connections between the two courts, the possibilities for overcoming future conflicts between the two courts, and, in this context, the influence the ECHR has on the EU Law and by that on the national law(s) of the Member States. These open issues remain and will undoubtedly stimulate a debate among the theoreticians in the EU and in the CoE.

3. Conflict between two fundamental principles, or…?

In context of gaining a clear picture about the ECJ practice, there is a conclusion that this Court has always stood for a certain balance between the fundamental rights and the economic freedoms. It is a fact that the fundamental rights can conflict the economic freedoms determined in the EU Charter. This opens the issue on whether the tension between the fundamental rights
and the economic freedoms ought to be seen as a conflict between two fundamental principles, or otherwise? There are several arguments that support the close connection between the economic freedoms and the fundamental rights and, according to this, the treatment of these freedoms in the EU Treaty as fundamental rights. When the four economic freedoms are viewed through the case law of the ECJ, one can locate several different opinions about the fundamental character of the fundamental freedoms. Namely, the ECJ does use several terms, such as, fundamental freedom as one of the fundamental principles of the Treaty or fundamental provision of the Community. The “fundamental nature” of the freedoms can be seen in several aspects, from the scope of freedoms listed in the Treaty, to their dogmatic foundation as determined in the Dassonneville case. The “fundamental nature” of the freedoms in the Treaty, although in indirect form, can be seen through their institutional dimension. In this context the opinion of the EU Attorney-General Maduro in the Vodafone case is very interesting; he speaks of so-called “horizontal application” of the rights to free movement of goods (horizontal direct effect), as a consequence of the scope of Article 114 of the EU Treaty, i.e. the legal grounds for free movement of services which can be expanded to regulate the private affairs of the individuals. An important aspect here is the issue of legitimacy of the Regulative which regulates the prices of the roaming services in the telecommunication sector. Although the Court did not accept the opinion of the Attorney General for this type of extensive range of the Article 114 of the EU Treaty, it still applied a very cautious measure. Instead of expanding the range of the Article 114 to cover individual behavior, the ECJ reviewed the possible future competition violations in this field, as well as the possible problems that could emerge in the telecommunication sector as a result of these differences between the national legislation of the member states, and thus it stood directly in defense of the EU interventions when it comes to uniformed determining of the roaming prices within the Union. There are other arguments that can be given to support the fundamental character of these freedoms:- Firstly, the freedoms play a key role in the building of the so-called European Economic constitution. According to the liberal school, which comes from the German town of Freiburg from 1930, the Constitution ought to protect the economic freedoms “which are an integral part of protection of the human dignity and which are considered as indicators for the degree of overall freedom in the society.” Secondly, the economic freedoms are often defined in accordance with the terms of free trade or the specific profession, which is considered a fundamental right determined in Article 16 of the EU Treaty; and, thirdly, the fundamental rights that also represent explicit economic freedoms, such as the right to equal treatment (non-discrimination), the right to free movement and reside freely within the territory of the Member State, come out of the specter and have a much broader economic dimension than the rules of free movement. Still, there is no doubt that there are boundaries in the application of the freedoms determined in the Treaty. In other words, these freedoms do not have an absolute character, which means that in certain cases their “fundamental nature” can be put to a test.

13 The opinion of Maduro published on 1 October 2009 in the case C-58/08, Vodafone and others, Judgment of 8, June 2010. In this context, also see the observations of the Attorney General Trstenjak from 28 March 2012, C-171/11, Fra. Bo SpA, where she stands for application of horizontal direct effect of Article 34 of the EU Treaty regarding the free movement of goods.


4. Challenges for the Republic of Macedonia in the field of human rights and freedoms as a EU Candidate State for Membership

Undoubtedly, the Republic of Macedonia, as an EU Candidate State, is obliged to carefully monitor the changes that occurred in the national constitutions of the EU Member States and, based on their experience, to develop a national, beyond-party concept of constitutional amendments that should take place before the country joins the Union, so that it can speed up the EU negotiating process, i.e. to close the chapters sooner. It seems that in that way the constitutional adjustments will be ready in a sufficient timing based on detailed analysis of the form, type and their content, and based on the capacity of the institutions to meet the requirements that come from the application of the EU law and the European standards. Having in mind the fact that the EU does not favor a best model of constitutional changes and leaves it to the national authorities to make their choice, and also having in mind the experience of the EU Member States, one can say that the technique of combining of a separate section in the Constitution devoted to the EU with specific amendments to certain articles of the Constitution is the best alternative for the constitutional changes in the Republic of Macedonia. In this case, we should highlight that in the part of the Constitution devoted to the human rights and freedoms interventions will be needed in several areas, such as:

- in the Amendment 32 of the Constitution of the Republic of Macedonia, in context of applying the European arrest warrant;
- possible defining of the rights that the citizens would enjoy on the territory of the EU in the part of the Constitution devoted to the basic rights and freedoms and the rights of the citizen;
- implementation of the rights from the EU Charter about the basic rights that are not contained in the Constitution of the Republic of Macedonia;
- implementation of both the active and the passive right to vote (at local elections) for Macedonian citizens who live in a EU Member State, as well as for EU Member State citizens who live or reside in Macedonia;
- guaranteed freedom of movement and stay for Macedonian citizens at the territory of all EU Member States;
- guaranteed right to diplomatic and consular protection for Macedonian citizens in any EU Member State, and equal protection for the Macedonian citizens who are in a third country and in which Macedonia does not have a diplomatic or a consular office;
- right to submit petitions for every Macedonian citizen to the European Parliament;
- right to launching a complaint before the European Ombudsman;
- right to address the EU institutions and advisory bodies in the Macedonian language and in all official languages of the EU, and right to response in the same language, in accordance with the conditions and restrictions contained in the regulations on which the EU is founded, as well as in accordance with the measures adopted based on these agreements.

1. Right to vote

According to Article 20, para. 2 (ex Art.17 TEC) of the EU Treaty, “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: a) the right to move and reside freely within the territory of the Member States, b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State”.
2. **Extradition of domestic citizens**

According to the EU Framework Decision No 2002/584/JHA from 13 July 2002\(^{17}\), which was recently approved also by the ECJ, the EU Member States are obliged to extradite the citizens to another state if that state has issued an European Arrest Warrant. In this context, the framework decision does not contain any provisions that the states can use to protect their own citizens from extradition.

3. **Comparative experiences from other states**

1. The **Constitution of Croatia** says that the citizens of this country are also citizens of the EU and shall enjoy the rights guaranteed to them by the *acquis communautaire*, and especially particularly the following:
   - freedom of movement and establishment on the territory of all the Member states,
   - active and passive right to vote at elections for European Parliament and at local elections in another Member State, in accordance with the regulations of the Member State in question,
   - right to diplomatic and consular protection of any Member State, equal to the protection of its own citizens when found in a third country in which the Republic of Croatia does not have a diplomatic mission or consulate,
   - the right to submit petitions to the European Parliament, complaints to the European Ombudsman, and the right to address the institutions and advisory bodies of the EU in the Croatian language, in addition to all other official languages of the EU, and the right to receive a response drawn up in that same language.

   “All rights shall be realized in accordance with the conditions and restrictions prescribed by the treaties on which the EU is founded and measures adopted on the basis of those treaties.”

   This Croatian model is specific having in mind that it concludes the rights that the EU Law gives to the citizens of Croatia after the country joined the EU. The two articles mentioned above entered into force on the day when Croatia entered the EU, same as the Article 9(2) in the part that refers to the decision for extraditing persons adopted in accordance with the EU Law (Article 152).

2. **Article 16(4) of the Constitution of Romania** reads that “After Romania’s accession to the European Union, the Union’s citizens who comply with the requirements of the organic law have the right to elect and be elected in the local public administration bodies”.

   Article 20, which refers to the international treaties and human rights, says that:

   “(1) Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.

   (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party of, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.”

   Article 35(1) says that “After Romania’s accession to the European Union, Romanian citizens shall have the right to elect and be elected for the European Parliament.”

3. The **Constitution of Bulgaria**, in article 25(4) determines the following amendment to the Constitution: “No Bulgarian citizen may be surrendered to another State or to an international tribunal for the purposes of criminal prosecution, unless the opposite is provided for by international treaty that has been ratified, published and entered into force for the Republic of Bulgaria.”

4. Article 7 of the **Constitution of Slovakia** reads:

"(1) The Slovak Republic may enter into a state union with other states upon its free decision. The decision on entering into a state union with other states, or on withdrawal from this union, shall be made by a constitutional law which must be confirmed by a referendum.

(2) The Slovak Republic may, by an international treaty ratified and promulgated in a manner laid down by law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and European Union. Legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic. Undertaking of legally binding acts that require implementation shall be executed by law or a government ordinance pursuant to Article 120, paragraph 2.

(3) The Slovak Republic may, with the aim of maintaining peace, security and democratic order, under the terms laid down by an international treaty, join an organization of mutual collective security.

(4) In order for any international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties establishing the membership of the Slovak Republic in international organizations, international economic treaties of general nature, international treaties whose execution requires a law and international treaties which directly constitute rights or obligations of natural persons or legal persons to be valid, an approval of the National Council of the Slovak Republic is required prior to their ratification.

(5) International treaties on human rights and fundamental freedoms, international treaties whose executions does not require a law and international treaties which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law shall have primacy over the laws.

Article 30(1) of the **Slovak Constitution** says that: “Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives. Foreigners with a permanent residence on the territory of the Slovak Republic have the right to vote and be elected in the self-administration bodies of municipalities and self-administration bodies of superior territorial units”.

5. The **Constitution of Slovenia**, more specifically Article 47, says that "No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which, in accordance with the provisions of the first paragraph of Article 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organisation”.

In most of the national constitutions, the voter's right (passive and active) is reserved only for the citizens of that country, regardless whether it comes to local or national elections. This method of giving exclusive right to vote only to the citizens of that Member State in the national constitution does not also mean inability for this right to be exercised by the citizens of other EU Member States, according to the provisions of the EU law. This is the position of the Constitutional Court of Poland regarding Article 62(1) of the Polish Constitution. Similar to this opinion is the position of the Estonian Chancellor of Justice, who has said before the Estonian Supreme Court that Article 48(1) of the Estonian Constitution, when it comes to the right of the Estonian citizens to join in political parties ought to be viewed in accordance with Article 19 of the EU Treaty, i.e. in accordance with the Article 2 of the Act for Amending the Estonian Constitution, which grants the same right also to the EU citizens.

Most of the EU Member States have tried to resolve this issue through direct changes in the Constitutions, in the parts that concern the voter's right. Such was the case with Spain, Germany, Austria, Belgium, France, Portugal, Hungary, Slovakia, Bulgaria and Romania.
Having in mind the continental constitutional tradition, most of the EU Member States have incorporated a constitutional obligation for the country to protect its own citizens from a foreign criminal justice, i.e. they provide constitutional guarantees which prevent the citizens from being extradited without a previously signed bilateral agreement with the country concerned. This opens room for possible conflicts between the constitutional norms that disable extradition and the European Arrest Warrant. When the EU Framework Decision entered into force, so did the obligation for all EU Members to act in accordance with its content, i.e. it determined an obligation for coordinating of the constitutions of the Member States with the EU law in the part that concerns this issue.

5. Conclusion

It is an undeniable fact that EU acceding to the ECHR will not change, nor it will endanger the autonomy of the EU Law, i.e. the autonomy of the ECJ which validates the EU acts. EU’s accession to the Convention is more and more observed as incorporating of a new, additional external instrument for monitoring over the fundamental rights, i.e. their better protection within the Union. This will certainly not reflect on the ECJ case law, developed in 1970 as a result of the judicial dialogue between the national constitutional courts and the ECJ in the light of the Solange (1 and 2) case. Having in mind the ECJ case law, and the EU Treaty, it is clear that the fundamental rights, guaranteed with the ECHR, and those that come as a result of the joint constitutional tradition of the EU member countries, constitute the common principles of the EU law.

On the other hand, the EU Charter on Fundamental Rights declares that: “the Charter contains the rights that correspond with the rights guaranteed in the ECHR, so the meaning and the scope of these rights will be the same as those determined in the Convention.” In this context, this wording will not prevent the EU Law from providing a more consistent protection of the rights contained in the Charter, i.e. in the ECHR. What should be noted as a fact from the EU’s accession to the ECHR is that this will significantly improve the legal protection of the EU citizens, particularly from harming the human rights of the citizens as a result of activities and acts of the executive government in the application of the EU Law. The accession also seems to have for its goal to minimize the evident risk for the two Courts to come out with different interpretations of the human rights standards. This was the case on several occasions when the ECJ did not take into consideration the case law of the ECHR. After the accession, this issue will be closed having in mind the fact that the Strasbourg Court will have the final word on the interpretation of the rights defined in the ECHR. And finally, it is of great importance that the EU, by joining the ECHR, will send a signal to the third countries (China, for example) that the EU has a serious policy devoted to the protection of the human rights and freedoms. On the other hand, the Republic of Macedonia, as EU Candidate State for membership, is obliged to adjust its legal acts in accordance with the Union legal practice and to continuously monitor the changes in this field. The first step is certainly adjusting the national constitution and the other acts which directly concern the freedoms and the rights to the European practice (case law) and standards, while the other steps are in direct correlation with the active monitoring of the work of the EU Court of Justice and the ECHR and their specific work in cases that concern the human rights and freedoms.
PART THREE • FUNDAMENTAL RIGHTS AND FREEDOMS IN CONTEXT OF THE EU ACCESSION TO THE ECHR AND THE NOVEL TIES FORESEEN WITH THE EU CHARTER ON FUNDAMENTAL RIGHTS

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INTEGRATION OF THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS IN EUROPE

Ivana JELIĆ*

Abstract

After Lisbon Treaty the idea of integration of human rights protection in Europe became reality as it got its legal background in the Treaty. Two crucial facts supporting the integration are: the Charter on Fundamental Rights became a part of the acquis as legally binding instrument, and the European Union committed to accede the European Convention on Human Rights of the Council of Europe. The first fact obtained the insurance that human rights and freedoms are the Union’s concern, as well as that their comprehensive protection is on its agenda. The second fact, among other aspects that are analyzed in the paper, pave the path towards judicial integration in human rights protection and brought closer two European courts.

The European Union accession to the European Convention on Human Rights is the process that will still take time, although the accession agreement has been worked out by the experts of the Council of Europe and European Commission. Having in mind positive novelty concerning the Committee of Ministers’ acceptance of the expert text of agreement and that it is the turn of the Court of Justice of EU to give its comments, gives positive signal that the end of the integration concerned is closer. Also, due to the overall importance of the accession, it is to believe that the political will of the EU state-members would not miss this time.

The paper discusses mainly the process of the accession of the EU to the European Convention of Human Rights and analyses its importance and consequences.

Key words: Accession agreement, Council of Europe, European Convention on Human Rights, EU Charter on Fundamental Rights, Lisbon Treaty.

Introduction

The more and more evident necessity for stronger convergence in human rights protection at the European level, as well as existence of two courts – The European Court for Human Rights (in further text: Strasbourg Court) with clear jurisdiction in regard to the European Convention on Human Rights and its Protocols and The Court of Justice of the European Union (in further text: Luxembourg Court), which jurisdiction is in regard to the acquis - brought the integration of human rights protection in Europe, as one of the most important issues, at the agendas of both Council of Europe and EU.

The last EU founding treaty - the Treaty of Lisbon† introduced a shift in addressing the issue of human rights by the Union. Namely, although primary aim of the treaty was to address the issue of further institutional functioning of the Union, it actually resolves some open and pending issues regarding the protection of human rights. However, it also opened up some new questions such as the accession of the European Union to the European Convention on Human Rights as the main legal instrument of the Council of Europe.

* Ivana Jelić, PhD, Associate Professor at the Faculty of Law, University of Montenegro, e-mail: ijelic@yahoo.com
† It was adopted on 13 December 2007 and entered into force on 1st December 2009, after being ratified by all of EU member-states.
Namely, crucial progress towards a stronger and more coherent human rights protection in Europe has been made by the Lisbon Treaty. It was done in two complementary steps: the Charter on Fundamental Rights got its legally binding character and became integral part of the *acquis communautaire*, and the Union committed itself to accede to the European Convention on Human Rights.²

The action followed after the entry into force of the Lisbon Treaty. Specifically, the Council of Europe adopted Protocol No. 14 to the European Convention, which entered into force in June 2010. The Protocol amended Convention, *inter alia*,³ in terms of the provision which states that “The European Union may accede to the Convention.”⁴ Immediately thereafter, the European Union and the Council of Europe started talks on joining the European Union to the European Convention, as the main instrument of the Council of Europe. This does not mean that EU would eventually join the CoE, as they both stay independent international organizations with clear different mandates and several common goals, deriving from in the principle of rule of law, human rights protection and democracy.

From today’s perspective, and bearing in mind the way of getting closer of the European Union and the Council of Europe, which implicitly started with a case Bosphorus,⁵ all indications show that the process entered its final phase, in terms of legal preparations for the accession. Namely, the group of experts from the Council of Europe⁶ and the European Commission drew up a draft agreement on the accession and the Committee of Ministers of the Council of Europe confirmed the text, after almost two years of consideration. Actually, the Committee of Ministers has done its political work within the Council of Europe, i.e. negotiation of several contentious issues such as the role of a co-respondent mechanism in the Court in Strasbourg, EU role in the Committee of Ministers, as well as the adjustment of the procedure in terms of individual complaints concerning the cases where the law of the Union violated human rights guaranteed by the Convention.

The last information from Strasbourg sais that the agreement on accession is now in the hands of the Luxembourg Court and that it is to be expected to receive its comments soon. That fact suggests that the overall process of completion of the accession is not far from its ending, at least until the decision taken by the EU member-states. Namely, in order for the agreement to enter into force, it must be accepted by all member-states of the Union, in accordance with their constitutional procedures, which may put into the question acceptance of this legal act. Latter especially due to rather firm positions of some of the countries in terms of adjustment of the proceedings to the European Court of Human Rights in new circumstances in which it is important to ensure equal treatment of EU as new High Contracting Party.

Also, the specific nature of EU is always in focus of legal thinking and political attention. Namely, EU is supposed to be a *sui generis* High Contracting Party as it is an international organization, which all 28 member-states are at the same time member-states of the Council of Europe. But regardless of the differences among them, all states-parties to the European Convention agree that

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² Amended article 6 of the Treaty on EU stipulates that the Union shall accede to the European Convention on Human Rights.
³ The amendments to the Convention were undertaken due to make procedure at the Strasbourg Court more effective and efficace. Due to great number of pending cases and application, the single judge mechanism was introduced to deal with admissibility of the applications as well as to rule in so-called repetitive cases, etc. Concerning the EU accession, CoE adopted new Protocol No. 14 which amended Convention in its article 59 par 2, stipulating that the EU may accede the Convention.
⁴ This provision indoubtfully indicates that the EU accession to the Convention is a possibility for the CoE, but not an obligation as it is stipulated in Lisbon Treaty which is an imperative obligation for the EU.
⁵ Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sireti in. Ireland, 45036/98, judgement from 30.06.2005.
⁶ The author of this paper was a member of the Working Group during 2010/2011, elected by the Steering Committee for Human Rights (CDDH), among fourteen experts of the CoE.
the process of joining the European Union should be fully supported as common priority. That suggests also that issues and some technical details on procedural nature are to be resolved on the fly. However, the practice shows that it is not easy for diverse membership of EU to agree on all such details, because within the EU there are some countries that had hindered the process due to some internal reasons.

However, the reasons deriving from the interest in ensuring coherent system of human rights protection and providing the legal security is stronger. Therefore, it is to hope that it would prevail political interest of the EU member-states. Namely, the issue in our concern has to be considered as prior to any political relation and interest, especially because better human rights protection is a noble and lofty goal, which was set in all founding treaties and the EU accession to the Convention is the necessary means for it.

In the context of legal certainty, in the Council of Europe the accession to the Convention is considered as the vital issue for the protection of individual fundamental human rights and freedoms. Among other things, because it would enhance consistency in the application of the provisions of the European human rights law in the whole Europe, through enabling the “harmonious development of relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union”.

Finally, the goal, which derives from the spirit of Lisbon Treaty, and which means creation of a harmonized development of case-law and integration of the protection of human rights in Europe is an absolute priority. It is not only an expression of the new politics of human rights in Europe, but also the way to better and, why not to say, full protection of individual human rights and freedoms, which would be realized through system of legal actions by natural and legal persons against the European Union before the European Court for Human Rights in situations in which there are allegations that the Union violated European Convention on Human Rights and its Protocol.

**From Bosphorus Case to the EU Accession**

The initial contribution of the jurisprudence to the idea on the need for convergence and integration of processes of the courts in Luxembourg and Strasbourg, whenever possible, was given by the judgments of the European Court of Human Rights in *Bosphorus Case*. It was brought at a time when the EU Charter of Fundamental Rights was not an integral part of the *acquis* (consequently it was not a binding legal document) and when the EU was not in the process of accession to the European Convention on Human Rights.

In this judgment European Court of Human Rights handed a statement that it will not review the actions of the member-states only when they apply the EU law, since in this period the level of human rights protection in the EU could be considered as at equal level as guaranteed by the European Convention on Human Rights. Thus, the Court concluded that there is a presumption of equality in the protection of human rights (*presumption on general equivalence of human rights protection*), and that this assumption can only be challenged and questioned if the case shows that the level of protection of human rights has a “manifest deficiency”. By this the Strasbourg Court has shown its ambition to take into consideration some specific circumstances of the cases in the future in order to effectively oversee and review the possible shortcomings in the protection of human rights at the EU level, but not to audit the acts of the Union.

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8 Ibid.
Also, this judgment has shown that the European Court of Human Rights, although it has no jurisdiction to review the judgment of the Court of Justice of the European Union, has the right to establish the international responsibility for the unlawful acts of the member-states of the Union. This conclusion does not enter the issue on how well the standard of “manifest deficiency” is established and if it is sufficiently precise. Also, it does neither challenge the test concerning establishing the obvious shortcomings in the protection of human rights at the EU level, nor the degree of the discretion of the Court. Furthermore, this does not interfere in the relationship of processes and competencies of the two European courts, although in this case the conclusion on indirect superiority of the Court of the Council of Europe concerning the protection of human rights may be imposed.

On the other side, the proliferation of international judicial and quasi-judicial bodies, in addition to positive effects in terms of specialization, brings with it the problem of decentralized and fragmented international justice. In support of the last conclusion we can use the case in our concern on the occasion of which the proceedings were held before both European courts. Quite reasonable seems the opinions that the Bosphorus case testifies the decentralization of international justice and the problem of judicial control of international organizations in the implementation of human rights standards.10

Soon after, the Council of Europe and the European Union have become aware of the need approaching each other in order to concentrate and ensure the full protection of human rights in Europe, as well as other shared values, above all the rule of law and democracy. Consequently, they have signed a Memorandum of Understanding in 2005. By this, they expressed a recognition to the contribution of the European Convention on Human Rights, the European Court for Human Rights, as well as to the importance of the EU Charter of Fundamental Rights. Furthermore, in Memorandum they defined the key areas that need their cooperation and unity, including those ones which are addressed in this paper.

However, still at that time, the original founding treaties of the European Community did not contain provisions on human rights protection. Moreover, they were free of references that refer to human rights. Only the Treaty of Maastricht of 1992, introduces the obligation of the European Union to respect fundamental human rights, in accordance with the guarantees given by the European Convention on Human Rights.11

Additionally, the EU Charter of Fundamental Rights had no imperative and strength. It was only, after several modifications, solemnly proclaimed in Nice on 7th December 2000, while the solution of its constitutional status was postponed for the next conference.12 Protection of human rights was the task of the Council of Europe and there was general agreement that the Strasbourg bodies deal with these issues at the European level. Consequently, the standards that were established by the European Commission for Human Rights and the European Court for Human Rights, and after 1998 only the Court as the Commission was abolished by Protocol No. 11, were binding for all member-states, due to the fact that all of those are also the High Contracting Parties to the European Convention on Human Rights.

However, the time showed an increasing need for stronger EU involvement in human rights protection issues, and very often also their protection from the wrongful acts by the Union.

So, the Charter of Fundamental Rights in its version of 2007 became legally binding after the Lisbon Treaty entered into force. It guarantees that the Union recognizes the rights, freedoms

11 Article 6, paragraf 2 of the Maastricht Treaty.
and principles of the Charter of Fundamental Rights of the EU as well as the provisions of the same significance that have community treaties, by which the Article 6 of the Treaty on European Union was amended.

The Charter pointed out that the fundamental rights, those ones that it recognizes as the result of the constitutional traditions common to the Member States of the EU, should be interpreted in accordance with these traditions, national laws and practices as it is specified in the Charter. Also, it was pointed out that the courts of the Union and its Member States should give due attention to the explanations that had been made so as to give the necessary instructions for the interpretation of the Charter. These explanations were published in the same issue of the “Official List of the EU”, in which the Charter was published.

Despite above-mentioned and analyzed significance which the Charter got by the Lisbon Treaty, the problematic issue of its full implementation still remains open in practice. It is to hope that the integration of the system of human rights protection in Europe, through the EU accession to the European Convention, would make this issue possible. However, there are still open questions regarding effective international legal protection of national minorities in the European Union and throughout Europe. The level of protection is lowered to the state, due to the fact that the mechanisms of protection by the Strasbourg Court are limited as the provisions on protection of national minorities are not guaranteed by the European Convention on Human Rights. They are defined by the Framework Convention and the Charter on Regional or Minority Languages, though. However, the implementation and monitoring are dislocated from the jurisdiction of the Court.

Based on the above-mentioned provisions of the Lisbon Treaty and Protocol 14, on 17th March 2010 the European Commission proposed a Directive on negotiation of the accession to the Convention. In the same year, on 26th May, the Committee of Ministers of the Council of Europe gave an ad hoc mandate of the Steering Committee for Human Rights (CDDH), to review the legal instrument of accession together with the Union. In the same year, on 4th June, the EU Justice Ministers gave a mandate to the Commission to conduct negotiations on their behalf.

Process of negotiations on the accession between the European Union and the Council of Europe, informally, at the expert level, started in the beginning of July 2010. The Steering Committee for Human Rights established the ad hoc expert working group of experts from fourteen states of the Council of Europe, which task was to, together with experts from the European Commission Delegation, prepare a draft agreement on the accession in one year period. This process was done and Committee of Ministers of the CoE adopted the draft text (expert version) of the agreement.

The Committee of Ministers shall finally adopt the text of the Accession Agreement, after previously obtained opinions of the Parliamentary Assembly of the Council of Europe and both courts in Strasbourg and Luxembourg.

Finally, the Union will accede the Convention at the moment when the Accession Agreement enters into force. In order to do this, it is necessary that all the High Contracting Parties of the Convention, and the Union itself, ratify and deposit the instruments of ratification of the Council of Europe.

13 Article 52 paragraph 4 of the Charter on Fundamental Rights from 2007.
15 Protection on national minority within the European Convention can be only connected with the article 14 where national origin and affiliation with a national minority is mentioned as grounds for discrimination. However, this article is applied only in the connection with some right stipulated by the Convention and that make national minority rights protection more difficult. In addition, there is a stipulation on prohibition of discrimination in regard to any right stipulated in national laws stipulated by the Protocol No. 12 to the Convention which is a progress in this regard.
PART THREE • FUNDAMENTAL RIGHTS AND FREEDOMS IN CONTEXT OF THE EU ACCESSION TO THE ECHR AND THE NOVEL TIES FORESEEN WITH THE EU CHARTER ON FUNDAMENTAL RIGHTS

Now the ball is in the yard of the Luxembourg Court to give its opinion and the comments on the draft agreement concerning its mandate and scope. At the final stage all EU member-states should give their consent to the agreement in order for it to be effective, which still needs a lot of political efforts as not all of the member-states agree on some aspects of the accession.

Importance of the Process of the EU Accession

The EU accession to the Convention represents a major step towards the development of human rights protection in Europe. The process is actually means for integration of the protection of human rights of the Council of Europe and European Union. When the process is ended, the individual human rights guaranteed by the European Convention and its Protocol would be better protected in the cases they are violated by acts, actions or failure to act by the EU.

Having in mind several facts, such as that all EU member-states at the same time the High Contracting Parties of the Convention and that the Convention protects basic civil and political rights, parallel existence of two separate systems of judicial protection is illogical and expensive. It is illogical because both systems are based on the same foundations and values, while however there is still a gap in which not all fundamental rights are fully protected. Namely, in the present situation and the Union has developed a completely separate system of protection of human rights concerning the EU acts, actions and inactions, and the European Convention and its judicial mechanism is not applied to acts of the Union by which it violates the human rights of individuals. So, despite the two systems of protection, at some level human rights and freedoms remain unprotected.

Thereby, the main argument for the EU accession is in the line of better and unified protection of human rights, as the accession will bring better legal certainty of the EU citizens. Namely, by this the legal order of the Union would be also a subject of independent control out of the Union. Its citizens will, thus, enjoy the same level of the protection in relation to acts or omissions of the Union - threatening their rights - as they enjoy the protection in respect of such acts and omissions by their country. Also in the cases of alleged double responsibility of the Union and its state-member, the agreement foresees the co-respondent mechanism.

Finally, it is evident that the benefits of the EU accession are great for more coherent system of fundamental rights protection. Additionally, by this, the role of the Strasbourg Court is more emphasized, because, at least indirectly, all the trials in the EU concerning the rights stipulated by the European Convention and its Protocol are subject it.

Instead of the Conclusion: Looking Forward

Respect for human rights is a measure of democratic capacity of every society and the Union is expected to be at the highest level in that regard, because the level and efficiency of human rights protection shows the level of democracy and the rule of law. Therby, human dignity has to be primarily protected as a core value for human survival in terms of his/her existence in modern democracy. This is an axiom of international human rights law and as such does not need to be proved. Also, international jurisprudence and doctrine emphasize the human dignity as an important factor in political activities on providing the level of human rights protection. Judge of the International Court of Justice Rosalyn Higgins said that human rights are rights that maintain due to the existence of human beings and that they are an integral part of the integrity and dignity of human beings.16

Within the EU and CoE instruments the importance of human dignity of all is specified and emphasized. It is also confirmed in the first chapter of the EU Charter of Fundamental Rights which is devoted to dignity.

Also, it is important to underline that the legal standards that were established in the jurisprudence of the Strasbourg Court significantly contribute to the development of legal certainty in the member states of the Council of Europe, as the judgment of the Court are legal sources in them. That is why also the EU needs to be bound to these standards. In addition, but not less important is the hypothesis that the accession of the European Union to the European Convention on Human Rights will contribute to the strengthening of legal certainty, through the consistent application of European human rights law in the whole of Europe. When the accession process is completed, the European human rights protection will be not only integrated, but the citizens of the Union will finally get a chance to sue both the Union and its member-states in regard to the Union violations of human rights stipulated by the European Convention and Protocol thereto. That is why theorists and practitioners believe that the urgency of EU accession to the European Convention is of vital importance for legal certainty and coherence of the protection of fundamental human rights in Europe. 17

The EU accession is supposed to contribute to the rule of law, as well. And that is precisely one of key principles of the European Union and the Council of Europe, as well as of all the their member-states. All other values are subordinated to the primary value of the European Union - the rule of law. Also, respect for the rule of law in the European Union implies its commitment to the goals and principles of the United Nations, as well as the direct application of international agreements where possible. 18

Finally, the way from the case Bosphorus to the EU accession to the European Convention on Human Rights indicates a complex process, which has entered its final phase as far as the legal preparations for the accession concern. However, this specific path from an idea to prior goal still do not have an ending date due to its political dimension.


Bibliography


PART FOUR

POLICY OF COMPETITIVENESS AND SUSTAINABLE DEVELOPMENT AND THE SEE 2020 STRATEGY
SERBIAN INNOVATION POLICY AS A MOTOR OF COMPETITIVENESS AND SUSTAINABLE DEVELOPMENT
Dušan V. POPOVIĆ *

Abstract

Innovation policy and instruments are of outmost importance for sustainable development and competitiveness of a country. The present paper analyzes to what extent Serbia embraced the goals set by the EU 2020 Strategy, in particular the goals related to the innovation and technology development. Serbian innovation policy is largely defined by the Strategy of the intellectual property development, which is being effectively implemented by the competent authorities. The author assesses the results of the implementation of the national innovation policy by applying the criteria laid down in the Annex I of the EU Communication on the Innovation Union. It is concluded that certain features of a well performing national and regional research and innovation system are currently present in Serbia. Promotion of R&D is indeed a key policy instrument. However, the level of public investment in research is not sufficient for the achievement of goals set by national and EU sustainable development strategies. Although the Government is devoted to providing friendly environment for private investments into innovation, the level of such investments, as well as the number of public-private partnerships remain rather limited.

Key words: innovation, intellectual property, research and development, technology transfer.

1. Introduction

In the 2010, the European Union and its Member States launched a strategy for sustainable growth for the coming decade – the European Strategy for Intelligent, Sustainable and Inclusive Growth (hereinafter, the EU 2020 Strategy).1 The European Union has set five objectives to be reached by 2020: (1) ensuring 75% employment of 20-64-year-olds; (2) getting 3% of the EU’s GDP invested into research and development; (3) limiting greenhouse gas emissions by 20% or even 30% compared to 1990 levels, creating 20% of our energy needs from renewables and increasing the energy efficiency by 20%; (4) reducing school dropout rates to below 10%, with at least 40% of 30-34-year-olds completing tertiary education; (5) ensuring 20 million fewer people are at risk of poverty or social exclusion. In order to meet these targets, the European Commission proposed seven flagship initiatives: (1) Innovation Union – focusing on research and development policy; (2) Youth on the move – focusing on enhancement of Europe’s higher education system; (3) A Digital Agenda for Europe – aimed at delivering sustainable economic and social benefits from a Digital Single Market based on ultra-fast Internet; (4) Resource-efficient Europe – focusing on development of low-carbon economy; (5) Industrial Policy for Green Growth – aimed at promoting entrepreneurship and developing new skills; (6) Agenda for New Skills and Jobs – aimed at raising employment levels; (7) European Platform for Green Growth – focusing on economic, social and territorial cohesion.

* Dušan V. Popović, PhD, Associate Professor at the Faculty of Law, University of Belgrade, e-mail: dusan.popovic@ius.bg.ac.rs

1 The EU 2020 Strategy was adopted by the European Council on 17 June 2010.
Policy of competitiveness\(^2\) lies at the very foundations of the EU 2020 Strategy. The successful implementation of the strategy should enable the Union to remain the global economic and political player, and cope with additional pressure coming from the “new” economic powers, such as India or Brazil. Although the EU 2020 Strategy focuses on Member States of the Union, it certainly has implications on candidate countries like Serbia. Following the entry into force of the Interim Agreement with the EU, and subsequent entry into force of the Stabilization and Association Agreement, Serbia undertook the obligation to harmonize its legal system with the *acquis communautaire*.\(^3\) The legal and political approximation with the European Union comprises the acknowledgment of EU’s global strategies, their adaptation to national context and, finally, their efficient enforcement. Only after Serbia develops a sustainable and competitive economic system it will be able to join the Union.

The present paper analyzes to what extent Serbia embraced the goals set by the EU 2020 Strategy, in particular the goals related to the achievement of sustainable economic and technological development. Due to author’s predominant focus on development of economy stricto sensu, the goals related to the achievement of sustainable development of society and the protection of environment will not be examined. The paper first focuses on the analysis of the framework document – National Sustainable Development Strategy (hereinafter, NSDS), adopted by the Serbian Government in 2008. This framework document was subsequently completed by several sector-specific strategies, some of which will be examined in detail. The role of science, technology and innovation policies and instruments is of outmost importance for sustainable development.\(^4\) In that respect, the Serbian Government adopted the 2011-2015 Strategy of the Intellectual Property Development, which shall be closely analyzed. To a lesser extent, the paper focuses on other strategic documents, such as the Strategy for scientific and technological development, adopted in 2010, and the Strategy for development of competitive and innovative small and medium sized undertakings, adopted in 2008. The fact that the adoption of certain national strategies preceded the adoption of the EU 2020 Strategy does not compromise the pertinence of the objectives set by the Serbian Government, as compared to those of the European Union. This is not fortuitous given that the EU 2020 Strategy

\(^2\) Classical definitions of competitiveness concentrate on the capacity of an economy to export. They emphasize the capacity of national economies to directly compete against one another. However, certain economists strongly reject the idea that competitiveness is about competing nations. For instance, Krugman argues that national living standards are predominantly determined by domestic factors rather than by some competition for world markets. In this paper, we shall use the concept of competitiveness in its usual understanding – as the productivity with which a state utilizes its human capital and natural resources. For an in-depth presentation of different concepts of competitiveness, see: Gros, Daniel, and Roth, Felix. *The Europe 2020 Strategy: Can it maintain the EU’s competitiveness in the world?*. Brussels: Centre for European Policy Studies, 2012, 5-11.

\(^3\) Stabilization and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia of the other part, Art. 2: “*Respect for democratic principles and human rights (…), respect for principles of international law (…) and the rule of law as well as the principles of market economy (…) shall form the basis of the domestic and external policies of the Parties and constitute essential elements of the Agreement.*” The identical provision is laid down by Art. 1 of the Interim agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part. The Interim Agreement entered into force on 01 February 2010, while the Stabilization and Association Agreement entered into force on 01 September 2013. The aim of the Association between the Community and its Member States, of the one part, and the Republic of Serbia, of the other part, *inter alia*, is “(…) to provide an appropriate framework for political dialogue, allowing the development of close political relations between the Parties, to support the efforts of Serbia to develop its economic and international cooperation, including through the approximation of its legislation to that of the Community, (…) to promote harmonious economic relations and gradually develop a free trade area between the Community and Serbia (…).” See Art. 1 of the Stabilization and Association Agreement.

\(^4\) There is an increased recognition that science, technology and innovation (STI) can stimulate inclusive and sustainable development in multiple ways. For an in-depth analysis of the role of STI policies, see: Brito, Lidia “The role of Science, Technology and Innovation Policies and Instruments for a Paradigm Shift Towards Sustainable Development”. In *Technologies for sustainable development: A way to reduce poverty?*, edited by Jean-Claude Bolay, 13-20. Geneva: Springer, 2014.
closely follows the goals laid down by previous EU strategies (e.g. Lisbon Strategy), and should be seen as a follow-up strategy rather than as an entirely autonomous strategic document.5

2. National Sustainable Development Strategy

In May 2008, the Government of the Republic of Serbia adopted the National Sustainable Development Strategy, which is a comprehensive framework addressing the main areas of social and economic development of the country until 2017.6 The NSDS outlines the following key national priorities: (1) membership with the European Union; (2) development of a competitive market economy and balanced economic growth; (3) development of human resources, increased employment and social inclusion; (4) development of infrastructure and balanced regional development; (5) protection and improvement and the rational use of natural resources. The first priority underlines the importance of the accession of Serbia to the EU. The NSDS further defines this priority through the following subgoals: (1) development of stable institutions guaranteeing democracy, rule of law, and respect and protection of human and minority rights; (2) development of a market economy capable of withstanding the pressure of competition within the EU; (3) harmonization with the EU acquis and undertaking obligations resulting from membership. The second priority underlines the importance of economic stability of a country. It is further defined through the following subgoals: (1) improving conditions to attract foreign direct investment; (2) macroeconomic stability and increased exports; (3) development of small and medium-sized enterprises; (4) finalizing privatization; (5) providing for a safe energy supply with increased energy efficiency of actors in the energy sector and improving the energy efficiency of the economy; (6) promoting innovations and entrepreneurship; (7) promoting an IT society.7

Following the adoption of the NSDS, the Government of Serbia established the Office for sustainable development, initially attached to the Office of the Deputy Prime-Minister in charge of European integration.8 The Office for sustainable development coordinates the activities of different state bodies which are expected to implement the NSDS, such as the Intellectual Property Office, the Competition Authority, Office for European integration, Privatization Agency, National Employment Agency… Each of these state bodies appointed a coordinator for sustainable development. Further to this, the Deputy Prime-Minister in charge of European integration chairs the Council for sustainable development, an advisory body formed of representatives of different ministries, as well as representatives of non-governmental organizations. Unfortunately, the Council rarely meets and the last session was organized in 2011.

The priorities set by the NSDS do not differ significantly from those laid down by sustainable development strategies in other countries of the region. For instance, both Montenegrin and Croatian strategies also highlight the importance of competitiveness of a country, which should be

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5 The importance of sustainable development was recognized by other international organizations as well. For instance, UNESCO adopted instruments aiming at strengthening national capacities in STI policy formulation, evaluation and implementation. Furthermore, UNESCO is focused on the promotion of culture of innovation. See: Bokova, Irina ‘An integrated policy approach in science, technology and innovation for sustainable development: A UNESCO idea in action.’ The Global Innovation Index (2012): 143-149.


7 As explained in the introductory part, this paper is concerned only with the “economic pillar” of sustainable development. The “social pillar” and “environmental pillar” will not be analyzed. Within the “economic pillar” the paper focuses specifically to innovation policy.

8 Following the adoption of the Act on ministries (Official Journal of the Republic of Serbia, № 72/2012 and 76/2013), the position of the Deputy Prime-Minister in charge of European integration was abolished. Instead, the Act introduced the position of a minister without portfolio responsible for European integration.
improved through *inter alia* innovation and new technologies.\(^9\) Certain authors consider that strategies on sustainable development are rather a “collection of wishes” than a result of systematic plan of a country to substantially reshape its policies.\(^{10}\) In our view, the success of a framework sustainable development strategy is best verified through the analysis of the implementation of sector-specific strategies within the reference period. In order to assess the outcome of Serbian sustainable development strategy with respect to innovation, we shall analyze the results achieved through the implementation of the national strategy of intellectual property development. Finally, we shall apply the self-assessment tool contained in the Annex I of the EU Communication on the Innovation Union in order to identify whether the features of a well performing national and regional research and innovation system are currently present in Serbia.\(^{11}\)


In June 2011, the Government of Serbia adopted the Strategy of the Intellectual Property Development for the period of 2011 to 2015 (hereinafter, SIPD).\(^{12}\) This document sets the main priorities of the Serbian innovation policy within the reference period. The SIPD identifies the objectives and measures of short term, middle term and long term development of the system of intellectual property in Serbia, in order to make it compatible with the priorities projected in the National Sustainable Development Strategy. According to the SIPD, in 2015 Serbia should be a country in which the level of protection of intellectual, industrial and commercial property is comparable to that existing in the European Union, where the level of piracy and counterfeiting of goods is reduced to the average level existing in the European Union, where programs have been established for the affirmation of innovative activities, and where public-private partnership between scientific and R&D organizations, on the one part, and economy, on the other part, gets facilitated by precise legal framework.

The SIPD sets four national key priorities of the innovation policy in Serbia: (1) improvement of legal and institutional basis of intellectual property protection; (2) suppression and sanctioning of infringements of intellectual property rights; (3) economic valorization of intellectual goods; (4) raising public awareness and improving education in IP-related issues.

#### 3.1 Improvement of legal and institutional basis of intellectual property protection

Serbia is a country with a long tradition of intellectual property protection.\(^{13}\) It is member of all major international conventions for the protection of the intellectual property, with the exception of the Treaty on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPS). Since Serbia’s goal is to become a member state of the European Union and the World Trade Organization, the process of harmonization of its IP rules with the *acquis communautaire* and the TRIPS started already...
in 2000, following the changes in the political orientation of the country. This process intensified in the last five years (2009-2013), when Serbia adopted its new IP legislative framework. The reform started with the adoption of the new Copyright Act, the Act on the legal protection of registered designs, as well as the Trademarks Act. This was succeeded by the adoption of the new Act on Geographic Indications and Designations of Origin, the Act on optical discs, the Act on the protection of business secrets, the Plant Varieties Protection Act, the Patents Act, as well as the Integrated Circuit Topography Act. Furthermore, in October 2010, Serbia became party to the European Patent Convention and in November 2010 it became party to the Singapore Treaty on the Law of Trademarks. This comprehensive reform brought legal instruments on IP protection in Serbia generally in line with the EU law. This view is shared by the European Commission, which stated in its 2013 Serbia Progress Report that “(...) overall, alignment in the area of intellectual property is advanced”. Regarding the improvement of legal basis of intellectual property protection, the SIPD and the Action Plan adopted for its implementation were closely followed by the IP Office, the Government and the National Assembly. All the acts the adoption of which was scheduled in the Action Plan were passed, leading the European Commission to highlight that the SIPD is being successfully implemented. By reforming the rules on intellectual property protection, Serbia fulfilled the obligation undertook by signing the Stabilization and Association Agreement with the EU. Namely, Serbia was under obligation to secure the level of protection of the intellectual property similar to the level existing in the Union, within the period of five years following the entry into force of the Interim Agreement. This period ended on 31 December 2013.

With regard to the institutional basis for intellectual property protection, the SIPD takes the position in favour of the financial independence of the Intellectual Property Office. In the conditions of purely budget financing, the IP Office cannot achieve the necessary flexibility with respect to hiring of national and foreign experts and development of other, non-administrative functions (e.g. information, coordination, mediation). Following examples of IP offices in France, Britain, Denmark, or Romania, the SIPD argues in favour of a self-financing of the Serbian IP Office, or at least the introduction of a combined system of self-financing and budgetary funding. As rightly indicated in the SIPD, the transfer to self-financing would be a rational way to reduce the pressure on the public budget, while at the same time enabling the Office to further develop. The Office could finance its activities from the income realized through the administration of international conventions (e.g. Madrid Agreement concerning the International Registration of Marks), from the registration and

23 The Interim Agreement, Art. 40, para. 3.
24 As it was the case at the moment of the adoption of the SIPD, the information and coordination activities, as well as the international cooperation, are not funded by the Government, but from external sources (European Patent Organization, European Union, World Intellectual Property Organization). Since the financial aid provided by international organizations is not of a permanent character, the problem of financing of these activities remains to be resolved.
maintenance of validity of national industrial property rights, from the organization of expert exam for the representation in the process of protection of patents and other industrial property rights before the Office… Unfortunately, for the time being the IP Office remains entirely dependent on budget transfers, with no expression of the political will of the Government to modify the system of financing.  

Although the overall activities of the IP Office may be positively assessed, the introduction of the “user-friendly” information and communication infrastructure has not yet been entirely implemented. Namely, the SIPD projected the introduction of the electronic administration of the applications for the acquisition of industrial property rights, by the end of 2015. The preparations for the introduction of e-government functionalities in the Office are ongoing and will hopefully be completed by the end of the reference period.

### 3.2 Suppression and sanctioning of infringements of intellectual property rights

The system of suppression and sanctioning of infringements of intellectual property rights consists of two main segments: the administrative one (police, customs, inspectorates, Republic Broadcasting Agency) and the legislative one. Inspections are the most efficient bodies in fighting against counterfeiting and piracy. Their activities are governed by the Act on special powers for efficient protection of intellectual property rights, and a number of sector-specific acts. However, since the competencies of different inspections are highly segmented and in certain cases overlap, the SIPD instructs the reconsidering of the division of competences of the inspections, with the aim of concentrating competences to fewer bodies. The European Commission also highlighted the problem of distribution of inspection powers and noted that inter-institutional cooperation takes place on a bilateral and ad hoc basis, rather than in an institutionalized and predictable manner. The Proposal of the new Act on special powers for efficient protection of IP rights is currently under public debate. Although the new act introduces clearer division of competencies between different institutions in charge of IPR protection, it does not establish a formal coordination mechanism between the institutions in charge of IPR protection.

The efficient IPR protection largely depends on the expertise of courts in intellectual property. For years, the competence in IP cases was distributed to more than 40 courts – higher courts, and, in case the parties were business companies - commercial courts. Bearing this in mind, as well as the fact that less than 5% of court cases in Serbia were IP-related, judges of higher and commercial courts rarely had the occasion to decide on this type of disputes, which led to their limited expertise in intellectual property. The SIPD instructs the specialization of certain courts in intellectual property disputes, which would be possible through amendments to the acts on organization of courts. The Action Plan for the implementation of the SIPD prescribed that this reform should take form either of the introduction of specialized IP courts or the concentration of territorial competence of courts of first instance. The legislator opted for the second possibility and reduced the number of courts of

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25 The Action Plan for the implementation of the SIPD scheduled the completion of legislative proposal for the transformation of the IP Office into an independent public agency for June 2011.


28 The text is available on the website of the Intellectual Property Office.

29 The lack of formal coordination mechanism was also criticized by the European Commission in its latest progress report See: Serbia 2013 Progress Report, p. 25.

30 In the absence of the official court statistics, we quote the information provided by the Government in the SIPD (pp. 28-29).
first instance competent for IP-related cases. Since 01 January 2014, Higher Court in Belgrade and Commercial Court in Belgrade are exclusively competent to decide on IP-related disputes in first instance.

3.3 Economic valorization of intellectual goods

With regard to the economic valorization of intellectual goods, the SIPD highlights the importance of creation of technology transfer centers at public universities, since this would facilitate the contacts between innovators and capital owners. Such forms of cooperation have stimulating effect on the national technological development, because the economy becomes a “client” of domestic universities, which work on projects solicited directly by the economy. With the assistance of the Intellectual Property Office, the University of Belgrade, a leading Serbian university, established in 2010 its Technology Transfer Center. The IP Office also drafted model licensing agreements and models of other contracts for economic exploitation of intellectual property rights. These are particularly useful for inventors coming from the universities or small and medium sized enterprises, since they usually do not have in-house access to expert legal assistance. Further to this, the IP Office started offering, within the time limits set by the Action Plan, the service of “diagnostics” of intellectual property status. This service, offered on a commercial scale, helps undertakings identify weaknesses in their treatment of intellectual property and explore possibilities for development. The statistics of the IP Office demonstrate the increase in the number of national applications for industrial property rights registration.

Other forms of assistance to research and development activities, particularly the activities of small and medium sized undertakings, are defined by the Strategy for scientific and technological development, as well as the Strategy for development of competitive and innovative small and medium sized undertakings.

3.4 Raising public awareness and improving education in IP-related issues

With respect to the raising awareness on the importance of intellectual property protection, the SIPD requires from the IP Office to organize the translation and distribution of WIPO and EPO brochures, improve the marketing activities surrounding the celebration of the Intellectual Property Day, improve the website of the Office and continue supporting the exhibitions of innovations. These goals are already achieved. With respect to the education in intellectual property, the SIPD requires that the Government support the introduction of mandatory courses in intellectual property law at Judicial Academy. This objective has not yet been achieved; however, all Law Faculties at public universities in Serbia introduced a mandatory undergraduate course in Intellectual Property

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31 Act on the seats and territorial jurisdiction of courts and public prosecutor’s offices, Official Journal of the Republic of Serbia nº 101/2013, Art. 4-5.
32 A detailed presentation of the activities of the Technology Transfer Center of the University of Belgrade is available at http://www.ctt.bg.ac.rs.
33 December 2012.
34 In 2013, the increase of 42% of national design applications was registered, followed by the increase of 20% of national trademark and designation of origin applications, and 5% of national patent applications. See: Serbian IP Office Bulletin, nº 16/2014, p. 1.
36 The IP Office translated into Serbian and posted all the brochures on its website. It regularly supports the organization of the Annual Competition for the Best Technological Innovation and the Annual Competition of Inventors “Tesla Fest.” See websites of these competitions: http://www.inovacija.org and http://www.teslafest.com.
37 Further to passing the bar exam, all future judges and prosecutors need to complete the educational training programme at the Judicial Academy.
PART FOUR • POLICY OF COMPETITIVENESS AND SUSTAINABLE DEVELOPMENT AND THE SEE 2020 STRATEGY

Law. Law also requires that IP courses are introduced at art, engineering, technical and management faculties. This goal is partly achieved – IP Law is taught at majority of art faculties at public universities in Serbia, and only at few engineering, technical and management faculties.

4. Assessment of Serbian innovation policy with regard to priorities of the EU Innovation Union

The previous analysis demonstrated that, overall, the SIPD has been successfully implemented by the relevant Serbian authorities. However, the success of the innovation policy does not depend exclusively on the effective implementation of the national intellectual property development strategy. Indeed, in correctly assessing the results of a national innovation policy of an EU candidate country, one should compare the current state of innovation development with that projected in the EU strategic documents. The innovation policy of the EU and its Member States in the reference period 2010-2020 has been defined by the Europe 2020 Strategy, within the initiative “Innovation Union”. In this chapter, we shall apply the self-assessment tool contained in the Annex I of the EU Communication on the Innovation Union in order to identify whether the features of a well performing national and regional research and innovation system are currently present in Serbia.

4.1 Promotion of R&D as a key policy instrument

In Serbia, innovation policy is perceived as an important public policy. Its design and implementation is steered at the highest political level and based on a multi-annual strategy. The Council for sustainable development defines broad policy orientations and is supposed to ensure sustained and properly coordinated implementation. The coordination is particularly important given the fact that the innovation policy cannot be defined and pursued independently from other public policies related inter alia to education and research, industrial development, or employment. Although Serbia adopted the framework strategy on sustainable development, as well as the accompanying sector-specific strategies, their implementation lacks proper coordination. Regarding specifically the implementation of the innovation policy, no central entity has been established in order to effectively coordinate the activities of the Intellectual Property Office, the Ministry of education and science, the Ministry of economy, and other relevant authorities. The National Council for Science and Technological Development is not empowered to coordinate such activities, but only to report to the Government on the scientific and technological development. The implementation of the innovation policy is further complicated by the fact that the subject-matter of innovation development is regulated by several different strategies (the Strategy of Intellectual Property Development and the Strategy of Scientific and Technological Development, above all). Even the implementation of a single strategy entails the coordination of activities of several state authorities. Our analysis demonstrated that the major problem in the implementation of the SIPD is the absence of a formal coordination mechanism which would organize the activities of the IP Office, inspections, courts and ministries.

38 With the exception of the Faculty of Law of the University of Novi Sad, where IP Law is taught as an optional master course.
39 For instance, the Information and Education Center of the IP Office regularly organizes additional courses in Intellectual Property Law for students of the Faculty of Mechanical Engineering and the Faculty of organizational sciences of the University of Belgrade.
40 The self-assessment tool enumerates ten features of well performing national and regional research and innovation systems. Since certain of these features overlap to a certain extent, we organized them differently - into four distinctive criteria.
42 This problem was also emphasized by the European Commission. See: Serbia 2013 Progress Report, p. 25.
Overall, one could conclude that the promotion of R&D is a key policy instrument in Serbia. However, the effective coordination, monitoring and review system is not in place and should be developed in the short run.

4.2 Extensive definition of innovation

The EU initiative “Innovation Union” relies on a broad concept of innovation, which goes beyond technological research and its application. The chosen concept includes innovation in services, improvements of processes and organizational change, business models, marketing, branding and design. The same concept of innovation is accepted in Serbia: innovation may refer to the new or improved product, new or improved process, new or improved management or marketing method.43 In supporting innovation, the state authorities demonstrate equal interest in technological research, on the one hand, and improvements of processes and business models, on the other hand. Development of technological innovations is mostly supported through the activities of the Innovation Fund of the Republic of Serbia. This fund, established in 2011 by the Government, provides funding for innovations, particularly through cooperation with international financial institutions, donors and the private sector.44 The Fund supports technological innovations, extensively defined as development and successful placement into widespread use of new or improved products, services and processes from all fields of science and technology.

4.3 Adequate and predictable public investment in research

Within the projected Innovation (European) Union, public funding should assume an important role in providing a high quality knowledge infrastructure and should act as an incentive for maintaining excellence in education and research. Public investments in education, research and innovation should be prioritized and budgeted in the framework of multi-annual plans to ensure predictability and long-term impact. Public funding should leverage greater private sector investments. The state authorities should adopt policies to promote innovation, entrepreneurship and enhance the quality of business environment.

The Serbian research system is centralized and governed by the Ministry of Education, Science and Technological Development. The Ministry is almost only public funding body in the country. Investments in R&D are budgeted in the framework of multi-annual plans to ensure stability and long-term impact. Project financing based on an open competition is accepted in Serbia since 2002. Recognition and integration of business R&D sector into the national development system is key objective of the Strategy of Scientific and Technological Development.45 The implementation of the Strategy is based on the annual budget of the Ministry, which must be approved every year by the Parliament. Since 2001, the public investment in science rises, but remains on similar level when expressed in percentage of GDP.46 Gross domestic expenditure on research and development

44 Yearly reports of the Innovation Fund of the Republic of Serbia are available on its website: http://www.inovacionifond.rs.
45 Strategy of Scientific and Technological Development, pp. 48-52.
is approximately at 0.7% of GDP, significantly below 3% projected in the European Union. Given the complex economic environment, it is not likely that the objective of investment in innovation of 1% of Serbian GDP in 2015, projected by the Strategy of Scientific and Technological Development, will be achieved.

Overall, public investment in research is present, but its level is not sufficient for the achievement of goals set by national and EU sustainable development strategies. Although the Government is devoted to providing friendly environment for private investments into innovation, especially through the activities of the Innovation Fund of the Republic of Serbia, the level of such investments, as well as the number of public-private partnerships remain rather limited.

### 4.4 Supporting innovation through education system

According to the EU 2020 Strategy, the state authorities should ensure a sufficient supply of (post)graduates in science, technology, engineering and mathematics. Education and training curricula should focus on equipping students with the capacity to develop transversal competencies (e.g. critical thinking, creativity, teamwork). Entrepreneurship education should be widely available or included into curricula. The Government should support partnerships between higher education institutions, research centers and businesses. Innovation clusters should be promoted to encourage co-operation and knowledge sharing. In particular, the authorities should create a more favourable business environment for small and medium sized enterprises.

The Serbian education authorities engaged into a comprehensive reform of education system a decade ago. All public and private universities accepted the principles of Bologna Declaration, thus restructuring and modernizing their curricula. Certain efforts have been made in supporting partnerships between higher education institutions and businesses, for example through the activities of the Technology Transfer Center of the University of Belgrade or the Innovation Fund of the Republic of Serbia. Unfortunately, the Government does not coordinate its education, employment and innovation policies. For instance, the number of students whose education is funded by the state is not determined in relation to the situation on the labour market and the priorities of scientific and technological development of the country. Rather, it represents a political compromise, resulting in further misbalances on the labour market.

Innovation policy is well harmonized with the Government activities aiming at supporting small and medium-sized enterprises (hereinafter, SME). In 2008, the Government adopted the Strat-

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48 One of the key objectives of the European Union throughout the last decade has been to encourage increasing levels of investment, in order to provide a stimulus to the EU’s competitiveness. The Lisbon strategy set the EU an objective of devoting 3% of its gross domestic product to R&D activities by 2010. The target was not reached. Subsequently, the 3% target was maintained, forming one of five key objectives within the Europe 2020 Strategy, adopted in 2010.

49 The Act on public-private partnership and concessions (Official Journal of the Republic of Serbia, no 88/2011) was adopted only in 2011. Due to late introduction of the adequate legislative framework, cooperation between public and private sector in Serbia was organized sporadically and generally took form of a “contractual PPP” where the public sector contracted the provision of a certain service to the private investor. For a detailed analysis of public-private partnerships in the context of technology transfer see: Danilovic-Grkovic, Gordana et al., Javno-privatno partnerstvo za naucno-zasnovane inovacije i znanjem odvijen ekonomski razvoj u Srbiji. Belgrade: UNDP, 2007. See also the website of the Commission for public-private partnership, established by the Government of Serbia in 2012: http://www.ppp.gov.rs.

ogy for development of competitive and innovative small and medium sized undertakings, as well as the corresponding Action Plan. One of the main priorities set by the Strategy is the development of innovative capacities of Serbian SMEs, in particular through the introduction of marketing and organizational innovations, and product and process innovations. \(^51\) Serbia’s state-run Development Fund is a major player in supporting SME development as it provides funds in the form of favourable loans to SMEs in Serbia. \(^52\) However, an uneasy economic environment caused stagnation of SMEs and postponed the achievement of objectives set by the Strategy. \(^53\)

5. Concluding remarks

Policy of competitiveness lies at the very foundations of the EU 2020 Strategy. The successful implementation of the strategy should enable the Union to remain the global economic and political player. Being the EU candidate country, Serbia harmonized its sustainable development strategy with the priorities set by the Union. Further to the adoption of the National sustainable development strategy, Serbia adopted a series of sector-specific strategies and designated the state authorities in charge of their implementation. However, the central coordination mechanism – the Council for sustainable development, does not meet regularly. It is of outmost importance that the effective coordination, monitoring and review system is put in place in the short run.

Serbian innovation policy is largely determined by the Strategy of the intellectual property development. Our analysis demonstrated that the strategy is being successfully implemented. Legislative framework has been harmonized with EU law, and activities aiming at facilitating economic valorization of economic goods have been taken. Further efforts should be made in coordinating the activities of state authorities in charge of sanctioning the infringements of intellectual property rights. Further to the Strategy of intellectual property development, Serbia’s innovation policy is defined by the Strategy for scientific and technological development and the Strategy for development of competitive and innovative small and medium sized undertakings. Based on the application of the criteria laid down in the Annex I of the EU Communication on the Innovation Union, one could conclude that certain features of a well performing national and regional research and innovation system are currently present in Serbia. Promotion of R&D is indeed a key policy instrument. The Governments set a network of bodies in charge of the effective implementation of objectives of the national innovation policy. Efforts have been made with respect to stronger support to innovation through education system. However, although public investment in research is present, its level is not sufficient for the achievement of goals set by national and EU sustainable development strategies. Albeit the Government is devoted to providing friendly environment for private investments into innovation, the level of such investments, as well as the number of public-private partnerships remain rather limited.

\(^{51}\) Strategy for development of competitive and innovative small and medium sized enterprises, p. 9.

\(^{52}\) Annual programs of the Development Fund of the Republic of Serbia are available on its website: http://www.fondzarazvoj.gov.rs.

\(^{53}\) The European Commission publishes the Annual Report on European SMEs. Serbian SMEs are also evaluated. SME Performance Review, the main tool the European Commission uses to monitor and assess countries’ progress in implementing the Small Business Act, is available on the website of the Commission: http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review.
PUBLIC-PRIVATE PARTNERSHIP AS THE “HORIZON 2020”
IMPLEMENTATION TOOL: THE MAIN METHODOLOGICAL ISSUES
Predrag CVETKOVIĆ

1. Introduction

In the document entitled as “A Strategy for smart, sustainable and inclusive growth”¹ public-private partnerships (hereinafter PPPs) are nominated as the relevant tool for leveraging the financial means of EU: namely, it is emphasized that Europe “must also do all it can…a pursue new avenues in using a combination of private and public finance, and in creating innovative instruments to finance the needed investments, including public-private partnerships (hereinafter: PPPs)”² In the quoted provision of the abovementioned Communication is anchored the undisputable legitimacy of PPPs concept as the pattern for achieving certain economic stability of EU. The described approach is further in-depth implemented in the European Commission Communication “Partnering in Research and Innovation”³ in this document the importance of PPPs role in Research and Innovation processes (R&I) is clearly underlined.⁴ The preceded considerations justified the presumption of PPPs importance for the realization of Horizon 2020 fundamental goals. Therefore the analysis of PPPs main methodological features is of the importance for the application of public-private partnership pattern as the legitimate tool for Horizon 2020 implementation.⁵ The treatise about this question is of particular purpose for the EU candidate countries with limited (if any) experience in the field of private participation in the public sector activities.⁶

2. Methodological Questions: the “Intellectualization” of PPP as Preliminary Issue

As the phenomenon of undisputable economic, social, political and legal importance at national, regional and universal level, PPPs demand the creation of broader “intellectual framework” in order to provide clear structure and principles necessary for producing genuine and practically implementable results of relevant research. This process for the purpose of this work is named “intellectualization” of PPPs (creation of PPPs “common intellectual platform”).

¹ Predrag Cvetković, PhD, Professor at the Faculty of Law, University of Niš, e-mail: pepi@prafak.ni.ac.rs
³ See ibidem, par. 3. 2: “Investing in growth: cohesion policy, mobilizing the EU budget and private finance”.
⁶ For the example, obstacles for legitimization of PPPs in the realm of socio-economic environment of Western Balkan Countries could be summarized to the following issues:1. lack of institutional memory which causes disparity between private and public interests (the apologetics of “hierarchical constant”; see more infra in the last paragraph of part III of the present article); 2. (un)justified stigmatization of privatization process; 3. insufficient ‘epistemic legitimacy’ (lack of public sector knowledge and skills necessary for PPP realization).
Two main directions of PPPs “intellectualization” could be detected: polycentric and holistic approach.

In prominent academic circles prevails the attitude that PPPs are not suitable to be embraced in the generally structured system based on universally applicable principles (independent from the point of PPPs observation: legal, social, economic, political etc). The main argument for the “polycentric approach" is that PPPs have different faces. Therefore, the practice has to be criteria in finding the peculiar characteristic of each of them. The magisterial example in this sense is substantiated by Guðrið Weihe, who explains why is not possible, even not needed to have one genuine and holistic definition of PPPs.\(^7\)

With full respect to the advocates of “polycentricity" as the methodological premise on which the research of PPPs phenomenon rests on, this paper accepts and promotes another, holistic approach. Namely, the dynamic and importance of PPPs question and, above all, the immense practical consequences (economical, political, social) of (un)successfully implementation of particular public-private partnership project, are the impetus for the efforts for incrementally building of the encircled (but at the same time flexible) holistic “intellectual" framework for PPP research and implementation of its results. Broadly formulated, thoroughly defined and theoretically informed holistic framework should prevail over the polycentricism of PPPs in terms of subjects, tasks and discourse. The described approach is the presumption for the coordination\(^8\) and galvanization\(^9\) of public and private, as well of “third sector"interests. The inclusion of “third sector" in (otherwise binary) construction of PPPs is justified by its raising role in PPPs conceptual framework.\(^10\) The third sector (embodied and heralded in the terms „civil sector" or “NGOs") could have important function for the purpose of PPPs structuring and implementation. The term “public-private partnership" as defined in this work for the purpose of its analysis in the Horizon 2020 discourse has to be understood in the broader meaning: meaning which includes “third" sector alongside public and private one. To conclude with the following: the main methodological remarks contained in the present paper are equally applicable to the described broader understanding of PPPs, in the same manner, with the same substance and reach as it is the case with PPPs understood as the binary construction restricted to public –private cooperation.

3. PPPs: Basic Issues

Public-private partnership is a widely accepted concept of joint action involving the private and the public sectors (embodied in the state and its different emanations) which is aimed at exercising the public interest in free market economies. The functioning of PPP is subject to establishing:

- a strong institutional background;
- ideological neutrality (involving a non-partisan approach, i.e. the absence of a negative attitude by public sector toward the privately owned capital);

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\(^7\) "(...) there are multiple understandings and usages of the PPP term. The label covers, for example, short-term and long-term contracting arrangements, joint ventures, and network relations between public and private actors as well as general public-private policy set-ups. For the same reason, it is argued that it is neither feasible nor expedient to search for an overarching and authoritative definition of PPP – i.e. one which is capable of capturing all the different variations of public private arrangements that the PPP label covers today. This is not logically possible without rendering the definition so broad that it in reality becomes meaningless (...). See: Weihe, “Public-Private Partnerships -Meaning and Practice”, PhD Series 2. Copenhagen Business School open archive, 2009, pp. 15-16. Available at: http://openarchive.cbs.dk, accessed June 11, 2012.

\(^8\) About coordination process see more infra in part IV of the present paper.

\(^9\) About galvanization process see more infra in part V of the present paper.

• political support emanated through the existence of “policy window”\textsuperscript{11}.

The tension and controversy between the public and the private sector are defined by their mutual opposites and reflected in their conflicting interests. The former is by its own structure and mode of functioning aimed at the protection, exercise and development of the public interest. The latter is, on the other hand, based on private initiative aimed at creating economically measurable outcomes. The abovementioned difference is \textit{prima facie} the fundamental obstacle and the primary question to be answered in the construction of public private partnership.

The previous issue has to be resolved by PPPs construction through the coordination and galvanization of public and the private sectors’ interests.

The coordination implies the presence of clear and specific common interest (in addition to particular interests of each sector), which lays the common grounds for enacting and implementing an acceptable solution.\textsuperscript{12} The thoroughly structured coordination via PPPs construction is the base for the “galvanization” of public and private interest, as the second level of PPPs establishment.\textsuperscript{13}

The result of coordination and galvanization should contribute to the eradication or significant restriction of so-called “moral hazard” issue. As far as a public actor is concerned, the moral hazard rests on the confidence and trust vested in the private actor and his readiness, capability and commitment to fulfill not only his own private interest but also the public interest which is the first-degree interest in the PPPs construction.\textsuperscript{14} As for a private actor, the moral hazard is caused by his uncertainty in terms of being subject to a fair and equitable treatment in the PPPs relations, along with the exposure of such an actor to the discretionary and potentially capricious activities of the state and its emanation.\textsuperscript{15}

Nevertheless, even when the coordination and galvanization are successfully implemented, there is no absolute “equalization” between public and private interest in the PPPs framework. This inequality is reflected in the so-called hierarchical constant; namely, in case when two cardinal interests (private and public) are in conflict, the hierarchical supremacy of the public interest is activated. The state (as the holder and protector of public interest) returns to the sovereignty patterns and intervenes as soon as the public interest is deemed to be (or potentially might be) endangered. This permanent authority of the state persists during the entire PPPs process, irrespective of its dynamic, consistency or structure. On the other side of the spectrum, it remains the duty of the state to eliminate the possibility of transforming such a constant into the crypto-monopoly of public bodies over the public goods and private operators in the public sector.

\textsuperscript{11} As the PPPs devastate the monopoly of the state in the provision of public services and in sectors of public interests, the political support of state for such de-monopolization is of critical importance. The waiver of sovereignty in terms of such monopoly has to be explicit, irrevocable and with a defined scope of effect.

\textsuperscript{12} See more infra in part IV of the present paper.

\textsuperscript{13} See more infra in part V of the present paper.

\textsuperscript{14} The “first degree interest” feature of public interest is explained infra in the discussion dedicated to so-called “hierarchical constant” in the last paragraph of this part of the present article.

\textsuperscript{15} The goal of PPP is to increase benefits for both categories of participants. Thus, the public sector tends to achieve the social welfare and quality of life through improvement of the quality and accessibility of public goods and services. On the other hand, there is the pure economic interest of private participants. Nota bene: The benefit of public actors is not as measurable as the economic result. On the political “market” (as the place where the benefit of public actors takes place), there is no defined and workable law of “supply and demand”. The relevant instrument for regulating the political market is to pursue the activities aimed at securing an actual and genuine improvement in the volume and quality of providing public services and protecting public goods.
4. The Coordination of PPPs Actors’ Interests

As previously defined, the coordination in terms of PPPs implies the presence of clear and specific common interest (in addition to particular interests of each sector), which lays the common grounds coordination as the first phase of public-private partnership establishment.

The main presumption for the existence of mutual coordination between involved PPPs actors is the interdependence of the actors and the convergence of their objectives. This interdependence is defined as a “primary starting condition” for PPPs.16

When the abovementioned interdependence of actors (as the starting condition) arises? The answer is: when the actors perceive the pressure.17 This pressure differs in nature:

- political pressure for public actor (negative pressure, derived from economic need and public interests not adequately satisfied);
- economic pressure for private actor (positive pressure) which wants to use the public space as the field for generating the profit;18 and
- “metaphysical” pressure of “third” sector (having in mind the protection and development of broader public goals outside of available public actors arsenal of tools).19

As regard the coordination phase, there are two segments of PPPs “coordination” emanation: openness for cooperation and “learning” component.

- Firstly, openness of PPPs actors emphasizes their readiness to mutually recognize the benefits of other actor(s) as the legitimate goal of particular public-private partnership project.
- Secondly, PPPs are, among other “faces” also the learning process, incremental in its habitus.20 This is learning process forms the second, dynamical emanation of PPPs “coordination” process. The absence of this “learning” segment left “openness” of actors as the emblematic term without substance. The PPP concept and learning process (as the dynamic part of PPPs emanation of coordination phase) should provide the environment for equalization of positions of the actors: positions which otherwise differ in terms of interests, knowledge and goals.21

5. Galvanization of PPPs Actors’ Interests

The purpose of this part of article is to find the vectors on which PPPs as the process of interest alignment (“galvanization”) is driven.

The selection of Competitive dialogue procedure (hereinafter: “CDP”; CD procedure) and Unsolicited Project Proposal procedure (hereinafter: “UPP” procedure) as the compatible litmus for the treatise about the PPPs as the galvanization tool for public, private and other involved (e. g. “third 

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18 Economic pressure could be, even in case of private actor, combined with the “metaphysical” pressure. This is exactly the case of so-called “warm glove” phenomenon. Namely, it is possible for companies (conducting in accordance with the corporate social responsibility principle) to support the public sector in order to fulfill their own morally grounded social commitments. See more in: Reynolds, Mary Ann, Yuthas, Kristi, “Moral Discourse and Corporate Social Responsibility Reporting, Journal of Business Ethics” (2008) 78, pp. 47–64.
19 For organizations of the “third sector” it is of the most interest to indupe PPP as the vehicle for realization of their own vision for resolving certain social concerns. See Sack, op. cit, p. 215.
20 Ibidem, p. 213.
21 See more infra in the part V of the present paper and discussion about competitive dialogue procedure.
sector”) interests is grounded in and justified primarily with their “PPPs-oriented” character: namely, both procedures are created for the realization of long-term infrastructure and other projects of public interest.

5.1 Competitive Dialogue Procedure

5.1.1 Introduction

Competitive dialogue is introduced in the EU law through the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Public Service Directive; hereinafter also: “Classic directive”). The main goal of CD procedure is to provide the procurement procedure suitable for the complex project for which established and common modalities of procurement are not eligible. The target of CD procedure is, among others, the realization of projects involving public authorities and private partner in the framework of public private partnership concept. Since the introduction through classic directive, CD process acquired the legitimacy in the discourse of PPPs procurement.

5.1.2 The Course of the CDP procedure

The competitive dialogue begins with the publication of a notice in the EU Official Journal. Notice is the form for definition of ideas and requirements of contracting authority (public partner; hereinafter those two terms are used interchangeably) regarding the project which is the object of the procurement. In the case that more elaborated data about project are available, it is possible for contracting authority to attach additional description of the projects features. The recommendation


23 For example, in France at the moment 88 projects are in the phase of CD procedure. See more in: “Public Private Partnerships in Transport: Trends & Theory P3T3” 2013 Discussion Papers, Part I Country Profiles, Edited by Verhoest, K, Carbonara, N, Lember, V, Petersen, O.H, Scherrer W and Van den Hurk, M, p. 47 (available at: http://www.ppptransport.eu/docs/Book_part_1.pdf, accessed December, 12, 2013). Competitive dialogue is also elaborated as the tool for procurement of PPP project on the universal level (not only in the EU). See more in: Public-Private Partnerships: An International Analysis in a Legal and Economic Perspective Editor Tvrnca, Christina D. Copenhagen Business School, Law Department Host publication information, 2010, Asialink, EuropeAid. Republic of Serbia introduced the CD procedure through enacting the Law on public private partnership and Concessions (Official Gazette of Republic of Serbia, No. 88/2011) and elaborated in the Law on Public Procurement (Official Gazette of Republic of Serbia, No. 124/12). The availability of competitive dialogue procedure is recognized in the § 15 of the Preamble of new “Classic directive” proposal: “(…) It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over the last years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions (…).”
is to be cautious regarding the requirements directed toward potential bidders: namely, changing of once given procurement criteria is inadmissible. Consequently the contracting authority is to the end bound to the (necessary robust) award criteria set at the beginning of the CDP in the notice, in terms of content and ponderation. But, at that point (zero point in terms of public partner’s knowledge) contracting authority is not objectively in the position to now which technical, legal or financial solution for its PPP could be suitable. There are two main phases of CDP: prequalifcation phase and dialogue phase.

In a pre-qualification phase of the CD procedure contracting authority selects favorites among the unlimited number of applicants. At this phase CDP also has the function of aptitude/eligibility test. The particular goal of this phase is not only to identify those private participants that promise a flawless performance, but also to enable them to present the contract content and technological variations already in the preliminary stages of dialogue (according to the criteria set out in the notice, criteria that have to be meticulously demonstrated by all applicants). The contracting authority is free to structure the dialogue. It could be provided, for example, that the dialogue is conducted and completed in successive stages in order to gradually reduce the number of solutions to be discussed during the dialogue stage.

A dialogue phase should enable the contracting authority (public partner) and dialogue participants (private partners) to negotiate about content and conditions for task realization until the following matters are clear:

- how to achieve the wished performance of proposed PPP project;
- on what terms the dialogue partners should provide the mutual actions;
- allocation of duties and responsibilities.

The dialogue is a dynamic process during which the contracting authority has to ensure the disclosure of project-specific information. At the same time, the information lie behind the particular approaches of the private participants at dialogue must be treated confidentially. Dialogue phase ends with one or more solutions eligible to achieve the object of the PPPs. The dialogue phase can also end with the finding that no suitable solution was identified.

The private participants that have completed successfully the dialogue phase are invited to make the offer (bid). The approaches and solutions reached during the dialogue are the basis for the bid. The offer shall contain all the details necessary for implementation of the project. The contracting authority may require clarifications and additional information to be included in the bid. The burden of the risk of incompleteness is on the private participant (bidder). The know-how already rudimentary disclosed during the dialogue phase by the private participant(s) must be fully disclosed in the bid.

Contracting authority has to assess the bids within a reasonable time. The “preferred-bidder” is in position, even after it is characterized as the “chosen one”, to be asked to explain certain details of the offer or to confirm the taken commitments. The award made to accept an “aliud” which is not based on the results of the dialogue phase is excluded. The CD procedure ends with the decision of the contracting authority to determine the suitable offer. Before a contract is concluded the 14-day waiting (standstill, “Alcatel clause”) period must be complied with, in order competitors to be

25 In this vain see par. 32. of ECJ decision in case C-247/02 from 7. October 2004.
26 The “Alcatel mandatory standstill” period is a period of at least ten calendar days following the notification of an award decision in a contract tendered via the Official Journal of the European Union, before the contract is signed with the successful supplier(s). Its purpose is to allow unsuccessful bidders to challenge the decision before the contract is signed. It is named after a pair of linked European Court of Justice cases which are jointly known as the Alcatel case (Case C-81/98).
informed shortly before the end of the tender which company is awarded the contract and what is the justification of such award.

5.1.3 Positive and negative sides of the Competitive Dialogue procedure

The most obvious positive feature of Competitive Dialogue Procedure is recognizable in providing the contracting authority with the flexibility in finding the best solution for the proposed PPP. The CDP enables public partner to allocate freely duties and responsibilities using the criteria of the particular knowledge acquired by the private actors during the dialogue phase. It is also of considerable importance that duty and responsibility for development of extensive contract structures (and attached costs) are burdened by the private actors. Thus, CD procedure allows the government to behave in PPPs almost like a private person who wants to meet a specific need using the market and inquiring by various providers for potential solutions.

CD procedure enables contracting authority to improve continuously its knowledge of a possible solution by exchanging the consideration with several partners in dialogue about the legal, technical and financial basis of PPPs. In this procedure takes place a know-how transfer, which inevitable taking into consideration the structure and conditions on the application of competitive dialogue. Namely, at the beginning of CDP the contracting authority (public partner) has not enough knowledge to determine adequately (in terms of form, content and in accordance of state of art in the particular field) the content of particular PPP performance. Therefore, contracting authority rather must rely on the knowledge of the private participants to determine sufficiently and concretely the content of PPP performance.

Having the previous statements in mind, the CD procedure is characterized as the apparatus for articulation and control of the tension between the public interest (emanated in the demand the best possible solution-from the public point of view- to be achieved), on the one side, and the interest of the CDP participants (private actors) to secure confidential treatment of their technological and managerial know-how. Therefore the contracting authority is obliged to observe and meet the duty of confidentiality when it comes to conceptual, technical and pricing solution proposals by private participants in the dialogue procedure. Public actor also has to be careful not to interfere with the crypto-competition among participants providing them with the information about the solution proposed by other competitors.

The abovementioned features of CDP at the same time cause its main shortcoming: the preparation of offer and the whole procedure is quite expensive for the private participants. This cost characteristic of CD procedure’s implementation restricts the circle of companies eligible to be part of PPPs only to the large ones. Why and how? The answer is: because the contracting authority is not able to create a full and exhaustive data sheet about the potential project performance and features, it is the private participant the one who must conceptualize all particularities necessary for the implementation of the project in the competitive offer. What is by the other procurement result of external consultants’ involvement (hired and paid by public partner) or the task for the mobilized in-house professionals, is now burdened by private actor. This may imply that small and medium enterprises (SMEs) are often not in the position to participate in a PPP tender. In the realm, such development reduces the capacity for innovative solutions towards the potential PPPs projects.

Having in mind above explained features of Competitive Dialogue Procedure, it is possible to conclude that CDP is characterized by first and second level of dialogue.

First level of dialogue is between public actor and private participants. The set of terms and conditions for it are defined ex ante from the public actor in order to get as much as possible from
the private actor participating at the dialogue. The second level of dialogue is between two private participants. It is kind of “silent dialogue” mediated through public actor.

This “second level” dialogue is the corrective mechanism for the inherent incompleteness of the elements for the first level dialogue (elements defined ex ante by public actor).  

5.2 Unsolicited Project Proposal

Unsolicited Project Proposal is “an original solution, developed by a private party, for a public party problem which the public party did not ask for but will lead to demonstrable value”. The UPP procedure enables a public body to implement PPP venture on the initiative of private proponent, even in the absence of sufficient capacities by former to engage in legally, economically, socially and politically complex projects. The degree of contribution of the UPP to galvanization of public and private interests depends on the ex ante evaluation of structure, content and actual relationship between those interests. This evaluation is primarily the task of the initiator of the project: private proponent (in contrast to the CDP, where the initiator is the public actor).

The important condition for UPP success is the existence of a “policy window”, i.e. political will of particular public actor (local authority, public agency, publicly-owned enterprise) to accept the realization of Unsolicited Project Proposal. In contrast to the CD procedure, such policy window does not exist ex ante. Therefore the private proponent should help the potential public actor to “discover” the policy window (as the window of opportunity). It does that in the following manner: namely, the structure and content of UPP have to provide elements which enable the justification for the public actor’s decision on the acceptance of the private proponent’s proposal (justification available to the public actor seeking for broader public support for the project created by UPP). So, notwithstanding the public actor’s role of the “public support seeker”, it is the private proponent who has to provide ex ante the foundation for such support. Doing this public proponent has to create UPP with the respect for the following general PPPs “golden rule”: the wider range of subjects that have immediate benefits of PPP project is, lesser is the political pressure and broader is the policy window. The abovementioned rule can be implemented in different ways:

• the appreciation of citizens whose interests are tackled as the project’s shareholders and consequentially their inclusion in the decision making process;
• involvement of the local business community as the observer of the process or in the other role of “soft participation” nature, in order to use it as the vector for transmission of knowledge about concrete public interest (knowledge acquired as the result of doing business in the particular environment in which UPP is intended to be implemented);
• consideration of the interests of trade unions and employees of publicly-owned companies which activities are going to be taken over by implemented PPP project.

So, in the context of the UPP procedure specifically, the success of private proponent’s proposal depends on his ability to put on the “suit” of public actor. From that position it is necessary for

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27 The term “first level dialogue” and “second level dialogue” are used infra in this paper in accordance with the above defined meaning.


29 See discussion infra under V 1. of presented paper.
the private actor to use method of abductive reasoning\textsuperscript{30} in order to generate the UPP which is in accordance with the presumed public interest.

5.3 CDP and UPP procedure as the example of “Coopetitive Relationship”

The effort for capture and galvanization of public and private interests using CDP and UPP in methodological discourse is characterized by the development of interactive interface between public and private actor(s).\textsuperscript{31} In both cases it is recognizable interactive interface which provides the opportunities for learning and the creation of knowledge capital. In the case of CDP, the public actor learns by the private actors (during the first level dialogue) and uses the results of “silent dialogue” among participants in the competitive dialogue procedure (second level dialogue). In the case of UPP procedure, the private proponent (supplier) learns about the buyer (in the case of UPP procedure the buyer is public actor) in order to provide new solution (with the implementation of heuristics i.e. abductive reasoning).\textsuperscript{32} In both cases it is possible to talk about the coopetitive relationship. Why? Because in described cases cooperation and competition are parts of the same relationship and both are vital to success in innovation\textsuperscript{33}. The concept of coopetition is defined as the balance between cooperation and competition in a specific transaction relationship, resulting from the actors’ simultaneous cooperative and competitive behaviors.\textsuperscript{34}

6. Conclusion

In the relevant documents promoting Horizon 2020 Strategy public-private partnership concept is defined and legitimized as the relevant tool for achieving economic stability of European Union. With the abovementioned characterization, PPP structure and actors (public, private and those originating from the “third sector”) acquired additional critical weight, including qualified importance for EU candidate countries with limited experience in this field. Having this in mind, the analysis of PPPs structure, content, purpose and features got considerable additional importance.

There are two levels of PPPs establishment. The first one is the coordination of actors. The results of this phase are latter upgraded through process of public and private (as well “third sector”) interests’ galvanization, forming the second phase of PPPs establishment.

The coordination implies the presence of a clear and specific common interest (in addition to particular interests of each sector), which lays the common grounds for enacting and implementing an acceptable PPP solution. The main presumption for the existence of coordination between involved PPPs actors is their interdependence and the convergence of related objectives.

\textsuperscript{30} Abductive reasoning unlike inductive-deductive method reaches the conclusion on the basis of “best explanation criteria”, e.g. principle of common cause. The degree of reliability of the conclusion made by abductive reasoning is never absolute. The degree of truthfulness is not ultimately defined (the typical example of abductive reasoning is medical diagnosis procedure). Mutatis mutandis, in the case of UPP the private partner should use abductive reasoning to enter, understand and speculate about the value system of public partners (system functioning in political, economic, social, legal, historical, geographical or other relevant discourse). The outcome of this process should be the proposal acceptable for the public partner and ultimately creation of space for the political support for the project created in the form of Unsolicited Project Proposal.


The second level of PPPs establishment is the galvanization of involved actors’ interests. As the examples for such galvanization Competitive Dialogue Procedure and Unsolicited Project Proposal Procedure are used. CD procedure allows the public partner to behave in (PPPs discourse) almost like a private actor wanting to meet a specific need using the market and inquiring among various providers for potential solutions. Public actor relies on the knowledge of the private participants, to determine sufficiently and concretely the content of PPP project performance.

Unsolicited Project Proposal procedure is option for innovative private proponent confident of the success of the project idea at the level which justifies his readiness to participate in the project preparation and to cover the (usually high) costs of project’s realization. As innovative tool, it has particular importance and potential worthiness for Horizon 2020 goals achievements. UPP procedure channels innovative proposals which are novelty for public actors either due to the:

- lack of capacity for the simple recognition of certain PPP possibility, or
- because the possibility, though recognized, cannot be properly development as the consequence of the insufficient “in house” knowledge needed for the adequate project formulation.\(^{35}\)

To achieve above described goals it is necessary for the private actor to use method of abductive reasoning in order to generate the UPP which is in accordance with the presumed public interest.\(^{36}\)

Both procedures establish the two parallel corridors for the realization of PPPs projects. They justifiably coexist as the relevant patterns of PPPs project procurement. CDP as well UPP procedure ensure market-oriented way of thinking to be used in the realization of public interest through PPPs concept implementation.\(^{37}\) As such, the described methods for PPPs procurement are important tools for the achievement of goals defined in Horizon 2020 Strategy. This is the main value statement of this paper.

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\(^{35}\) Even when capacities for the proper preparation of project proposal exists, it is not rarely (at least in developing countries) that such capacities are used for the preparation of the more politically beneficial project (those who are focused and programmed to give the output inside of, e.g. 4 years “election horizon”).

\(^{36}\) See more supra footnote 30.

\(^{37}\) As it is pointed by Skelcher and Sullivan (Sullivan, H and Skelcher, C, 2002, Working across Boundaries: Collaboration in Public Services. Basingstoke: Palgrave) PPP are arrangements where the primary imperative is to realize benefits for the wider community rather than special interests” (quoted from: BEYOND THE CONTRACT: The Challenge of evaluating the performance(s) of public-private partnerships (Jeffares, Stephen, Sullivan, Hellen and Bovaird, Tony in, Rethinking Public Private Partnerships: Strategies for Turbulent Times, Edited by Carsten Greve and Graeme Hodge, Routledge, 2013, pp. 188-211). The direct consequence of this approach is the establishment of “hierarchical constant”. See supra last paragraph of part II of the present paper.
Abstract

The reform of the energy sector of the SEE countries represents one of the priorities of the South-East Europe 2020 Strategy recently adopted by the Regional Cooperation Council. Besides being one of the key EU accession criteria, the enforcement of State aid law in the energy sector in the SEE region would support the reform of this industry, by making it more competitive. During the last years, most of the SEE countries have adopted a national State aid law and established national Monitoring Authorities. By analyzing the decisions adopted by the State Aid Monitoring Authorities of the SEE countries and a number of international reports on this issue, the paper aims at assessing the degree of enforcement of State aid law in the energy sector in the SEE region. The paper concludes that the enforcement of State aid rules in the SEE countries generally does not go beyond the formal legal transposition. The State Aid Monitoring Authorities of the SEE countries usually are not notified by the granting authorities of new aid schemes in the energy sector. Even when notified, the Monitoring Authorities have generally followed a non-interventionist approach vis a vis the subsidies schemes granted in the energy sector. In particular, they have approved State aids without due regard to the case law of Court of Justice of the European Union and the Decisions of the EU Commission in this area. The lack of enforcement of State aid law in the energy sector thus endangers the long-term reform of the energy industry in the SEE region.

Key words: EU State Aid Law; energy sector; SEE countries; State Aid Monitoring Authorities; Energy Community Treaty

1. Introduction

The achievement of a sustainable growth is one of the pillars of the South-East Europe (SEE) 2020 Strategy recently adopted by the Regional Cooperation Council.¹ In particular, "energy" and "competitiveness" represent two important dimensions of the Strategy, which are closely related.² On the one hand, SEE countries need to increase their energy supply by 2020 (and in particular the production of green energy) in order to improve the affordability of energy consumption for final customers.³ On the other hand, the SEE countries also need to progressively phase-out price regulation and the subsidies in the energy sector which distort free competition in the market.⁴

By monitoring the subsidies granted by public authorities to private undertakings, State aid law represents an important tool which would allow SEE countries to achieve the objectives of the SEE 2020 Strategy in the energy sector. State aid rules, in fact, do not prohibit subsidies per se; they follow a case-by-case analysis carried out by an independent monitoring authority. Under State aid

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¹ Marco Botta, PhD, Assistant Professor, Institute for European Integration Research of the University of Vienna, e-mail: marco.botta@univie.ac.at
³ "Energy" represents dimension H in the Strategy, while "competitiveness" is dimension K. Both dimensions are sub-sections of the 3rd pillar of the Strategy on "Sustainable Growth".
⁴ Ibid, p. 46.
law, every local and central public authority has the obligation to notify new subsidies schemes to the State aid monitoring authority before the implementation of the subsidy scheme. After having assessed the distortive effect of the subsidy on the competition in the market, the monitoring authority decides whether “to allow”, “block” or “allow subject to certain condition” the implementation of the subsidy scheme.

State aid law originates in Art. 107 and 108 of the Treaty of the Functioning of the European Union (TFEU). Since the Treaty of Rome, the EU Commission has been playing the role of State aid monitoring authority vis-à-vis the subsidies schemes granted by the EU Member States. The EU founding fathers had serious doubts concerning the ability of the EU Member States to self-constraint their budget expenditures, and consequently the Treaty of Rome delegated the State aid monitoring activity to a supranational authority like the European Commission. In the context of the EU enlargement process to Central and Eastern Europe (CEE), however, the EU Commission asked the candidate countries to adopt a State aid law and to establish a Monitoring Authority. Such “internal” monitoring system would be “transitional”; the monitoring activity would later be carried out by the European Commission following the accession of candidate countries to the EU.

In accordance with the Stabilization and Association Agreements (SAAs) concluded with the EU, SEE countries have the legal obligation adopt a State aid law. The establishment of a system of State aid control is also one of the main EU accession criteria emphasized by the EU Commission in its Progress Reports. A further obligation for the SEE countries to introduce a system of State aid control in the energy sector derives from the Energy Community Treaty (EnCT), which includes a general prohibition on “any aid which distorts or threatens to distort competition among the undertakings active in the energy sector”. During the last years, most of the SEE countries have adopted a State aid law in accordance with their international legal obligations. The last countries that adopted such legislation were Kosovo and Bosnia and Herzegovina. The 2003 Croatian State aid law, on the other hand, has ceased to be applicable since 1st July 2013: since the moment of accession to the EU, in fact, Croatia has transferred the task to enforce State aid rules to the European Commission.

The SEE countries have established Monitoring Authorities in accordance with two institutional

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7 Ibid.


14 http://www.aztn.hr/o-nama/ (11.2.2014).
set-ups: either by establishing an inter-governmental State Aid Commission assisted by an administrative State Aid Office (e.g. Serbia, Montenegro, Albania, Kosovo), or by empowering the National Competition Authority (NCA) to review the notified aid schemes (e.g. Croatia, Rep. of Macedonia).

2. Structure and Objectives of the Paper

Although State aid law includes “horizontal rules” which are applicable to every economic sector, these rules are particularly relevant in the energy sector, due to the high degree of subsidization of the electricity and gas industries in the SEE countries. The paper aims at assessing the degree of enforcement of State aid rules in the energy sector in the SEE countries. The existing literature has mainly focused on the institutional set-up of the State Aid Monitoring Authorities, focusing on the ineffectiveness of the inter-governmental State Aid Commission due to their lack of independence from the executive branch. On the other hand, an analysis of the degree of enforcement of State aid rules by the State Aid Monitoring Authorities in a specific industry, such as the energy sector, has never been undertaken. The paper aims at filling this gap by analyzing the administrative decisions adopted by the Monitoring Authorities of the SEE countries in relation to the subsidies granted in the energy sector. In particular, the paper will focus on the electricity sector, since both the EU Commission and the State Aid Monitoring Authorities of the SEE countries have generally enforced State aid rules vis-à-vis subsidies granted in this industry. The enforcement of State aid rules by the Monitoring Authorities of the SEE countries will be assessed in view of the existing case law of the Court of Justice of the European Union (CJEU) and the Decisions adopted by the EU Commission in this field. Secondly, the paper will rely on a number of international studies, in order to estimate the amount of energy subsidies which escape from the duty of notification to the State Aid Monitoring Authorities. In particular, the annual reports published by the EnC Secretariat and a recent study published by the United Nations Development Program (UNDP) will be important sources of information.

In the following section, the paper will provide an overview of the CJEU’s case law and of the main EU Commission State Aid Decisions adopted in the electricity sector during the last decade. Afterwards, the paper will assess the enforcement trends of State aid rules in the energy sector in the SEE countries. Finally, the paper will elaborate a number of conclusions.

3. Enforcement of EU State aid law in the electricity sector

EU Member States have traditionally heavily subsidized the energy sector in order to achieve a number of public policy goals, such as ensuring security of supply, universal service and affordability of energy sources, as well as promoting the development of green energy production and increasing energy efficiency. For a number of decades the State aid rules were irrelevant in the energy sector, since the energy companies were vertically integrated State-owned monopolies, and

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17 Under Art. 67(b) EnCT, the EnC Secretariat is required to prepare every year a report to assess the degree of implementation of the EnC acquis by the Contracting Parties. The reports include a section on State aid rules. http://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Implementation/Report (last access on 11.2.2014). Secondly, in April 2011 the law firms Hunton & Williams and Eisenberg Herzog published a report concerning the enforcement of State aid rules in the electricity sector in SEE countries. The study was commissioned by the EnC Secretariat. http://www.energy-community.org/pls/portal/docs/948179.PDF (last access on 11.2.2014).
thus there was no competition in the energy markets. On the other hand, since the beginning of the liberalization process, State aid rules have been increasingly enforced by the EU Commission, especially in the electricity industry. In the attempt to strengthen the enforcement of State aid rules in the energy sector, the EU Commission thus faced a difficult task to “balance” the subsidies’ distortive effects on competition, since they could discourage new entrants in the market by thus jeopardizing the process of liberalization, with the achievement of the abovementioned public policy goals.

During the last years, DG Competition has actively enforced Art. 107 TFEU vis a vis long term Power Purchase Agreements (PPAs). The latter are long term supply contracts, which bind the supplier to purchase a fixed amount of electricity from the generators at a regulated price periodically adjusted over a long period of time (e.g. usually over one decade). PPAs were often concluded in the Central and Eastern European (CEE) countries in the 1990s during the restructuring process of their electricity industry. From the State’s point of view, PPAs aimed at attracting foreign investors by reducing their commercial risk, and thus ensuring security of electricity supply in the country on a long-term basis. Three main types of PPAs exist:

1. PPAs concluded between electricity generators and State-owned electricity wholesale supplier: this type of PPAs guarantees to recently privatized generators that its electricity capacity will be purchased by the wholesale supplier over a long period of time.

2. PPAs concluded between a generator which has recently built a new power plant in the country and a State-owned wholesale supplier: this type of PPA is designed to encourage the construction of new power plants, by ensuring to the foreign investor that the electricity capacity will be entirely purchased by the wholesale supplier, by thus reducing the uncertainty for the generator.

3. PPAs concluded between State-owned generators and recently privatized distributor/supplier: it guarantees to the recently privatized distributor/supplier a security of electricity supply during the years following the privatization for all its customers.

The State aid element in these agreements relates to the losses caused by the PPAs to the State-owned company (i.e. wholesale supplier or generator). Under the first and second types of PPAs, in fact, the State-owned wholesale supplier usually commits itself to purchase electricity from the generator at a price above an average market price. On the other hand, under the third type of agreement, the State-owned generator will supply the recently privatized supplier/distributor at a price regulated by the national energy regulator (i.e. price that is usually below an average market price over a longer period of time). Therefore, each PPA creates a selective advantage for the new investor, while it creates a loss for the State-owned energy company (i.e. loss of State’s resources). In view of these considerations, the EU Commission considered the Polish and the Hungarian PPAs as unlawful State aids in breach of Art. 107(1) TFEU. The Polish and the Hungarian PPAs fell within the

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22 Supra, Hancher and Salerno, p. 248.

23 Supra, Glachant and De Hautecloque.

24 European Commission Decision of 25 September 2007 on State aid awarded by Poland as part of Power Purchase Agreements and the State aid which Poland is planning to award concerning compensation for the voluntary termination of Power Purchase Agreements.

25 Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements.
first category of PPAs mentioned above. On the other hand, the EU Commission has not sanctioned under State aid rules PPAs under the second and third category of agreements.

Historically, the energy prices have been regulated at the retail level in most of the EU Member States. A “regulated price” is set by a public authority (i.e. National Regulatory Authority - NRA), rather than by the free interaction of supply and demand on the market. Although price regulation is not per se prohibited by the EU acquis, it may discourage new entrants in the market if the regulated energy prices are “too low” (i.e. they are not “cost-reflective”), and if most of the customers benefit from the regulated tariffs. While household customers should benefit from low regulated electricity prices as long as the market is not fully liberalized, large industrial customers should not benefit from price regulation since the early stage of the liberalization process. Large industrial customers, in fact, have the capacity to access the offers provided by the different suppliers, by thus encouraging new suppliers to enter into the market. As recognized by the CJEU in Federutility, regulated tariffs for the large industrial customers might be allowed only as a temporary measure for a limited period of time, in exceptional and clearly defined circumstances, satisfying the proportionality principle.

The EU State aid rules are relevant in relation to the regulated tariffs since the NRAs usually fix them at a level which is not cost reflective. The losses caused to the electricity operators by the regulated tariffs are usually covered either via direct State’s transfers (i.e. State’s resources), or via a levy charged on all the electricity customers, including the customers which do not benefit from the regulated tariff. Regulated tariffs which benefit households do not fall under the scope of State aids prohibition: first of all, households are not undertakings; secondly these subsidies could be justified as social aids under Art. 107(2)(a) TFEU. On the other hand, regulated tariffs may be prohibited under EU State aid rules when they create a selective advantage benefiting a single or a group of undertakings. The 2009 EU Commission’s Decision sanctioning the beneficial electricity rate granted by ENEL (i.e. Italian State-owned energy supplier) to Alcoa (i.e. aluminum producer – energy intensive company) is a good example of a State aid in the form of regulated electricity tariff benefiting an individual undertaking. In addition, in 2007 the EU Commission opened the investigations vis-à-vis the French and the Spanish regulated electricity tariffs benefiting medium and large industrial customers. Both cases remain pending at the moment, while the regulated tariff clearly created a selective advantage for the French and Spanish undertakings, the two regimes were partially financed by a levy charged on every electricity customer. Consequently, the EU Commission has never proved that the regulated tariffs were financed via State´s resources. Therefore, although in its 2007 Energy Sector Inquiry the EU Commission announced its intention to enforce more rigorously Art.

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29 In 2006, France introduced a system which allowed large industrial customers which had opted for the liberalized electricity market “to return” to the regulated tariffs for a period of 2 years. The lower regulated tariff was financed by a levy charged on all electricity customers. http://ec.europa.eu/competition/sectors/energy/electricity/electricity_en.html (last access on 11.2.2014).

30 In 2007, the EU Commission opened investigations vis-à-vis Spanish regulated electricity tariffs to the benefit of large and medium enterprises in relation to the year 2005. The losses generated by the regulated tariffs were covered a levy charged on every electricity customer. http://ec.europa.eu/competition/sectors/energy/electricity/electricity_en.html (last access on 11.2.2014).

31 Ibid.
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107 TFEU vis-à-vis preferential energy tariffs, so far the it has only sanctioned preferential energy tariffs benefiting individual or groups of undertakings which are clearly financed exclusively via direct State’s resources.

As mentioned above, during the last decade the EU Member States have granted subsidies to stimulate the production of electricity from renewable energy sources. In Preussen Elektra, the CJEU ruled that the legal obligation for the supplier to purchase a certain amount of electricity from generators based on renewable energy sources did not represent a State aid, since there was no transfer of State’s resources involved. In that case, in fact, the supplier was a private company, and thus the purchase obligation did not affect the State’s resources. Following Preussen Elektra, the EU Commission has cleared a number of similar cases involving “green energy” purchase obligations. On the other hand, if the purchase obligation fell on a State-owned supplier, the obligation would fall under the scope of application of Art. 107(1) TFEU. The electricity produced from renewable energy sources, in fact, is more expensive than the electricity produced from other sources (i.e. loss for State’s resources). Secondly, such obligation would create a selective advantage for the generators that rely on renewable energy sources. However, even green energy subsidies prohibited under Art. 107(1) TFEU have generally been exempted by the EU Commission under Art. 107(3)(c) TFEU: taking in consideration that the promotion of renewable energy is one of the priorities of the Europe 2020-20 strategy, the EU Commission has generally privileged the goal of environment protection over the competition distortive effect of green energy subsidies in its analysis. In particular, the General Block Exemption Regulation provides an exemption for green energy subsidies. In addition, individual aids that fall outside the scope of the General Block Exemption could be further justified under the Environmental Aid Guidelines.

The last aspect of the EU State aid law which is relevant in the electricity sector concerns the subsidies granted as a compensation for the provision of a Services of General Economic Interest (SGEI). Under the Altmark case law, a compensation for the provision of a SGEI falls outside of the scope of Art. 107(1) when 4 cumulative conditions are satisfied: the SGEI provider is “clearly entrusted by an act of the EU Member State”; the compensation for the SGEI provision is “established in consideration that the promotion of renewable energy is one of the priorities of the Europe 2020-20 strategy, the EU Commission has generally privileged the goal of environment protection over the competition distortive effect of green energy subsidies in its analysis. In particular, the General Block Exemption Regulation provides an exemption for green energy subsidies. In addition, individual aids that fall outside the scope of the General Block Exemption could be further justified under the Environmental Aid Guidelines.

55 Ibid, para. 19.
56 Supra, Bacon, 394.
58 See, for instance, the EU Commission’s Decision concerning the Slovenian system to stimulate the production of electricity from renewable energy sources. European Commission Decision of 24 April 2007 on the State aid scheme implemented by Slovenia in the framework of its legislation on qualified energy producers — Case No C 7/2005.
59 Commission Regulation (EC) No 800/2008 of 8 June 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L. 214/3 -47.
63 Ibid, para. 89.
advance in an objective and transparent manner”; the compensation “cannot exceed” the cost of SGEI provision; the SGEI provider is selected either via a public tender or by comparing the costs of the SGEI provider with a “typically well run undertaking.” The 4 Altmark conditions have to be complied cumulatively: in the Hungarian and Polish PPAs cases the EU Commission recognized that the conclusion of PPAs could be justified due to reasons of security of supply. However, the generators which benefited of the PPA had not been selected via an open and transparent manner, and thus the Altmark conditions were not complied with.

4. State Aid Enforcement in the Electricity Sector in SEE Countries

According to a recent study published by the United Nations Development Program (UNDP), SEE countries heavily subsidize their energy sectors; the average level of subsidies is estimated around 9% of the GDP of these countries. In spite of the relevance of the energy subsidies in the region and though most of the SEE countries have already adopted a State aid law, so far the State aid Monitoring Authorities of these countries have played a marginal role in reviewing the subsidies granted. In particular, only the State Aid Monitoring Authorities of Albania, Rep. of Macedonia and Croatia have analyzed a limited number of subsidy schemes granted in the energy sector. A study carried out in 2011 by the law firm Hunton & Williams on behalf of the EnC Secretariat has also pointed out that most of the aid schemes granted in the energy sector in the SEE region have not been notified to the State Aid Monitoring Authorities. The report established a “State aid inventory” of the energy schemes present in the EnC Contracting Parties. The report underlined the existence of a great discrepancy between the large number of energy aid schemes present in these countries and the limited number of decisions adopted by the State Aid Monitoring Authorities in this field. Finally, even when notified, the State Aid Monitoring Authorities have generally approved without conditions the notified aid schemes; as recognized by the EnC Secretariat, “…no Contracting Party has ever taken a decision to prohibit the granting of aid to an energy undertaking or ordered its recovery in the energy sector.”

The types of State aid granted in the energy sector by the SEE countries are quite similar to the energy subsidies granted by the EU Member States. In particular, during the last decade PPAs were concluded by KESH, the Albanian State-owned electricity wholesale supplier, with a number of hydropower plants. Under the energy law 9470/2006, KESH was legally required to enter into power purchasing agreements with the recently privatized hydropower plants according to a fixed price determined by the Albanian National Regulatory Authority. The measure aimed at incentivizing the purchase of hydropower plants by foreign investors during their privatization process. These PPAs were similar to the Hungarian and Polish cases analyzed in the previous section; nevertheless, these

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44 Ibid, para. 90.
46 Ibid, para. 93.
48 Supra, 2011 UNDP study, 18.
49 See section 5 of the 2012 EnC Secretariat’s annual report.
50 Supra, study by Hunton & Williams 2011, Part II.
51 Supra, EnC Secretariat annual report 2012, 130.
52 Supra, study by Hunton & Williams 2011, 75.
long-term agreements have never been notified to the Albanian State Aid Commission. Secondly, the Government of Kosovo is currently launching an international call for tenders to build a new hydropower plant in Zhouri. The contract for the construction of the new power plant is likely to include a PPA, in order to ensure that that the entire new generation capacity produced will be sold. Finally, the SEE countries have also included PPAs in the privatization agreements of the distribution electricity company. A good example to this regard concerns the recent contract of privatization of KEDS (i.e. Kosovo distribution and supply electricity company). After having been separated from KEK, which remained State-owned generation company, KEDS has been sold to foreign investors. Under the terms of the privatization agreement, KEDS will continue to benefit from the PPAs previously concluded with KEK: KEDS will be able to purchase electricity from KEK at a guaranteed price over a long period of time.

These examples show that the PPAs are not only concluded in the context of the privatization of State-owned generators, like in Poland and Hungary, but also in the context of the privatization of the supply and distribution companies, as well as in the tenders to build new power plants. The examples of the recent PPAs concluded in Kosovo and Albania show that the SEE countries are willing to rely on these long-term agreements in order to attract foreign investors. Nevertheless, in none of these examples the State aid Monitoring Authority seems to have been notified of these agreements, in order to assess their compatibility with State aid rules.

Most of the SEE countries provide either regulated tariffs or subsidies for vulnerable customers. For instance, in accordance with its Social Action Plan, in 2010 the Government of the Rep. of Macedonia adopted a regime of electricity subsidies for vulnerable households. The latter could receive a partial reimbursement of the paid energy bills from the State’s budget. On the other hand, other SEE countries (e.g. Bosnia and Herzegovina, Montenegro and Serbia) opted for a system of regulated tariffs for all households. As mentioned in the previous section, regulated tariffs may jeopardize the liberalization of the electricity industry if they are not cost-reflective and if they concern most of the customers. From the point of view of State aid rules, regulated tariffs for households would not qualify as aids under Art. 107(1)TFEU, since they would not affect undertakings. In addition, even if considered State aids, they could be per se justified as social aids under Art. 107(2) (a) TFEU. On the other hand, regulated electricity tariffs for industrial customers might be considered State aids when they are funded by State’s resources, rather than via a levy charged on the electricity bill of every customer. A study conducted in 2012 by the EnC Secretariat pointed out that in most of the EnC Contracting Parties industrial customers still benefit from regulated tariffs and fail to comply with the conditions pointed out by the CJEU in the _Federutility_ judgment. An example of subsidized energy tariff to an individual customer concerns the sale of electricity by the Croatian State-owned

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53 _Supra_, study by Hunton & Williams 2011, 75.
54 http://mzhe.rks-gov.net/?page=2,76 (last access on 11.2.2014).
55 _Ibid._
56 http://mzhe.rks-gov.net/?page=2,270 (last access on 11.2.2014).
58 _Supra_, study by Hunton & Williams 2011, 88.
59 _Supra_, study by Hunton & Williams 2011, 79.
60 _Supra_, study by Hunton & Williams 2011, 93.
61 _Supra_, study by Hunton & Williams 2011, 100.
supplier HEP to the aluminum producer TML-TVP, based in Mostar (Bosnia and Herzegovia). In July 2011, the two companies concluded an electricity supply contract, whereby HEP would sell electricity to TML-TVP at a price of 42.75€/MWh. Such price was below market price, since the regular price for electricity supply in Croatia for large industrial customers varied between 48€/MWh and 52€/MWh. In exchange, TML-TVP ensured a regular supply of 60,000 tons of aluminum per year for the Croatian market. TML-TVP was an important aluminum supplier for Croatia, and thus the agreement aimed at achieving important industrial policy goals for Croatia (i.e. ensuring aluminum security of supply). In December 2011, the Croatian Parliament adopted an amendment to the electricity law to allow the sale of electricity below-market price to TML-TVP. Although TML-TVP would have clearly benefited of a State aid, since HEP was a State-owned company and the agreed electricity tariff was below market value (i.e. loss of State’s resources), the AZTN (Croatian Agency for Competition, acting as State Aid Monitoring Authority) was not notified of this aid scheme. Only under the pressure of international institutions (i.e. EnC Secretariat and the EU Commission), the Croatian Parliament later amended those provisions of the electricity law.

The SEE countries have adopted a number of subsidies schemes to incentivize the production of renewable energy. In particular, a number of SEE countries have introduced the legal obligation for the electricity wholesale supplier to conclude long-term PPAs with electricity generators relying on renewable energy sources (e.g. Kosovo, Rep. of Macedonia, Montenegro, Serbia, Bosnia and Herzegovina). In addition, some SEE countries have also provided tax reliefs (e.g. Albania, Serbia) and direct grants (e.g. Montenegro) to support green energy projects. As mentioned in the previous section, the PPAs should be assessed under Preussen Elektra case law: they would not qualify as State aid under Art. 107(1) TFEU if the purchase obligation was imposed on a private supplier/distributor. On the other hand, they could be considered State aids if the supplier was State-owned, and thus the PPA involved a transfer of State’s resources. However, even if the PPAs and other aid schemes to incentivize the production of renewable energy were qualified as State aids under Art. 107(1) TFEU, they could still be exempted under Art. 107(3)(c) TFEU. As mentioned above, the EU Commission has generally exempted most of the notified aid schemes aiming at supporting green energy projects; therefore, most of the aid schemes adopted by the SEE countries in this field are unlikely to breach EU State aid rules. Nevertheless, this presumption of legality does not prevent...
the granting authorities from notifying the scheme to the State Aid Monitoring Authority. So far, only the Croatian NCA reviewed ex-ante the State aid schemes aiming at improving production of renewable energy and to support projects to stimulate energy efficiency.

The main issue of concern in the SEE countries in relation to the enforcement of State aid rules vis-à-vis long-term PPA\textsuperscript{77}, regulated retail electricity tariffs and green energy subsidies is the lack of notification of the new aid schemes to the State Aid Monitoring Authority. On the other hand, in relation to their analysis of SGEI in the energy field, the State Aid Monitoring Authorities have often “misapplied” the Altmark criteria. Good examples of this misapplication are two decisions adopted in December 2011 by the Комисијата за заштита на конкуренцијата (Macedonian Competition Commission, KZK), acting as State Aid Monitoring Authority in the country.\textsuperscript{79} KZK approved two aid schemes provided by the State-owned companies MEPSO (i.e. Macedonian Transmission System Operator, TSO) and ELEM (i.e. Macedonian Power Production Company) to Toplifikacija (i.e. private company providing district heating in the city of Skopje). MEPSO and ELEM would grant to Toplifikacija a loan at an interest rate lower than the ordinary interest rate applied by commercial banks. The loan would satisfy the conditions to be considered a State aid under Art. 107(1) TFEU: the loan implied a disbursement of State’s resources by State’s owned companies, it created a selective advantage for Toplifikacija, and it breached the market investor principle (i.e. the interest rate was lower than the commercial interest rate available on the market). The Macedonian NCA, however, approved the two aid schemes by arguing that “…companies performing activities of public interest may receive State aid to cover any arising costs, including a reasonable profit from performing activities of public interest…”\textsuperscript{80} KZK thus argued that the aid was granted in view of the “public interest” function performed by Toplifikacija (i.e. provision of district heating in Skopje), and the aid did not “over-compensate” Toplifikacija for the public service performed. Prohibition of over-compensation is one of the 4 Altmark conditions; nevertheless, the Macedonian NCA omitted to assess whether the other 3 conditions were duly complied as well. In particular, in its decision the KZK did not assess whether Toplifikacija had been entrusted by an act of the State to perform the SGEI; whether the amount of compensation had been defined in advance when Toplifikacija had been selected as SGEI provider, and whether Toplifikacija had been selected via public tender. The Toplifikacija decision well represents the tendency by the State Aid Monitoring Authorities of the SEE countries to approve any aid scheme in the energy field which aims at satisfying general “public interest” objectives, without analyzing in details whether the 4 Altmark are cumulatively satisfied.

A closely connected issue to the “misapplication” of Altmark conditions is the tendency by State Aid Monitoring Authorities of the SEE region to approve any aid scheme granted to the State-owned companies operating in the energy industry. In June 2011, the KZK approved a State’s guarantee in favor of MEPSO at more favorable conditions than ordinary market conditions.\textsuperscript{81} MEPSO

\textsuperscript{77} For instance, in April 2012 the Croatian NCA submitted an opinion to the Parliament concerning a new draft legislation aiming at stimulating the production of renewable energy in the country. The Croatian NCA analyzed whether the new tariff system introduced by the legislation to incentive renewable energy production would have distorted competition in the market. Decision of the Croatian NCA n. 430-01/2010-002/009, adopted on 25.4.2012. http://www.aztn.hr/uploads/documents/odluke/DP/430-012010-02009.pdf (last access on 11.2.2014).

\textsuperscript{78} Before joining the EU on 1.7.2013, the Croatian NCA has adopted a number of decisions concerning the compatibility of the subsidies granted by the national fund for energy efficiency to individual firms willing to undertake large projects to increase energy efficiency. The list of decisions adopted by the Croatian NCA in the field of State aid before 1.7.2013 is available at: http://www.aztn.hr/rezultati-odluke/?casenumber=&dateearlier=&datelater=&area=dp&text=&submit_odluke= (last access on 11.2.2014).


\textsuperscript{80} Ibid.

needed a financial guarantee in order to receive a loan from international financial institutions (e.g. World Bank and European Bank for Reconstruction and Development); the loan would finance the construction of new interconnectors with Serbia and Bulgaria. In its decision, the KZK recognized that the guarantee created an advantage for MEPSO. However, since MEPSO was the only entity in the Rep. of Macedonia dealing with the electricity transmission, the Macedonian NCA concluded that the subsidy did not disturb the competition in the market (i.e. the subsidy did not qualify as State aid under Art. 107(1) TFEU).82 A similar case was decided at the beginning 2013 by Montenegro State Aid Commission, which authorized a loan granted by the central government to CGES (i.e. Montenegro TSO), in order to build a new under-sea electricity transmission line connecting Montenegro with Italy.83 Similarly to the KZK decision in MEPSO, the Montenegro State Aid Commission authorized the aid without a deep analysis of the effects on competition caused by the aid.84 These decisions are clearly in contrast with the practice of the EU Commission. A relevant Decision to this regard concerns the aid granted by Poland to the Polish TSO in order to build new interconnectors and a new power line between Poland and Lithuania.85 A second Decision concerns the aid granted to KrafSat Aâland Ab for the construction of an electricity cable between mainland Finland and Aland.86 Both Decisions followed the same line of reasoning and reached the same conclusions. Contrary to the Macedonian NCA and Montenegro State Aid Commission, the EU Commission decided that the public funding would create an advantage for the Polish and Finnish TSOs which “…will make it more unlikely that any alternative operators bid for a transmission license when the current license expires…”87 Consequently, the EU Commission considered the subsidy received by Polish and Finnish TSOs as State aid under Art. 107(1) TFEU, and afterwards it exempted it in the light of Art. 107(3)(c) TFEU exception.88 Although the authorities achieved the same final conclusion (i.e. public funding to build an important cross-border interconnector could be authorized), they followed a different legal reasoning: while the KZK and Montenegro State Aid Commission pointed out the current lack of competition in the transmission market, the EU Commission looked at the “potential” distortive effect on competition of the subsidy in a long term perspective. MEPSO and CGES decisions are not isolated cases of this type of reasoning: in September 2012, the Albanian State Aid Commission authorized a State’s guarantee to allow KESH (i.e. State-owned wholesale supplier) to import electricity from abroad.89 In its decision, the Albanian State Aid Commission concluded that the State’s guarantee would not distort competition since KESH was the only licensed entity in the country which had the obligation to purchase electricity either from generators present in the country, or to import it from abroad.90 The Albanian State Aid Commission concluded that the State’s guarantee was not a State aid since KESH was a State-owned company and it acted as monopolist in the wholesale electricity supply market, rather than exempting the aid under the national provision equivalent to Art. 107(3)(c) TFEU.

The last issue that affects the SEE countries concerns the widespread “operating” aids granted to State-owned energy companies which face troubles to remain profitably in the market. A number of SEE countries have covered the losses cumulated by their energy companies via loans and

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82 Ibid.
83 Supra, 2013 EnC Implementation Report, 84.
84 Ibid.
87 Ibid, 40.
88 Ibid, 44-67.
90 Ibid.
financial guarantees (e.g. Serbia91), measures of debts cancellation (e.g. Albania92) and tax exemptions (e.g. Albania93). A good example of this tendency is Kosovo, where the formerly State-owned electricity company KEK cumulated a debt of 157 million € vis a vis the Kosovo Government over the period 2005-2009.94 Due to the low electricity bills collection rate in the country (i.e. which varied 51% and 64% over this period of time), the Government of Kosovo had to directly intervene via loans and financial guarantees to ensure that KEK had sufficient liquidity to purchase electricity.95 The cumulated debt was periodically reduced by Kosovo Government via measures of debt cancellation. Such measures could be considered as operational State aid schemes, necessary to allow KEK to stay in the market. In view of their potential anti-competitive effect, it is well known that operating State aids should be allowed only for a limited period of time, in context of a restructuring program of the beneficiary undertaking. However, in some SEE countries operating State aids to State-owned energy companies have been granted over a long period of time, and such aid schemes have generally not been notified to the State Aid Monitoring Authority.

5. Conclusions

As mentioned in the introduction, the reform of the energy sector of the SEE countries is one of the key priorities of the 2020 SEE Strategy recently adopted by the Regional Cooperation Council. Besides being one of the key EU accession criteria, the enforcement of State aid rules would allow the SEE countries to make their energy sector more competitive, in line with the 2020 SEE Strategy objectives. SEE countries have so far complied with the formal transposition of State aid rules, by adopting a State aid law and establishing a State Aid Monitoring Authority. However, the degree of enforcement of these rules in the energy sector is currently disappointing; the data analyzed in the previous section show a general lack of de facto compliance with State aid rules in the SEE countries. Due to the lack of notifications of new aids schemes by the aid providers, the State Aid Monitoring Authorities have played a marginal role in enforcing the State aid rules in the energy sector. The latter remains a highly subsidized sector in the SEE region. In particular, the fact that State-owned energy companies have received substantial “operational” State aids during the last decade is a matter of concern.

Besides the lack of enforcement, the previous section has shown that the State Aid Monitoring Authorities have cleared energy subsidies without taking in consideration the CJEU’s case law and the EU Commission’s Decisions in this field. In particular, the Macedonian State Aid Authority has “misapplied” the Altmark criteria, considering out of the scope of Art. 107(1) TFEU any subsidy granted in the “public interest”, rather than analyzing whether the 4 Altmark conditions were cumulatively satisfied. Furthermore, the Albanian, Montenegrin and Macedonian State Aid Monitoring Authorities have considered subsidies granted to State-owned energy companies operating in monopolistic sectors (i.e. aids to TSO or single wholesale supplier) as per se falling outside of the scope of Art. 107(1) TFEU.

It is worth to stress that a number of SEE countries have only recently adopted a State aid law (i.e. Kosovo and Bosnia and Herzegovina), and thus their Monitoring Authorities are still not fully

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91 Over the last years, Serbia has provided extensive loans and guarantees to Elektroprivreda Srbije, the main State-owned generator active in the country. A table summarizing the loans and financial guarantees granted by Serbian government in favor of Elektroprivreda Srbije is available at: Supra, study by Hunton & Williams 2011, pp. 97-99.
92 During the last decades, the Albanian Governments adopted a number of decisions to cancel the debts cumulated by KESH based on unpaid taxes and contributions. Supra, study by Hunton & Williams 2011, 76.
93 For instance, in July 2007 the Albanian State Aid Commission approved an aid scheme deferring the VAT payment for imported equipment by KESH to be used in electrical power plants. Decision of the Albanian State Aid Commission n. 17, adopted on 16.7.2007.
94 Supra, UNCTAD 2011 report, 41.
95 Ibid.
functional. It is thus understandable that these countries may need a number of years before fully enforcing the State Aid law in the energy sector. On the other hand, in countries like Albania and Rep. of Macedonia the State Aid Monitoring Authority has already been operational for a number of years. The cases of “misapplication” of the Altmark criteria by these authorities and the low number of notifications of new aid schemes show that even in these countries the enforcement of State aid law in the energy sector is not effective. This conclusion is independent from the institutional set-up of the State Aid Monitoring Authority (i.e. inter-governmental State Aid Commission in Albania v. independent NCA in the Rep. of Macedonia). Croatia has been more active than other SEE countries in enforcing State aid rules in the energy sector. However, this might be explained by willingness of the Croatian Government to reduce the amount of the granted State aids in view of the Croatia’s accession to the EU, rather than by the effectiveness of the State Aid control carried out by the Croatian NCA. As shown by the case of the beneficial electricity tariff applied by HEP in favor of TML-TVP, similarly to the Monitoring Authorities of other SEE countries the Croatian NCA did not receive the notification of this politically sensitive aid schemes and failed to enforce the State aid rules in this case.

Besides the political sensitivity of State aid control, the limited human resources and lack of expertise of the State Aid Monitoring Authorities, the SEE countries do not enforce EU State aid rules due to the limited control on compliance exercised by the EU Commission. In its annual reports, the EU Commission generally points out whether each EU candidate country has adopted the State aid law and established the State aid Monitoring Authority. Nevertheless, the EU Commission has never undertaken any assessment of the number of aid notifications received by the Monitoring Authorities in comparison to the total number of existing aid schemes in the country. In addition, the EU Commission has never assessed the “quality” of the decisions adopted by the State aid Monitoring Authorities in any sector of the economy. The process of EU enlargement proceeds by monitoring if the “transposition” of the EU acquis by the EU candidate countries is satisfactory. However, regulatory policies like competition, State aid control and regulation of network industries require a delicate process of institution building and monitoring of proper implementation; process which goes far beyond the mere legislative transposition. Since these regulatory policies do not fall in the core area of expertise of DG Enlargement and of the EU Commission delegations in the EU candidate countries, the EU Commission does not have the capacity to follow “more closely” the enforcement of these regulatory policies by the newly established institutions in the EU candidate countries. The EU Commission has been financing projects of technical assistance and twinning projects to strengthen the capacity of the State Aid Monitoring Authorities of the SEE countries. However, after the conclusion of every project the main challenges faced by the Monitoring Authorities remain (i.e. lack of human resources and constraints related to the political sensitivity of the system of State aid control).

The Monitoring Authorities of the SEE countries could enforce more effectively State aid rules only if they would follow more closely the relevant Decisions of the EU Commission and the case law of the CJEU. Only by relying on the decisions/judgments of the EU institutions, the Monitoring Authorities will be able to “de-politicize” the enforcement of State aid rules at the national law. Secondly, the Monitoring Authorities should actively cooperate with the local and central aid provider, making them aware that any subsidy, even in a politically sensitive area like the energy sector, should be notified to the Monitoring Authority before being implemented.


97 For instance, the Macedonian NCA has been benefiting of a project of technical assistance in the field of State aid organized by the EU Commission. http://www.kzk.gov.mk/images/Vestilimages/1056/DOWNLOAD.pdf (last access on 11.2.2014).
CONCLUSIONS
CONCLUSIONS

The Regional Conference “Promotion of scientific research and education in European integration and policy” organized by the South East European Law School Network (SEELS) and supported by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe-Legal Reform took place at the University of Rijeka, Faculty of Law on 27th and 28th May, 2014.

Representatives from the Ministries of Foreign and EU Affairs, EU integration offices, Ministries of Economy, National Competitiveness and Entrepreneurship Councils, European Movement NGOs from the region, representatives from University of Graz- Faculty of Law and from the University of Vienna - Institute for European Integration Research and also representatives from the Law Faculties member of SEELS from South East European countries took part at the Regional Conference.

The results from the regional research carried out by assigned regional and international experts on EU integration related issues were presented at the Regional Conference. The aim of the Regional Conference was to present the findings from the research, to exchange views and experiences and to determine further steps and recommendations.

The first session of the conference was dedicated to “The new EU Enlargement approach” where Mr. Marko Kmezić from the University of Graz, Faculty of Law presented “The new EU approach to the Enlargement and to the Western Balkan region”. Mr. Kmezić gave an overview of the EU-integration process in the Western Balkans (WB) region during a period of enlargement-abstinence. The focus is on the effectiveness of the rule of law conditionality towards the remaining WB (potential) candidate countries in an attempt to answer the critical question: whether the EU should employ new approach to the rule of law conditionality in order to accelerate the process of EU integration, and how the new approach could sustain EU’s transformative power.

The second session was dedicated on the “Enhanced capacity of the rule of law in the EU”. Prof. Silvija Petric from the University of Split, Faculty of Law presented the “Principle of State Liability and the Rule of Law”. Prof. Petric stated that the responsibility of the rulers for the wrongs done in the conduct of governmental powers constitutes a significant part of the very essence of the principle of the rule of law. In many national legal systems there are strong residues of the old maxim “The King can do no wrong” and state liability for a damage caused by the breach of law is often restrained or even non-existent, especially for judicial and legislative errors. Development of the principle of the Member State liability for infringement of EU law therefore gives private parties much stronger possibilities to obtain damages than in the case when national rules have been breached.

Prof. Nataša Žunić Kovačević from the University of Rijeka, Faculty of Law delivered a presentation on “Enhanced capacity of the rule of law in the EU – Challenges and possible novelties of the rule of law mechanism”. Prof. Žunić Kovačević examines the possible routes of announced novelties in the rule of law mechanism in the European Union. Particular attention is paid to describe and compare two different approaches on the offered steps in building the new regime of safeguarding the rule of law as the core and constitutional principle of European Union and it is at the same time a fundamental principle at national level of Member States.

The third session was dedicated to the “Fundamental rights and freedoms in context of the EU accession to the ECHR and the novelties foreseen with the EU Charter on Fundamental Rights”.

Prof. Evis Alimehmeti from the University of Tirana, Faculty of Law presented “The EU Accession to the ECHR, Novelties with regard to the protection of Human Rights”. She elaborated on the relationship between the European Convention on Human Rights and the EU Charter on Fundamental Rights.
Rights and the jurisdiction of the European Court of Human Rights and the Court of Justice of the
European Union. Although elements of cooperation and acknowledgment of the limits of jurisdic-
tion appear frequently in the jurisprudence of both courts, practice shows also inconsistencies and
unsettled positions. Several cases have been presented to the ECtHR challenging legal acts of the EU
or actions of the states acting upon them, as in violation of the human rights guarantees provided in
the Convention. The Convention’s institutions seem to have intentionally tried to avoid a conflict of
jurisdiction and have generally shown prepared to consider the observance of human rights within
the EU amounting to an equivalent protection with that provided by the Convention. If accession of
the EU to the ECHR takes place, ECtHR will supervise the CJEU with regard to the claims that Conven-
tion has been violated. Still concerns with regard to the nature and the specific characteristics of the
EU need to be addressed.

Prof. Zlatan Meskić from the University of Zenica, Faculty of Law presented “From unrelated
to cooperative triple protection of human rights in the EU”. He stressed out that transformation from
an unrelated to a harmonized triple protection of fundamental rights in the EU is normatively deter-
mined by the Lisbon Treaty. The normative triple protection approach causes questions of compe-
tition, collision and hierarchy, but the solution is not a classical division of competencies and juris-
dictions. Following the purpose of fundamental rights within the ECFR, ECHR (European Convention
on Human Rights) and constitutional traditions common to the member states, all these laws are
related to ensure highest level of protection. Crucial for interpretation and application of these laws
is not the classification within a formal hierarchy, but the impact. This normative evolution follows
the cooperative approach of the EU Court of Justice and the European Court of Human Rights re-
specting each other’s jurisdictions.

Prof. Tanja Karakamisheva- Jovanovska from the University “Ss. Cyril and Methodius” Sko-
pje, Faculty of Law “Justinianus Primus” presented the article “The European Union and the Human
Rights and Freedoms – Dilemmas and Challenges for the EU members and the candidate countries”. In
the conclusions of the article she states that it is an undeniable fact that EU acceding to the ECHR
will not change, nor it will endanger the autonomy of the EU Law, i.e. the autonomy of the ECJ which
validates the UE acts. EU’s accession to the Convention is more and more observed as incorporating
of a new, additional external instrument for monitoring over the fundamental rights, i.e. their better
protection within the Union.

Prof. Ivana Jelić form the University of Montenegro, Faculty of Law in her article “Integration
of the protection of fundamental human rights and freedoms in Europe” states that the respect for hu-
man rights is a measure of democratic capacity of every society and the Union is expected to be at
the highest level in that regard, because the level and efficiency of human rights protection shows
the level of democracy and the rule of law. Thereby, human dignity has to be primarily protected as
a core value for human survival in terms of his/her existence in modern democracy. The accession of
the European Union to the European Convention on Human Rights will contribute to the strength-
ening of legal certainty, through the consistent application of European human rights law in the
whole of Europe.

The second day of the Conference started with the fourth session on “Policy of competi-
tiveness and sustainable development and the EU/SEE 2020 Strategy”. Prof. Predrag Cvetković,
presented the “Public-private partnership of the “Horizon 2020” implementation tool: The main meth-
odological issues”.

Dr. Veronika Efremova from GIZ –Open Regional Fund for South East Europe presented the
“Higher education research for innovation and competitiveness”, and referred to the EU Integration
and Higher Education Systems in South East Europe, Research and Innovation in South East Europe
and EU funding for Higher Education Institutions in South East Europe. As a future challenges, she
emphasized the need for better absorption and utilization of the existing EU funds (programmes for R&D), increased support by national decision makers for R&D activities and programmes, further strengthening of research and innovation capacities, increased investment in knowledge, technology and technical research equipment, increased participation into international projects and cooperation programmes, better communication and networking between academic research and HEIs from the region to the European R&D infrastructures, to interconnect and strengthen cooperation between research, higher education and innovation sectors.

Prof. Dušan Popović from the University of Belgrade, Faculty of Law presented the “Serbian Innovation Policy as a motor of competitiveness and sustainable development”. He gave an overview of the innovation policy and instruments as of outmost importance for sustainable development and competitiveness of a country. He analysed to what extent Serbia embraced the goals set by the EU 2020 Strategy, in particular the goals related to the innovation and technology development. The author assessed the results of the implementation of the national innovation policy by applying the criteria laid down in the Annex I of the EU Communication on the Innovation Union. It is concluded that certain features of a well performing national and regional research and innovation system are currently present in Serbia.

Prof. Predrag Cvetković from the University of Niš, Faculty of Law presented on “Public-private partnership of the “Horizon 2020” implementation tool: The main methodological issues”. He highlighted that in the relevant documents promoting Horizon 2020 Strategy public-private partnership concept is defined and legitimized as the relevant tool for achieving economic stability of European Union. There are two levels of PPPs establishment. The first one is the coordination of actors. The second level of PPPs establishment is the galvanization of involved actors’ interests. As the examples for such galvanization Competitive Dialogue Procedure and Unsolicited Project Proposal Procedure are used. Both procedures establish the two parallel corridors for the realization of PPPs projects. They justifiably coexist as the relevant patterns of PPPs project procurement. CDP as well UPP procedure ensure market-oriented way of thinking to be used in the realization of public interest through PPPs concept implementation. As such, the described methods for PPPs procurement are important tools for the achievement of goals defined in Horizon 2020 Strategy. This is the main value statement of his paper.

The fourth session continued with the presentation of the “SEE 2020 Strategy: Towards a regional growth” by Mr. Gazmend Turdiu, Deputy Secretary General of the Regional Cooperation Council (RCC). He referred that SEE 2020 Strategy provides a framework to assist governments in the region to implement their individual development strategies, including EU accession related goals, by enhancing national efforts through focused regional cooperation on those specific issues that can benefit from a shared approach. The SEE 2020 Strategy is consisted of 5 pillars, 16 policy dimensions, 86 measures and it is an instrument to move regional cooperation to a new phase. The five pillars of the SEE 2020 Strategy are: Integrated growth, Smart growth, Sustainable growth, Inclusive growth and Governance for growth.

Ass. Prof. Marco Botta from the University of Vienna, Institute for European Integration Research presented on “Enforcement of State Aid Law in the Energy Sector in South-East Europe”. He stated that the reform of the energy sector of the SEE countries is one of the key priorities of the 2020 SEE Strategy recently adopted by the Regional Cooperation Council. Besides being one of the key EU accession criteria, the enforcement of State aid rules would allow the SEE countries to make their energy sector more competitive, in line with the 2020 SEE Strategy objectives. SEE countries have so far complied with the formal transposition of State aid rules, by adopting a State aid law and establishing a State Aid Monitoring Authorities. At the closing session, the participants agreed on the following general conclusions from the Conference:
1. To further increase level of independence and effectiveness of the judiciary (prior the accession negotiations are launched)
2. To further increase progress and cooperation for good governance, rule of law and efficient public administration
3. Enhance the effectiveness of the rule of law conditionality principle towards the candidate countries
4. More inclusive bottom-up approach to the EU rule of law promotion and increased role of the civil society
5. Extending EU Monitoring Instruments for rule of law and the fundamental rights on the EU acceding countries
6. Promote public debate with regard to the integration and the future of the European Union.
7. To increase contribution of national innovation policies in achievement of SEE 2020 goals
8. To strengthen institutional coordination mechanism and capacities for research and innovation
9. To increase public sector knowledge and skills for PPP
10. To strengthen collaboration between academics and researchers within the EU integration process, with special focus on the regional integration
11. To better absorb and utilize existing EU funds
12. To increase public support by national decision makers and investment in knowledge, technology and research
13. To strengthen triple cooperation between public, academic and private sector for research and innovation
14. To increase country coherence, coordination, contribution and political support to progress of implementation and policy development of SEE 2020 Strategy
15. Improved enforcement of state aid rules would allow reduction of subsidies granted in specific sectors in SEE (i.e. energy)
16. De-politicization of the SEE state aid monitoring authorities for enforcement of state aid rules