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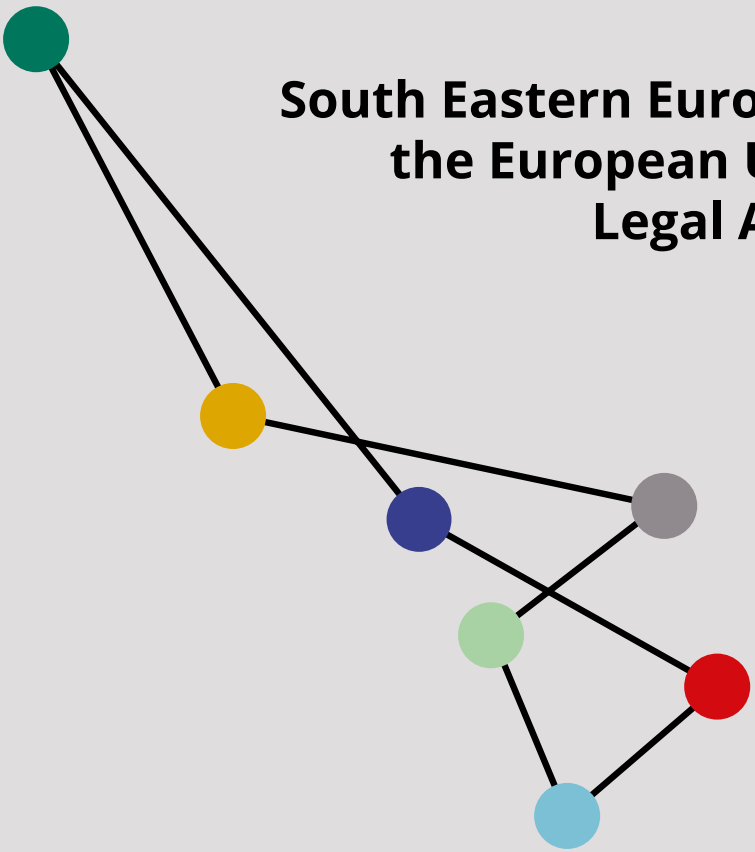
SEE | EU Cluster of Excellence
in European and International Law (Ed.)

South Eastern Europe and the European Union – Legal Aspects



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South Eastern Europe and the European Union – Legal Aspects

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Preface

This publication is the first volume of the series of papers of the SEE | EU Cluster of Excellence in European and International Law. The series is a compilation of articles from authors of different partner law faculties in Germany and South Eastern Europe.

The Europa-Institut of Saarland University is the leading partner of the SEE | EU Cluster of Excellence in European and International Law, along with the law faculties of: the University of Belgrade (Serbia), Montenegro (Podgorica, Montenegro), Sarajevo (Bosnia and Herzegovina), Skopje (Macedonia), Tirana (Albania) and Zagreb (Croatia), and the South East European Law School Network. The project is supported and sponsored by the German Academic Exchange Service (DAAD) as well as the German Federal Ministry of Education and Research, and aims to promote the outstanding capabilities in research and teaching in the field of European and International Law.

The SEE | EU Cluster of Excellence in European and International Law will improve not only the cooperation between Germany and the South East European countries but also the cross-border regional and local cooperation in the areas of teaching and research as well as the development of common structures and strategies. The Cluster of Excellence seeks to explore new avenues in the transfer of knowledge; sharing expertise and experiences will strengthen the profile of each partner and the network as a whole. Therefore, the Cluster will implement various measures and activities aspiring to achieve the set goals: eLearning modules, a model curriculum, a graduate school, a number of research projects, summer schools, library cooperation and various publications.

This collection of papers can serve as a forum for academic staff and young academics of the partner faculties in the SEE | EU Cluster of Excellence to publish their research results on relevant questions in European and International Law. In addition to the traditional areas of law, specific areas of interest include: the integration of SEE countries in the European Union, issues of legal reform and implementation of the acquis communautaire, best practices in legal reform, and approximation of legislation in the region of South Eastern Europe and

the EU. The series will be published on a yearly basis and is peer-reviewed by the Editorial Board.

The SEE | EU Cluster of Excellence in European and International Law • Series of Papers 2015 encompasses twelve papers of academic staff and junior researchers from the law faculties in Belgrade, Osijek, Rijeka, Skopje and Tirana. This issue covers a broad variety of topics and illustrates the wide range of topics connected to European and International Law. Particular topics in this volume discuss e.g. refugee law, company law, and comparative law. Most notably, several of these published papers constitute adaptations of the presentations held at the Cluster of Excellence's Launch Conference at the Europa-Institut in Saarbrücken in November 2015.

We thank the German Academic Exchange Service (DAAD) and the German Federal Ministry for Education and Research for their financial support. We owe our special thanks to all authors for their contribution as well as to Ass. iur. Mareike Fröhlich LL.M. and Ass. iur. Anja Trautmann LL.M. who made this book possible.

We are confident that the SEE | EU Cluster of Excellence in European and International Law • Series of Papers will raise the interest in European and International Law and contribute to the achievement of the SEE | EU Cluster of Excellence in European and International Law's goals.

Saarbrücken, December 2015

Prof. Dr. Marc Bungenberg LL.M., Director
Europa-Institut of Saarland University

Prof. Dr. Thomas Giegerich LL.M., Director
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The Enlargement of the Western Balkan Countries in the European Union: A Comparison with the Accession Criteria for Eastern Europe Countries

Fjoralba Caka[*]

Abstract

The European Union has experienced different waves of enlargements starting from 1973 where three countries, Great Britain, Ireland and Denmark acceded. In the largest wave of enlargement, i.e. the fourth wave of enlargement, in 2004, ten countries from East and Southeast Europe acceded to the EU. In the Thessaloniki meeting in 1999, five countries of the Western Balkan, Albania, Montenegro, Macedonia, Croatia, Serbia and Bosnia Herzegovina, were considered as countries that have the perspective of being members of the European Union. In the same year the Process of Stabilization and Association between the EU and these countries started, and beyond the measures for the stabilization, the instruments that would precede the accession were foreseen. This paper aims to analyse the general conditions for membership in the European Union. First we will analyse the accession criteria for enlargement. Then we will shift in an analysis of the conditionality policy for the Eastern Europe Countries and the conditionality policy for the Western Balkan Countries to determine whether there is any substantial change between thereof.

A. Criteria, Principles and Conditions for Membership

The first criteria for membership was determined in the Treaty of Rome, namely Article 237, where the European identity criterion was set – "Any European state may apply to become a member of the Community". On this basis it was denied the membership of Morocco in 1988 as the European Council stated that "Morocco is not a European state".

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The formulation of a political accession criterion was first mentioned in the declaration on European identity (1973) and the conclusions of the Copenhagen council (1978).[1] The Declaration on European identity (1973) noticed that the European Union is a construction that gathers all European countries who share the same ideals and objectives.[2] Further, Article 1 of the Declaration stated the common principles on which the Community was based:

"The nine [...] are determined to defend the principles of representative *democracy, of* the rule of law, of social justice [...] and of respect for human rights".[3]

Regarding the "European identity" criteria, the conclusions of the 1978 Copenhagen council were tacit. Rather it emphasized the importance of European Union common principles, in particular the respect for human rights and the representative democracy – "respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities".[4]

This was a clear signal to Greece, Portugal and Spain, that if they wanted to accede to the EU, they had to proceed with democratization.[5]

In the Lisbon European Council of June 1992, the Commission, apart the European identity, democratic status and respect of human rights conditions, stressed the ability of the new member state to implement the *acquis communautaire.* This included the single European market and the Maastricht provisions on the Economic and Monetary Union. An applicant state had to have a functioning and competitive market economy; if not, "membership would be more

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1 *Kahn-Nisser*, Drawing the Line: The EU's Political Accession Criteria and the Construction of Membership, Jean Monnet Working Paper 07/10, p. 10.

2 Article 4 of the declaration reads: "The construction of a united Europe [...] is open to other European nations who share the same ideals and objectives".

3 Emphasis added.

4 *Kahn-Nisser*, (fn. 1), p. 10 et seq.

5 *Pridham*, The International Dimension of Democratisation: Theory, Practice and Inter-Regional Comparisons, in: Pridham/Herring/Sanford (eds.), Building Democracy?, The International Dimensions of Democratisation in Eastern Europe, 1994, p. 24.

likely to harm than to benefit the economy of such a country, and would disrupt the working of the Community".[6]

The European Council of Copenhagen in June 1993, when examined the application for membership of the Central and Eastern European Countries (CEEC), declared that those CEECs that had concluded a Europe agreement were eligible for EU membership, provided they could meet the criteria of:

– Political stability and respect for democratic principles

– Respect of the rule of law, human rights and protection of minorities;

– Having a functioning market economy with the capacity to cope with competitive pressures and market forces within the EU;

– Taking on the obligations of EU membership including adherence to the aims of economic and political union.[7]

The Copenhagen criteria are by and large similar to the criteria set out in the Commission's 1992 report, with two important additions: respect for and protection of minorities[8] and the absorption institutional capacity of the Union.[9] These conditions were designed to minimise the risk of new entrants becoming politically unstable and economically burdensome to the existing EU. They were thus formulated as much to reassure reluctant member states as to guide the candidates, and this dual purpose of the conditionality has continued to play an important role in the politics of accession within the EU.

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6 *Sjursen/Smith*, Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement, ARENA Working Papers, WP 01/1, p. 7.

7 *Verrilli*, Diritto dell' Unione Europea: Aspetti istituzionalli e politiche comuni, XV ed. 2007, p. 537.

8 *Sjursen/Smith*, (fn. 6), p. 8.

9 *Cameron*, The European Union and the Challenge of Enlargement, OP973, Paper presented at the Halki International Seminars (31 August-7 September 1996), p. 4: "The European Council added a further criteria when it linked enlargement to institutional reform by concluding that 'the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general in the general interest of both the Union and the candidate countries'".

The fourth condition reflects member states anxieties about the impact that enlargement might have on EU institutions and policies because of the increase in numbers and diversity, apart from the specific problems that CEE members might bring along. It is a condition for enlargement, whereas the others are conditions for entry.[10]

The Madrid European Council in December 1995 confirmed these criteria and referred also to the need "to create the conditions for the gradual, harmonious integration of the candidate countries particularly through: the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment".[11] Both summits in Madrid and Luxembourg underlined the challenge of making domestic laws and judiciary practices compatible with EU's structure and values.

The Helsinki European Council in December 1999 stressed that "compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations".

It was the Amsterdam Treaty that formalized the political criteria of membership in a Treaty level, declaring that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Article 6) and that "[a]ny European state that respects these principles may apply to become a member of the Union" (Article 49).[12] These new Treaty provisions in fact, did not bring any new criteria or principle on membership, but rather they were considered as a reflection of the substantive facet of customary enlargement law of the European Union, which was created mainly in European Councils meetings.[13]

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[10] *Grabbe*, The Implications of EU Enlargement, in: White/Lewis/Batt (eds.), Developments in Central and Eastern European Politics 3, 2003, p. 5.

[11] *Cameron*, (fn. 9), p. 4.

[12] *Sjursen/Smith*, (fn. 6), p. 10.

[13] *Kochenov*, EU enlargement Law: History and recent developments: Treaty-Customs Concubinage?, EIOP 9 (2005) of 14/4/2005.

Thus, the political criteria was the most emphasized during the European Council meetings, and was, moreover, set as the basic criteria to open negotiations with the new applicants of the 2004 enlargement. This was an expression that European Union is an entity based on values and democratic principle, and also an important factor in the international arena that promotes democracy, the rule of law and the protection of human rights. The threshold, which the new applicants had to pass, was moreover a guarantee for the Union itself, because it would avoid troublesome company within the club. The last remark we can make with regard to this is that the political criteria as well as the other set of criteria stated in the Copenhagen European Council and reaffirmed afterwards, were merely vague, hard to be identified and evaluated, since there were not any benchmarks or monitoring agencies to evaluate them. This left a lot of discretion to the Commission and the Council, and also to the Members States to decide on the merits of the applicant, making the process more of political rather than of legal nature.

Further, we will stop on a specific analysis of the conditionality, or the "carrot and stick" policy the EU has set for the CEEC and the Western Balkan and judge on the nature and extent of the criteria and conditions for enlargement.

B. The CEEC Conditionality

Conditionality is not a term provided in the fundamental Treaties. According to some scholars,[14] its origins date back to the fourth and fifth wave of enlargement, i.e. when ten countries, mainly from Central and Eastern Europe applied for entering the EU or with the accession of Rumania and Bulgaria.[15]

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[14] Ibid.

[15] Anyway there are other scholars that date conditionality since 1980, see *Anastasakis/Bechev*, EU Conditionality in South East Europe: Bringing Commitment to the Process, South East European Studies Programme – European Studies Centre, St Antony's College, University of Oxford, April 2003; or since the Copenhagen European Council in 1993. Conditionality refers to the linking of perceived benefits to fulfillment of a certain program. According to *Kubicek*, The Application and Acceptance of Democratic Norms in the Eastward Enlargement, in: Sjursen (ed.), Enlargement in process, 2005,

The conditionality policy is based on the "carrot and stick" methodology. On one hand there is the "carrot", the reward for complying with the EU conditions. The reward can be of two categories: accession advancement rewards which reflect the progress of the candidate country in the accession process and financial rewards (or financial assistance). The main accession advancement rewards include: granting membership perspective; signing association agreement; implementing association agreement; granting candidate status; opening accession negotiations; opening a chapter; provisionally closing a chapter; credible membership perspective; completing accession negotiations; signing accession treaty; ratification of the accession treaty; accession to the European Union. The financial rewards refer to the financial assistance provided by the EU to the candidate country through the pre-accession financial instruments: PHARE, SAPARD and ISPA and IPA programs.[16] On the other hand, there is the "stick" that are sanctions taken by the EU for non-compliance of the candidate/associated countries with the EU requirement. According to *Gateva*, these sanctions could be in the shape of implicit threats, such as sanction non-compliance by delaying the receiving of the accession advancement rewards (Bulgaria and Rumania in 2002), or explicit threats, such as financial sanctions which penalize non-compliance with EU rules by suspending or withdrawing funds, provided by Article 4 of Council Regulation (EC) No 622/98 of 16 March 1998, or specific precautionary measures (safeguard measures), ranging from economic and internal market safeguard clauses to specific measures in the areas of food safety and air safety.[17] Thus, by offering the "carrot" of accession, the EU has sought to consolidate the reform process and reduce the political and economic gap between existing and potential members. At the same time however, conditionality also clearly serves an internal EU purpose, to address the

p. 180: "the clearest use of conditionality is in the 1993 Copenhagen Criteria to membership: meet these criteria, and you are eligible to join us and receive various benefits. Along with this 'carrot', there is an implied 'stick': failure to abide by the criteria will be costly since you will be excluded from membership".

[16] See the model of stage-structered conditionality presented by *Gateva*, Post-Accession Conditionality-Support Instrument for Continuous Pressure?, Working Paper KFG, No. 18, October 2010, p. 10 et seq.

[17] Ibid., p. 11.

potentially negative effects of enlargement for the EU itself and to reassure existing members that the values, standards and effectiveness of the EU will not be undermined by new member states.[18]

The conditionality differs from the membership criteria and principle mentioned in the EU documents cited in the first part of this article, in some aspects.

Previously, the Union made an overall judgment on the applicant Member State whether if fulfilled the minimal criteria, while conditionality presupposes the right of the Union to scrutiny all spheres of political, legal and economic reforms whether they are in compliance with the Union demands.[19]

Grabbe explicitly states that conditionality for accession has extended the reach of EU influence considerably more deeply into domestic policy-making in CEE than it has done in the member states, which have only had to implement policies resulting from "the obligations of membership" (the third condition) and have never been judged on the other two conditions.[20] The democracy and market economy conditions have led the EU (in the form of the Commission and Council) to influence many policy areas beyond the reach of Community competence in the member states. Indeed, the conditions cover several areas where member states have long been very resistant to extending Community competence for themselves. The political criteria take the EU into areas such as judicial reform and prison conditions; the economic criteria are interpreted to include areas such as reform of pension, taxation and social security systems; and the measures for "administrative capacity to apply the *acquis*" brings EU conditions to civil service reform in CEE, for example.[21]

In this regard, legal instruments mechanisms are raised in order to cope for the political, economic and legal reforms of the associated

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[18] *Barnes/Randerson*, Can Conditionality Counter Enlargement Fatigue?, International Conference, New frontiers of the EU: effects of enlargement; sustainable development, East-South dialogues of 11/5/2006, p. 7.

[19] See further *Kochenov*, (fn. 13), p. 14.

[20] *Grabbe*, Europeanisation Goes East: Power and Uncertainty in the EU Accession Process, in: Featherstone/Radaelli (ed.), The Politics of Europeanization, 2003, p. 307.

[21] Ibid.

country. The European Agreements, which provided the framework of reforms, combined with the creation of the Association Council and the structural dialogues of the heads of state or ministers in the pre-accession period, the White Papers drafted in the *Cannes* European Council on the steps which the associated country should take in order to prepare themselves to enter the Single Market, were used for the CEE countries to scrutiny whether this countries' policies comply with the EU conditions.[22]

Secondly, the principle of conditionality applies through the whole accession process. Different categories of conditions may be developed by the Union to access the process.[23]

Thus, the Accession Partnerships issued from 1998 onwards present a huge range of demands. The candidates have to implement the Accession Partnerships to move forward towards accession, and also to qualify for EU aid and other benefits. Moreover, in 1997 the Agenda 2000 report on the EU enlargement towards the CEEC was published. It stated the general criteria and conditions the CEEC should met in order to accede to the EU. Apart the Copenhagen and Madrid criteria, the Agenda 2000 provided the adoption of yearly reports on the progress of applicant countries as well as a new condition, that of dispute resolution and good neighbourhood. Regarding the dispute resolution it was stated that the European Commission "considers that, before the accession, applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries. Failing this they should agree that the dispute be referred to the International Court of Justice."[24]

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22 *Cameron*, (fn. 9), p. 9 et seq.

23 See further *Kochenov*, (fn. 13), p. 14.

24 The Helsinki European Council reiterated this condition in December 1999: it stresses the principle of peaceful settlement of disputes in accordance with the United Nations Charter and urges candidate States to make every effort to resolve any outstanding border disputes and other related issues. Failing this they should within a reasonable time bring the dispute to the International Court of Justice. The European Council will review the situation relating to any outstanding disputes, in particular concerning the repercussions on the accession process and in order to promote their settlement through the International Court of Justice, at the latest by the end of 2004. See *Sjursen/Smith*, (fn. 10), p. 10.

Thirdly, with the deepening of the EU integration between Member States, the range of conditions to be met in order to be in compliance with the EU acquis is widened.

Thus, the Maastricht Treaty added new policy areas to EU activities, such as justice and home affairs, and the Schengen area of passport-free travel; a common foreign and security policy, with a defence identity; and a common currency. All of these developments add to the requirements that the candidates have to meet before accession. The CEE countries have no possibility of negotiating opt-outs like those applying to some member states on the Schengen and the monetary union. The candidates also have to take on the EU's "soft law" of non-binding resolutions and recommendations.[25]

Furthermore, the EU has developed a new mechanism in judging upon the compliance of the legislation of the candidate/potential candidate country with the acquis, that is "the questionnaire". In 1996 the Commission sent to the ten countries of CEE questionnaires regarding the compliance of approximately 100.000 pages of EU legislation. The questionnaire had a twofold function: on the one hand they aim to give to the applicant countries a clear understanding of the extent and scope of EU policies, in order to take all the necessary internal measure to bring their national legislation into compliance, on the other hand the information taken by the questionnaire serves as an thorough information for the Commission for the preparation of its Opinions to open negotiations.

Fourthly, monitoring of the fulfilment of the conditions set by the EU towards the candidate/potential candidate countries is a key element of the conditionality.

From the first regular reports in 1998 and onwards the progress reports have gained a specific importance in the evaluation of the association process. The Commission significantly increased the relevance of monitoring reports as it started to use them not only as a basis for its recommendations (whether to grant a reward or impose a sanction), but as an instrument for prioritizing conditions as well as an instrument for establishing new conditions and introducing new

[25] *Grabbe*, (fn. 10).

threats.[26] Furthermore, the monitoring of the conditions is not limited only during the negotiation, pre-accession and accession phase, but also after the gaining of membership. Thus, unlike new member states which joined the Union on 1 May 2004, Bulgaria and Romania had to accept an additional "super safeguard" clause which allowed the EU to postpone their accession by one year.[27] Although the clause was not activated, the Commission concluded that further progress was still necessary in the area of judicial reform and the fight against corruption and set up the Cooperation and Verification Mechanism (CVM) in order to monitor the progress in these areas after the accession of Bulgaria and Romania.[28]

C. Western Balkan Countries Conditionality

The history of the Central and Eastern European Countries with the Western Balkan Countries is inextricably linked. All these countries have experienced the communist dictatorship and after its fall, they have entered into a transition period in order to restore democratic systems, the rule of law and the free trade market. Albeit the commons, the features of the transition period for the CEE and Western Balkan Countries differ, and as a consequence, it is understandable that the "stick and carrot" policy of the EU towards the Western Balkan countries would have different characteristic of that of the CEE countries.

In 1999, the European Union launched a challenging project towards the Western Balkan, i.e. the Process of Association and Stabilization. This process aimed the political, economic and regional stabilization of the Western Balkan and to avoid future conflicts in the regions.

The Western Balkan perspective of potential Member States was for the first time mentioned in the Fiera European Council in 2000. In the Zagreb European Council in 2000 these countries were considered

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26 *Gateva*, (fn. 16), p. 12.

27 Articles 36-39 of the Treaty of Accession concerning the Accession of the Republic of Bulgaria and Romania to the European Union, OJ L 157 of 21/6/2005, p. 11.

28 *Gateva*, (fn. 16), p. 7.

"potential candidates"; while in the Thessaloniki European Council in 2003 it was declared that "the future of the Balkan is within the EU". In 2004, the European Commission in its Third Annual Report on the Stabilization and Association Process for South East Europe state that "[t]he same basic entry requirements apply to the countries of the Western Balkans as to other countries that aspire to join the Union, namely the political, economic and institutional criteria established by the Copenhagen European Council in 1993 and set out in Articles 6 and 49 of the EU Treaty".

Similarly, with the CEE, the Commission presented some mechanisms and instruments for the association process: the European Partnerships, the Stabilization and Association Agreements, autonomous trade measures and substantial financial assistance.

The Commission report apart the general entry requirement, drafted some specific entry requirement for the Western Balkan Countries:

"The countries must also meet the criteria specific to the Stabilisation and Association process (SAp) as set out in the Conclusions of the General Affairs Council in April 1997 and in accordance with the Commission Communication of May 1999 on the establishment of the SAp. These criteria include full co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY), respect for human and minority rights, the creation of real opportunities for refugees and internally displaced persons to return and a visible commitment to regional co-operation. Important principles established during the present enlargement process also apply to the countries of the Western Balkans: each country proceeds towards membership on its own merits and at its own speed."

When comparing the Western Balkan conditionality with the conditionality of the CEE countries during the 2004-2007 enlargements, some remarks can be drawn.

First, the process of Europeanization and state building in the Western Balkan is different from that in the CEEC and this has led to a more expanded conditionality towards the Western Balkan. *Jano* distinguishes two main differences in respect of the transition period of these countries: the political (democracy, rule of law, free elections) aspect and the economic sphere (liberalization, stabilization and privatization of trade). Thus, regarding the political situation, if the Cen-

tral Eastern European countries have been consider "free", the countries of the Western Balkans have been considered at best only "partially free".[29] As far as the economic transition is concerned, the gap is even more profound. The economic performance of all transition economies in the Balkans has been worse than that in the CEE.[30] This has led to an overstretching of the conditionality. Thus, the political conditionality is not limited to the rule of law and respect of human rights, but expanded to free and fair elections, democratic institutions, protections of refugees and minorities, stable governments and so on.

Moreover, to further tighten up on implementation, some of the conditions were given added procedural force by being written into the *acquis*, including judicial reform and human rights.[31] Thus, the European Charter of Fundamental Rights, entered in force with the Lisbon Treaty, has also its external dimension, i.e. it is the benchmark of respect of human rights the Western Balkan Countries have to guarantee. We can say that the process of state building and Europeanization is deeper in the Western Balkan and this has led the EU to put new standards for their accession and extend the political conditionality.

Second, the "regional dimension" is a new important condition imposed on the Western Balkan.

Regional cooperation was not formally provided for CEE, which had only the obligation to foster bilateral relations. The purely bilateral approach adopted towards the CEE accession candidates prompted competition between them at the expense of cooperation, which a region as fragile and fragmented as the Western Balkans can ill afford,

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[29] *Jano*, From 'Balkanization' to 'Europeanization': The Stages of Western Balkans Complex Transformations, L'Europe en formation, special issue on the Western Balkans between Nation-Building and Europeanisation, No. 349-350, Fall-Winter 2008, p. 62.

[30] Ibid.

[31] *Pridham*, Securing fragile democracies in the Balkans: the European dimension, Romanian Journal of European Affairs 8 (2008), p. 11.

for economic as much as security reasons.[32] The EU's fundamental objective for the Western Balkans was "to create a situation where military conflict is unthinkable – expanding to the region the area of peace, stability, prosperity and freedom established over the last 50 years by gradual European integration".[33] By the regional cooperation the EU aims to repeat the history of its "spill-over" effect: cooperation for the sake of integration avoids war and military conflicts.

Third, the Western Balkan conditionality confronts sensitive and politically charged issues relating to the past. This is closely linked to the regional cooperation and the aim is to stop further conflicts in the region. Some of the "past issues to be resolved" deal with the "full cooperation" with the International Criminal Tribunal for the former Yugoslavia (ICTY) over handing over alleged war criminals, or the furthering ethnic and religious reconciliation.

Furthermore, in the Enlargement Strategy Paper it is stated that the Commission "is prepared to recommend the suspension of progress [with accession] in case of a serious breach of the EU's fundamental principles or if a country fails to meet essential requirements at any stage".[34] We can mention here the suspension of the negotiation with Croatia in 2005 for failure to deliver the criminal *Ante Gotovina*.

Fourth, various new mechanisms were introduced to improve implementation by making progress with accession more tightly and procedurally geared to conditionality results.[35] Here we can mention the application of benchmarks for provisionally closing and also opening negotiation chapters (thus allowing each member state "veto points"), the introduction of safeguard clauses to extend monitoring

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[32] *Batt*, Introduction: the stabilisation/integration dilemma, in: Batt (ed.), The Western Balkans: Moving on, Challiot Papers, No. 70, October 2004, www.iss.europa.eu/uploads/media/ cp070.pdf (1/12/2015), p. 10.

[33] See www.euractiv.com/en/enlargement/eu-western-balkans-relations/article-129607 (1/12/2015).

[34] European Commission, Communication from the Commission: 2005 Enlargement Strategy Paper, COM (2005) 561, p. 3.

[35] *Pridham*, Securing fragile democracies in the Balkans: the European dimension**,** paper presented in the Conference on Challenges to Balkan Security and the Contribution of International Organizations, held in Izmir/Turkey, May 2008, p. 10.

and a more routine procedure for suspending negotiations. These provisions were written into the negotiating frameworks for Croatia and Turkey which commenced their membership talks in autumn 2005.[36]

Fifth, the enlargement "fatigue" and the revival of absorption capacity are making the Western Balkan integration more difficult. The "absorption" capacity was mentioned for the very first time in the Copenhagen European Council, where it was stated that "[t]he Union's capacity to absorb new members, while maintaining the momentum of European integration, is an important consideration in the general interest of both the Union and the candidate countries".[37]

The absorption capacity was not mentioned as a "Copenhagen criteria" and was set aside when opening the negotiation for enlargement with CEEC, where the EU was more focused on the conditions and the monitoring of these countries rather than in its absorption capacity. Anyhow, after the rejection of the Constitutional Treaty in the Netherlands and France the "absorption capacity" appeared again in the EU documents regarding enlargement. This is intrinsically linked with the "enlargement fatigue". Though there was not any clear argument to support the idea that the Dutch and French "No" was linked to enlargement, statistics have shown that almost in all countries after 2004, the big-bang enlargement, the fostering of enlargement was negatively perceived among EU population , academics and further. This "enlargement fatigue" was soon reflected in the EU documents. The European Council of June 2006 stated:

"Therefore the European Council will, at its meeting in December 2006, have a debate on all aspects of further enlargements, including the Union's capacity to absorb new members and further ways of improving the quality of the enlargement process on the basis of the positive experiences so far. It recalls in this connection that the pace of enlargement must take the Union's absorption capacity into account. The Commission is invited to provide a special report on all relevant aspects pertaining to the Union's absorption capacity, at the same time as it presents its annual progress reports on enlargement

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[36] Ibid.

[37] European Council, Conclusions of the Presidency, Meeting in Copenhagen, 21-22/6/1993, SN 180/1/93, p. 14.

and pre-accession process. This specific analysis should also cover the issue of present and future perception of enlargement by citizens and should take into account the need to explain the enlargement process adequately to the public within the Union."[38]

Although, it is not foreseen in any Treaty or Association Agreement, the "absorption capacity" could be a strong ban in the future for the integration of Western Balkan. Academics[39] have articulated so far five components of the "absorption capacity": capacity of goods and service markets, capacity of labour markets, capacity of EU finance, capacity of EU Institutions to act, capacity of society to absorb and capacity to assure its strategic security. In some key respects the EU's absorptive capacity for further enlargement is going to be what its leaders choose it to be, especially as regards institutional factors. For EU leaders, to ask the Commission to report on the future absorption capacity becomes a circular argument, since it is for EU leaders to decide notably on institutional changes to enhance this absorption capacity.[40]

Lastly, the EU conditionality credibility is lower with respect to Western Balkan Countries in comparison with the CEE countries.

The credibility of EU conditionality represents a major difference between the Eastern enlargement and the enlargement strategy used for the Western Balkans. The current candidates are less certain when or even if they will receive the ultimate reward of EU accession. In view of a European public opinion increasingly opposed to further enlargement, European political actors are unwilling to specify a possible accession date for the Western Balkan Countries.[41]

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38 Ibid., p. 18.

39 *Emerson/Aydin/de Clerck-Sachsse/Nouthcheva*, Just what is this 'absoption capacity' of the European Union, CEPS – Policy brief, No. 113, September 2006.

40 Ibid., p. 24.

41 *Trauner*, The Europeanisation of the Western Balkans: deconstructing the EU's routes of influence in justice and home affairs, Institute for European Integration Research Austrian Academy of Sciences, paper presented to the ECPR Fourth Pan-European Conference on EU Politics, Riga, 25-27/9/2008.

D. Final Remarks: A Need to Revive the Commitments

The criteria set in the Copenhagen European Council and elaborated in the afterwards European Union Councils, are general and vague and leave room for interpretation by the EU institutions, Commission and the Council, or by Member States. Elaboration of what constitutes meeting the accession conditions has progressively widened the detailed criteria for membership, as new conditions can be added and old ones redefined. Moreover, new issues of concern arise, so the EU has added specific requirements for individual countries.[42]

It is very difficult to pinpoint exactly when each of the accession conditions has been met, giving the European Commission a degree of discretion in reporting on the candidates' progress. The Copenhagen conditions do not provide a check-list of clear objectives; neither do they specify the means to achieve stated goals.[43] The development of the "carrot and stick" methodology of enlargement, known as conditionality differs from the accession criteria applied before the 2004 enlargements, making the accession conditions for the Central East European Countries much stricter than the criteria for the previous accessions. During the 2004 enlargement conditionality increasingly became a technocratic tool, a set of technical regulations and hurdles for applicant states to achieve. In part, this reflected the pragmatic difficulties of measuring applicant states' success or failure towards imprecise concepts such as democracy, whereas progress towards the adoption of the *acquis* could more easily be established via the opening and provisional closing of chapters.[44] This was justified by the fact that enlarging the EU with ten new member states, which have been for a long time under the communist regime and their poor market economy and the lack of stability, would encounter a lot of reforms, in order not to import instability in the EU. This trend of stretching and transforming conditionality in a technical tool was followed also with the Western Balkan Countries. The disappointments caused by the Central East Europe enlargement, the "enlargement fatigue", the deepening versus widening approach, the difficult

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42 *Grabbe*, (fn.10), p. 2.

43 Ibid.

44 *Barnes/Randerson*, (fn.18), p. 7 et seq.

transition to democracy of the Western Balkan countries, caused that new instruments of conditionality be applied for these applicant members. In few words this means that the Western Balkan countries are subject to stricter and more complex conditionality instruments than the previous Central East Europe applicant states but for the same reward.

The hurdle of complex instruments may turn into an obstacle for the development of an effective enlargement policy towards Western Balkan. On one side the Western Balkan Countries may be frustrated for making enormous reforms and not getting the expected rewards for their efforts, while on the other side the European Union may judge that the reforms are not sufficient and satisfying and that the Western Balkan are being slothful in their progress. The escalation of irritation that the process may cause is not beneficial for any of the parties. The EU may lose its exclusive centre of gravity and attraction for the Western Balkan countries, making the application of the enlargement criteria low and elongated. The Western Balkan progress in the EU accession process may be delayed or halted, and this can affect the democratization and stabilization reforms these countries are taking in the name of EU accession. With this regards, there is a need of "revival of commitments" between these two parties, and maybe a review of the methodology of the accession criteria and the application of the conditionality. The European Union on its side should opt more for clear and short-term criteria to be met, rather than broad and ambiguous conditions. As the experience has shown, the Western Balkan countries are more efficient when the accession criteria are redefined as short term priorities, the fulfilment of which is crucial for the advancement into the accession process. Moreover, short term priorities combined with specific technical assistance from the EU would be more effective. By having intensive meetings with experts from both parties, the Western Balkan Countries would be clearer on the EU expectations on specific reforms, and on the other hand the EU delegation/experts would be more concrete on the specific needs and opportunities of each country to fulfil the criteria and actually make a better monitoring and evaluation of the progress of these countries. Furthermore, the intensive reforms which the Western Balkan countries have made for the visa liberalization process have shown that the EU criteria are met more easily by these countries, when the required reforms are combined with intermediary rewards.

This would be more motivation for the Western Balkan countries to work assertively to fulfil the set criteria and would mitigate the raising scepticism caused by the so much disputed "enlargement EU fatigue." Finally, the EU should consider the perspective to reproduce its success story in the Western Balkan. The EU was built on a consensus to cooperate and reform structural sectors of the economy, rather than on agreements to transform political aspects of their governance. It is true that the fulfilment of the political criteria is very important for the Western Balkans, especially for the specific problems this region has, but as shown above, the political criteria are more difficult to define, to monitor and to find an easy consensus between different political actors within the Western Balkans. It is easier for political parties in the Western Balkan countries to reach an agreement on a law on competition and state intervention rather than on public administration or judiciary. Should the EU give some more weight to the evaluation of the economic market criteria, the reforms in these countries can take some boost. The regulation of the markets and the good functioning of market economy in these countries would produce stabilization, which is necessary for other major reforms. Creating an ambit of free market and fair competition would strengthen businesses and other related stakeholders in the society as employers or employee etc., which empowered can serve as watchdogs of state reforms and political decision-makings. A strong pressure from the society would force political parties and governments to seriously work on major reforms as fight against corruption or reforming the public administration and meet the political criteria set by the EU.

On the other hand the Western Balkans has to revive its engagement towards the EU as well. The Western Balkan countries should abandon the status of the "pupils" that focus only in those "homeworks" dictated by the EU teacher, with the hope to just pass the class. These countries should turn into independent learners, who draw conclusions from their own mistakes and failures, know the history and learn from the success stories or problems other countries had during the EU accession or post-accession, in order to draft effective policies that fits the best to the structure and particularities of their own countries. If the reforms are done only because of the EU or through the EU experts, not only would they lack the required legitimacy of the sovereigns, but they are much likely not to have the desired results. The Western Balkan countries should not make plastic

interventions to appeal the EU, but rather some deep and professional surgeries that cure their problems and establish healthy democratic states with a good governance that comply with the principles of the European Union.

The Western Balkan countries should work for more consensuses within themselves to work hard on the priorities set towards the EU agenda. Many times the required EU reforms in these countries are clogged because of the lack of consensus between political parties, not on issues related to the EU reforms itself, but because of their own package of national political deals and problems. The representatives of these countries should not come at the EU negotiation table as children asking for a grown up to intervene in their own domestic political game, to "punish" or reward a political party towards another, but as partners with a baggage of values, policies and objectives. The political actors in these countries should jump from their own narrow political agenda to an agenda that serves better the interests of their countries towards the EU accession. To achieve this jump, it is necessary that the accession discourse be not an exclusive elite lead dialogue. Other stakeholders, apart from ministers or high officials should be invited at the table of EU reforms and negotiations. These countries should make room for businesses, academics, NGOs and other interested parties and create platforms so these stakeholders may be informed and also may influence their decision-making. This would make the political leaders more accountable towards their policies and the process of EU negotiations more democratic.

Neither Asylum Seekers nor Refugees? What is the Legal Status of Persons who are likely to be Refugees but who do not apply for Asylum in the "Transit" Country? – Focus on Serbia

Bojana Čučković[*]

Abstract

The paper identifies an issue of international and Serbian refugee law which has recently appeared as problematic in the context of current migratory flows. Neither the 1951 Convention relating to the Status of Refugees nor the 2007 Serbian Law on Asylum contain specific provisions for the legal status of persons who are likely to be refugees but who do not apply for asylum in the so called transit country. This issue may become of significance under the scenario that destination countries or any other country situated on migratory routes decide to suspend further reception, leading to longer periods of stay in the territories of transit countries. A number of legal questions would be raised in such a case, relating not only to procedural aspects but also to the substance of legal status of this category of persons and relevant duties incumbent upon states. By analysing applicable rules of international refugee law and Serbian asylum law, this article represents an attempt to offer certain solutions through their interpretation.

A. Introduction

The current "refugee" or "migrant" crisis in Europe has brought into question a number of international, European and national rules that regulate status of various groups of persons involved in migratory movements. Established asylum procedures have become inapplicable or malfunctioning in situations of massive influx of persons who either claim to be or really are in need of international protection.

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Even before the current crisis began, the Serbian asylum system suffered from a number of flaws and inconsistencies as regards both application of the 2007 Serbian Law on Asylum[1] and implementation of international legal standards in this sphere.[2] However, the high number of people transiting over Serbian territory every day for the last couple of months posed certain novel questions which seem to be left without answers in applicable national legislation. This article will represent an attempt to provide for legal guidance when it comes to legal status of persons who are likely to be refugees, but who, for various reasons, do not apply for asylum in Serbia.

B. An inherited Problem which has recently acquired new Dimensions

In the context of current migratory flows, the Republic of Serbia has always been a country of transit, not a country of destination. This statement is confirmed by reference to a number of persons who enter Serbian territory and its comparison with the number of asylum applications and the number of granted asylums.[3] However, it must be mentioned that these figures have started to change during the last months in the sense that there is even greater discrepancy

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1 Law on Asylum of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 109/2007 of 28/11/2007.

2 *Krstić/Davinić*, Zloupotreba koncepta sigurne treće zemlje, in: Vasić/Krstić (eds.), Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU, 2013, pp. 97-116; *Čučković*, Koncept sigurne treće zemlje – usaglašenost domaćeg prava i prakse sa međunarodnim standardima, Anali Pravnog Fakulteta u Beogradu 2/2012, pp. 327-349.

3 Since the beginning of the application of the Law on Asylum 132.356 persons expressed an intention to seek asylum in Serbia (in 2008: 77 persons, in 2009: 275, in 2010: 522, in 2011: 3.132, in 2012: 2.723, in 2013: 5.066, in 2014: 16.490, whereas only in the first eight months of 2015 this number amounted to 103.891 intentions). However, out of 103.891 expressed intentions, by 31/8/2015 only 511 persons actually submitted an asylum application in 2015. The Asylum Office, acting in first instance, interviewed only 63 asylum seekers. It adopted 24 applications for asylum, 3 applications were rejected, whereas the procedure was suspended in relation to 403 applications, mainly due to the fact that asylum seekers left the territory of the Republic of Serbia. Belgrade Center for Human Rights, Right to asylum in the Republic of Serbia, Periodical Report for June-August 2015, www.azil.rs/doc/Kvartalni_izve_taj_jun_avgust_5.pdf (1/12/2015).

between the number of people who arrive on the territory of the Republic of Serbia and the number of persons who enter the asylum procedure by submitting application for asylum.[4]

According to the provisions of the Law on Asylum, asylum seekers are entitled to a number of rights while waiting for the asylum procedure to be completed.[5] However, if the person in question decides not to submit an asylum application, his or her legal status would be regulated by the Law on Aliens[6] and he/she is considered to be illegally present on the territory of the Republic of Serbia. Such a solution is appropriate with regard to persons who are not refugees in the sense of the 1951 Geneva Convention on the Status of Refugees,[7] since they mostly represent economic migrants. The problem remains in relation to persons who may qualify as refugees, but who do not apply for asylum before competent Serbian authorities. This problem threatens to expand and acquire new dimension under the scenario, already applied or, for the moment, only announced by certain countries, to either close their borders, create "walls", or simply suspend reception of migrants.

A number of questions would arise in such circumstances. The first issue concerns Serbia's international obligations towards this specific category of persons. So far, Serbian authorities made no dis-

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4 Exact figures as to a number of persons who arrive in the territory of Serbia have long been unavailable since "official registration" at border started to be applied during 2015. However, such a conclusion may be confirmed by comparing number of persons who expressed intention to seek asylum with the number of asylum applications. In 2013 3 % of persons who expressed intention to seek asylum upon first contact with Serbian authorities actually submitted asylum applications. In 2014 this percentage decreased 2.35 % and it reached its minimum in the first eight months of 2015 – 0.49 %. Belgrade Center for Human Rights, Right to asylum in the Republic of Serbia in 2014, 2015, www.azil.rs/doc/Pravo_na_azil_u_Republici_Srbiji_2014.pdf (1/12/2015).

5 By applying for asylum, asylum seekers benefit from the fact that they are considered to be legally residing on Serbian territory, as well as the fact that they are entitled to be accommodated in one of the official asylum centers where they have at their disposal free housing, food and medical treatment.

6 Law on Aliens of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 97/2008 of 27/10/2008.

7 United Nations, Treaty Series, vol. 189, p. 137.

tinction between migrants and refugees and applied the same regime to everyone, without formally recognizing their status. However, this approach would neither be sustainable nor appropriate in case these persons would need to extend their stay on Serbian territory for various reasons. Such informal recognition of their refugee status would thus need to be formalized, which brings us to the second problematic issue. Will it be possible to differentiate at least between those who may be qualified as refugees and other migrants that do not meet the conditions set by the Geneva Convention? Under which rules and in what procedure would such status determination process be realized? Thirdly, besides these issues of procedural character, the substance of the legal status of persons who are likely to be refugees but who do not apply for asylum in Serbia, will certainly appear as even more controversial.

C. Are there any Solutions in International Refugee Law?

The 1951 Convention relating to the Status of Refugees employs only three terms as regards different categories of persons and their legal status – refugees, aliens and nationals.[8] Still, the Convention makes the distinction only in relation to the substantive aspect of the rights and duties of contracting parties and refugees, without providing guidance as to the procedural aspect of determining or recognizing the refugee status by national authorities.[9] Such an approach may

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[8] The 1951 Convention does not include the concept of asylum, which, according to certain authors, represents a source of ambiguities. *Guimezanes*, Le statut juridique des réfugiés, Revue international de droit comparé 1994, p. 215. On the other hand, *Gil-Bazo*, Asylum as a General Principle of International Law, Int'l J. Refugee L. 2015, p. 4 believes that the "conceptual distinction remains soundly established in law and practice", despite the trend in European countries" to blur it by restricting the use of the term asylum to refugees within the meaning of the Convention Relating to the Status of Refugees while developing alternative institutions for protection".

[9] The fact that the Refugee Convention does not contain specific provisions as to procedures does not imply that it has no influence, both direct and indirect, on the procedural approach adopted in national legislation. *Vedsted-Hansen*, The Asylum Procedures and the Assessment of Asylum Requests, in: Chetail/Bauloz (eds.), Research Handbook on International Law and Migration, 2015, p. 439 notes that "in so far as a person claiming refugee status is within the jurisdiction of a State Party to the Refugee Convention, that State will be under the obligation to treat him or her in

lead to a conclusion that not applying for asylum in a particular country does not necessarily suggest that the person in question is not a refugee.[10]

In addition, the Convention does not impose a duty to a person likely to be a refugee to apply for international protection in a given country. Language used in Article 31 of the Convention offers solid ground for such a conclusion. It relates to "refugees unlawfully in the country of refugee" and provides for the principle that refugees should not be penalized for their illegal entry or stay.[11] A number of remarks may be given in the context of the main issue discussed in this paper. First of all, Article 31 imposes a duty to "present oneself to the authorities", not the duty to apply for international protection. Secondly, this duty is discussed only in the context of the necessity to regularize one's stay in a given country in the sense of avoiding penalties, detention and restriction of movement. It does not touch upon the issue of the legal status of the person likely to be a refugee. Thirdly, literal reading of Article 31 provisions would imply that duties contained therein apply only to persons who come directly from a country of origin. Such narrow reading of Article 31 would not, however, be in line with an extensive understanding of the duty contained in Article 33 of

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accordance with the Convention unless and until it has been established in a formal examination procedure that the applicant is not a refugee as defined in Article 1 of the Convention".

[10] This interpretation of the Refugee Convention is in line with the principle that recognized refugee status is of declaratory nature, not constitutive. It represents an official interpretation of the Convention provided by the United Nations High Commissioner for Refugees: "a person is a refugee within the meaning of the 1951 Convention as soon as he [or she] fulfils the criteria contained in the definition [...] He [or she] does not become a refugee because of recognition, but is recognized because he [or she] is a refugee". UNHCR, Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2011, HCR/1P/4/ENG/REV.3, www.refworld.org/docid/4f33c8d92.html (1/12/2015), para. 28.

[11] Although this provision expressly uses the term "refugee", there are positions that it "would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or, [...], to 'presumptive refugees'." *Goodwin-Gill*, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, 2001, p. 8.

the Convention (*non-refoulement* principle) which has evolved in the sense to include also a duty not to return a refugee on the territory of a country where his or her life or freedom would not be threatened but where they face a risk of being further expelled to a country where this criteria would be met (*chain refoulement*).[12] Finally, this last remark should also be considered in terms of an absence, in international refugee law, of the duty to seek international protection in the first country that the refugee enters after leaving his or her country of origin. In this regard principle of effective protection and the absence of any prohibition as to secondary movements should be of relevance,[13] although there is no doubt that no such right as to choose a country of asylum exists.[14]

Another argument relates to the mandate of UNHCR as regards international protection, since it encompasses asylum seekers and refugees in general. It is not limited to persons who have either started national procedures for acquiring asylum or those who have been recognized as refugees by national authorities. UNHCR has clearly taken the position that it "is competent and mandated to intercede on their behalf notwithstanding that they have not formally sought international protection".[15]

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[12] *Sy*, UNHCR and Preventing Indirect Refoulement in Europe, Int'l J. Refugee L. 2015, p. 479.

[13] UNHCR, Summary conclusions on the concept of "effective protection" in the context of secondary movements of refugees and asylum-seekers (Lisbon Expert Roundtable, 9-10 December 2002), 2003, www.refworld.org/docid/3fe9981e4.html (1/12/2015), para. 11; UNHCR Executive Committee Conclusion No. 15 (XXX) – 1979, Refugees without an asylum country, www.refworld.org/docid/ 3ae68c960.html (1/12/2015), paras. (h)(iii) and h)(iv).

[14] UNHCR, Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers, 2013, www.refworld.org/docid/51af82794.html (1/12/2015), para. 3(i).

[15] UNHCR, Policy on UNHCR's role in relation to persons who are likely to be refugees who do not apply for asylum in the country in which they are present, UNHCR/HCP/2015/3, para. 4.6.3. Of relevance, according to UNHCR, would be the fact that circumstances in the country of origin or habitual residence indicate that "the majority or a significant proportion of people meeting a particular profile are refugees, or where members of a particular nationality or group enjoy high refugee recognition rates". Ibid., para. 4.6.4.

If, in line with the presented argumentation, this specific category of persons is considered as *de facto* refugees,[16] it remains to be seen which specific duties are owed by the State on whose territory they, at least temporarily, reside. In that regard it is the very wording used in specific provisions of the 1951 Convention that offers a solution. Duties incumbent upon contracting States seem to be divided into two groups. The first set of duties is owed to refugees legally residing on the territory of a contracting party[17] whereas the second category of duties relates to refugees in general, without specific qualification as to the issue of legality of their residence in a given country.[18] However, distinction between refugees *de iure* and refugees *de facto* appear to be most transparent as regards expulsion. Whereas duty not to expel a refugee lawfully residing on the territory of the State is regulated by Article 31 of the Convention, Article 33 deals with expulsion or return of refugees in general, thus encompassing *de facto* refugees as well.[19] Article 31 stipulates that expulsion may only be "in

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[16] For the critique relating to differentiation between *de facto* and *de iure* refugees, see Concurring Opinion of Judge *Pinto de Albuquerque*, ECtHR, no. 27765/09, *Hirsi Jamaa and others v. Italy*, judgment of 23/2/2012. However, the criteria used for distinguishing between these two categories of refugees is different from the one applied in the context of the present discussion, and relates to the distinction between the concept of refugees in terms of the 1951 Convention which are called *de jure* refugees and other individuals who are in need of complementary international protection, called *de facto* refugees by Judge *Pinto*. The criteria used in this paper relates, however, to the issue of whether the person in question decided to enter relevant procedures for acquiring international protection prescribed by national law, whereas both categories do represent refugees from the perspective of substantive conditions contained in the Geneva Convention. The term *de facto* refugee would, in our opinion, be more adequate than the term "presumptive refugee".

[17] The first group of duties encompasses duty to respect the right of association, right to engage in wage-earning employment, right to engage in self-employment, right to practice liberal professions, housing, public relief, right to social security, freedom of movement and right to be issued travel documents.

[18] The second group of duties includes freedom to practice religion, rights previously acquired by refugees which are dependent on personal status, access to courts, certain rights that relate to public education and issuance of identity papers.

[19] *Carlier*, Droit d'asile et des réfugiés, De la protection aux droits, RCADI 332/2008, p. 77 believes that Article 33 represents "*la clé de voûte qui reunit le droit d'asile et le*

pursuance of a decision reached in accordance with due process of law". On the other hand, duty to refrain from expulsion provided in Article 33 is significantly wider and prohibits the contracting State to expel or return a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened". This dual regulation of the duty not to expel the refugee clearly leads to the conclusion that the duty to respect the principle of *non-refoulement* does not depend on the fact that the person likely to be a refugee has submitted an asylum application or has already been granted international protection.[20] Furthermore, the *non-refoulement* principle does not exclusively relate to international refugee law. It is a well-established principle of customary international law which is also contained in a number of international human rights treaties.[21] Thus,

statut de réfugié et supporte l'édifice d'un veritable droit à l'asile provisoire au-delà d'une simple protection humanitaire".

20 UNHCR, Summary conclusions: the principle of non-refoulement, 2003, www.refworld.org/docid/470a33b00.html (1/12/2015), para. 3; see also *Lauterpacht/Bethelem*, The Scope and Content of the Principle of Non-Refoulement: Opinion, in: Feller/Türk/Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, 2003, pp. 115-119. In addition, persons granted refugee statuses enjoy significantly wider protection and are protected by Article 32 of the Convention, their rights surpassing the protection provided by Article 33. The situation is different as regards asylum seekers and persons who are likely to be refugees but who do not apply for asylum.

21 International human rights treaties recognize the *non-refoulement* principle in either explicit or implicit terms. The first group of treaties include, besides the 1951 Refugee Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, Treaty Series, vol. 1465, p. 85, Article 3). The second group of treaties does not contain an explicit prohibition. However, commentaries that accompany relevant provisions, or subsequent practice, have confirmed the tendency to interpret certain provisions of these treaties as containing the *non-refoulement* principle. International Covenant on Civil and Political Rights (United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407) has been interpreted by the UN Human Rights Committee as including this principle in Article 2: UN Human Rights Committee, General Comment No. 31/80 of 26/5/2004, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 12. For detailed analysis of the *non-refoulement* principle in international human rights treaties and the interaction of its refugee and human rights nature see *Wallace*, The Principle of Non-refoulement in International Refugee Law, in: Chetail/Bauloz (eds.), Research Handbook on International Law and Migration, 2015, pp. 427-431.

the State owes a duty of *non-refoulement* to any person, not only those likely to be refugees, to a place where they would face a risk of serious violations of human rights, or other relevant forms of serious harm, not exclusively relating to 1951 Convention grounds.[22] Such wide interpretation of the *non-refoulement* principle has also been confirmed in the case-law of the European Court of Human Rights[23] and the Court of Justice of the European Union.[24]

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[22] In the course of analyzing the *non-refoulement* principle in the context of treaties other than the Geneva Convention, *Carlier*, (fn. 19), p. 85 comes to the conclusion that "*le respect du principe de non-refoulement conduit à une forme de droit à l'asile provisoire tant lorsqu'il s'exerce ex ante, avant décision sur le statut de réfugié, que lorsqu'il s'exerce ex post, après décision sur le statut de réfugié, sur une base autre que l'article 33 de la Convention de Genève*". Therefore, if this principle is to be applied to a person who has not been granted protection, though on basis other than Article 33 of the Convention, there is no reason why it should not apply to persons who are likely to be refugees but who do not submit asylum application. Such a conclusion should not, however, be interpreted in the sense criticized by *Wallace*, (fn. 21), pp. 436, 438 that "although the principle of non-refoulement has been absorbed into other human rights instruments, its practical manifestation flowing from these instruments should not be assumed as being synonymous with refugee protection".

[23] Articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms have been interpreted as encompassing the *non-refoulement* principle. ECtHR, no. 30696/09, *M.S.S. v. Belgium and Greece*, judgment of 21/1/2011. For detailed analysis of this judgment in the context of *non-refoulement* principle see *Moreno-Lax*, Dismantling the Dublin System: M.S.S. v. Belgium and Greece, EJML 2012, pp. 1-31. However, strong argumentation has been exposed in the context of the applicability of the *non-refoulement* principle as regards violation of other rights guaranteed by the European Convention, *Battjes*, The Soering Threshold: Why Only Fundamental Values Prohibit Refoulement in the ECHR Case Law, EJML 2009, pp. 205-219; *Den Heijer*, Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights, EJML 2008, pp. 277-314.

[24] CJEU, case C-465/07, *Elgafaji*, ECLI:EU:C:2009:94; case C-285/12, *Diakité*, ECLI:EU:C:2014:39; joinedcases C-411/10 and C-493/10, *N.S. and others,* ECLI:EU:C:2011:865. For critical analysis of CJEU jurisprudence dealing with *non-refoulement* principle and influence of ECtHR on CJEU in this regard see *Bank*, The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law, Int'l J. Refugee L. 2015, p. 228 et seq.; *Morgades-Gil*, The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and CJEU?, Int'l J. Refugee L. 2015, pp. 433-456; *Garlick*, International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU

D. Legal Status of *de facto* Refugees in Serbian Asylum Law and Applicability of International Standards

The 2007 Serbian Law on Asylum regulates "the status, rights and obligations of asylum seekers and persons granted the right to asylum in the Republic of Serbia".[25] It follows that persons whose legal status and rights are prescribed by this Law are asylum seekers and *de iure* refugees, not persons likely to be refugees but who do not submit application for asylum in Serbia (*de facto* refugees). This conclusion may also be drawn from the provisions of Article 2 which aim at defining relevant terms.[26] Serbian Law on Asylum suggests that asylum represents a generic concept which includes all potential forms of international protection – refuge, subsidiary and temporary protection.[27] However, the focus is always on the decision of a competent authority which serves as the legal basis for granting various forms of international protection. Article 2 of the Law on Asylum further differentiates between the concept of asylum seeker and refugee. Whereas an asylum seeker is an alien who has filed an application for asylum on Serbian territory but who is still waiting for final decision to be taken, the term refugee is defined in the same words used by the 1951 Geneva Convention.[28] This means that the definition of refugee does not include reference to a decision made by competent national authority and may as well be understood to include the concept of *de facto* refugees. However, the next paragraph of the same article defines the term "refugee" which is understood as "the right to residence and protection granted to a refugee who is on the territory of

and UNHCR, Refugee Surv. Q. 2015, pp. 123-126; *Langford*, The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity, Harv. Hum. Rts. J. 2013, pp. 236-238.

25 Article 1 of the Law on Asylum.

26 Asylum is understood to mean "the right to residence and protection accorded to an alien to whom, on the basis of a decision of the competent authority deciding on his/her application for asylum in the Republic of Serbia, refuge or another form of protection provided for by this Law was granted." Article 2(2) of the Law on Asylum.

27 Such an understanding of different concepts and levels of offered protection is in accordance with latest doctrinal analysis of the relationship between asylum and refugee status, *Gil-Bazo*, (fn. 8), pp. 5-10.

28 Article 2(6) and (7).

the Republic of Serbia, with respect to whom the competent authority has determined that his/her fear of persecution is well-founded".[29]

Even though at first sight it may be concluded that refugee status, as one form of asylum, is also conditional upon decision of a competent body, thorough reading of this paragraph of Article 2 may lead to a different conclusion. Firstly, it is indicative that this paragraph uses the term refugee, not the term asylum seeker. As previously mentioned, only the term asylum seeker implies that the formal procedure for acquiring international protection has been initiated, which would, in turn, result in the decision of a competent authority. The term refugee is not defined with reference to any sort of official procedure. Secondly, the very wording of this paragraph suggests that the Serbian legislator draws a difference between two categories of persons – "refugees" in the meaning equal to the one contained in the Geneva Convention and "refugees with respect to whom the competent authority has determined that his/her fear of persecution is well-founded". Thirdly, it should not be neglected that in respect of refugees, paragraph 8 of Article 2 requires that the competent authority "has determined that the fear of persecution is well-founded". The manner in which this "determination process" is to be realized is not provided for in this article, which may also be interpreted as to suggest that informal, *prima facie* determination or determination of a generalized character are also possible, and that it does not necessarily include formal decision of a competent authority.

Similarly to the Convention on the Status of Refugees, Serbian Law on Asylum makes a distinction between two groups of provisions when specific duties for the State are concerned. The first set of provisions provides for duties explicitly owed to asylum seekers and those who are granted asylum,[30] whereas the second category of

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[29] Article 2(8).

[30] The first group of duties include the duty not to punish an asylum seeker for unlawful entry or stay in the Republic of Serbia (Article 8 of the Law on Asylum), duty to provide information and legal aid (Article 10), duty to provide free translation services (Article 11), duty to provide care for persons with special needs (Article 15), duty to provide accommodation and basic living conditions in Asylum Centers (Article 21), health care (Article 40), primary and secondary education and welfare benefits (Article 41), etc.

obligations is due by Serbia to "any person". As may be noted, the first set of duties mainly coincides with duties provided for in the Geneva Convention, which are owed by the contracting party to "refugees legally residing on its territory". The second category of obligations is embodied in the principle of *non-refoulement*,[31] which is owed by Serbia to anyone and is not conditional upon any formal application, procedure or decision prescribed by the Law on Asylum.

In spite of certain differences, it may be remarked that Serbian Law on Asylum is, in general, harmonized with the provisions of the 1951 Convention. What is more, Article 65 of the Law explicitly stipulates that its provisions "shall be interpreted in accordance with the Geneva Convention, Protocol and the generally accepted rules of international law".[32] However, national authorities have demonstrated an inability to interpret national law in accordance with international rules and standards. This claim may be confirmed by reference to jurisprudence dealing with one of the rare duties owed to *de facto* refugees – the *non-refoulement* principle and the significance accorded to international standards by national courts.

Of relevance for the main question discussed in this paper is the jurisprudence of the European Court of Human Rights in the case *Hirsi Jamaa and others v. Italy* where the Court took the position that "the fact that the parties concerned failed expressly to request asylum did not exempt Italy from fulfilling its obligations under Article 3".[33]

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[31] Article 6 stipulates that "no person shall be expelled or returned against his/her will to a territory where his/her life or freedom would be threatened on account of his/her race, sex, language, religion, nationality, membership of a particular social group or political opinions".

[32] The inclusion of such a provision was not even necessary since Serbian Constitution regulates the relationship between international and Serbian law in the manner that generally accepted rules of international law and ratified international treaties represent an integral part of the legal system in the Republic of Serbia and are to be applied directly. Article 16 of the Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 98/2006.

[33] ECtHR, no. 27765/09, *Hirsi Jamaa and others v. Italy*, judgment of 23/2/2012, para. 133.

In addition, the European Court explicitly stated that "it was for the national authorities, faced with a situation in which human rights were being systematically violated, [...] to find out about the treatment to which the applicants would be exposed after their return".[34]

As a principle belonging not only to international refugee law but also general international human rights law, the *non-refoulement* principle should be given extensive interpretation by Serbian courts as well. However, courts in Serbia have chosen to interpret this principle in a rather narrow manner, especially with regard to the safe third country concept.

An illustrative example of the case-law of the Serbian Administrative Court is the judgment delivered in a case concerning an Afghan national who, on his way to Serbia, travelled through Iran, Turkey, Greece and Macedonia. His asylum application was rejected by both the first and second instances, using the safe third country concept as an exception to the *non-refoulement* principle. Such a conclusion was confirmed by the Administrative Court.[35] The argumentation used in this judgment may be reproached for a number of reasons. First of all, the Court obviously applies the safe third country concept in an automatic manner, explicitly claiming that the very fact that the country in question is included in the list of safe countries[36] certifies that that country applies international rules and standards stipulated in relevant international treaties.[37] Secondly, the Court ignores the fact

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[34] Ibid. The Court also stressed that there were no "sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination". Ibid., para. 185. It referred to its position taken earlier: ECtHR, no. 30696/09, *M.S.S. v. Belgium and Greece*, judgment of 21/1/2011, para. 359.

[35] Administrative Court of the Republic of Serbia, no. 23 U 1280/13, judgment of 28/3/2013.

[36] Government of the Republic of Serbia, Decision relating to the determination of the list of safe countries of origin and safe third countries, Official Gazette of the Republic of Serbia No. 67/2009 of 17/8/2009.

[37] Administrative Court of the Republic of Serbia, no. 23 U 1280/13, p. 3: „Turkey, Greece and Macedonia, on whose territories the applicant resided before arriving to Serbia, are included in the list of safe third countries, and thus represent states which apply international principles relating to the protection of refugees contained in the 1951 Convention on the Status of Refugees and the 1967 Protocol".

that Turkey, although included in the Government list of safe countries, has not ratified the 1967 Protocol, which in turn implies that this country does not apply the 1951 Convention to persons who come from non-European countries. Thirdly, the Administrative court, in a somewhat contradictory manner, claims that "the applicant failed to prove that these countries are not safe for him".[38] Applicant's reliance, in that regard, on the relevant jurisprudence of the ECtHR is rejected by the Court using odd argumentation. Namely, the Administrative Court finds that the "judgment of the European Court may be of relevance only in case applicants claim in their application that one of the rights guaranteed by the provisions of the European Convention of Human Rights and Fundamental Freedoms is violated in administrative proceedings before competent administrative authority of the Republic of Serbia or in the proceedings before this court".[39]

Even though there are opinions that the Administrative Court thus aims at stressing the exclusive relevance of the judgments of the European Court delivered in disputes against the Republic of Serbia,[40] the Court has indeed demonstrated ignorance as regards rules of international law, their position in the sources of law in the Serbian legal system as well as Article 18(3) of the Constitution of the Republic of Serbia.[41] Finally, in the same judgment, the Administrative Court attributes significance to the fact that "the decision delivered in the first instance did not decide to return the applicant to a specific country but simply to leave the territory of the Republic of Serbia".[42]

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38 Ibid.

39 Ibid., p. 4. The same position is taken in other judgments of the Administrative Court dealing with asylum matters. See for example no. 1U.540/13, judgment of 20/3/2013, p. 4.

40 *Krstić/Davinić*, Pravo na azil – međunarodni i domaći standardi, 2013, p. 351 et seq.

41 Specifically referring to the area of human rights, the Constitution of Serbia stipulates that "provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation".

42 Administrative Court of the Republic of Serbia, no. 23 U 1280/13, judgment of 28/3/2013. p. 4.

Such a position is in obvious contradiction to relevant European Union standards which will have to be accepted and implemented in the course of Serbia's accession to the European Union.[43]

As opposed to the Administrative Court, the Serbian Constitutional Court frequently relies on asylum standards set by the ECtHR.[44] However, it should be stressed that reliance on the ECtHR case-law does not necessarily imply their appropriate application in the interpretation of relevant national rules. Initial enthusiasm and great expectations after the deliverance of the decision in case Už-1286/2012,[45] were soon replaced by disappointment[46] since both the Constitutional and the Administrative Court failed to apply them in subsequent cases. Thus, in case Už-3548/2013 the Constitutional Court again placed on the applicant the burden of proof that the third country could not be considered as safe, and it did not expect competent national authorities to take any steps to acquire such information on their own.[47] The

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[43] Namely, the person whose asylum application was not examined in substance would have to be issued a document in an official language of the country to which it is being expelled, with accompanying information that his application was rejected. In case the third country refuses to accept the person in question, the refouling country will be under an obligation to allow him/her access to procedures. Article 3(3) of the Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, p. 60.

[44] Constitutional Court of the Republic of Serbia, no. Už-1286/2012, judgment of 29/3/2012; no. Už-5331/2012, judgment of 24/12/2012 and no. Už-3548/2013, judgment of 19/11/2013.

[45] The Constitutional Court invoked the position taken by the ECtHR in the case no. 30696/09, *M.S.S. v. Belgium and Greece*, judgment of 21/1/2011, both in relation to the examination of the effectiveness of the asylum procedures of third countries as a precondition for the application of the *non-refoulement* principle as well as regards the burden of proof relating to real and individualized character of the risk to which the person would be exposed if returned to that particular country. Constitutional Court of the Republic of Serbia, Už-1286/2012, p. 8. For positive comments see *Krstić/Davinić*, (fn. 40), p. 352.

[46] Belgrade Center for Human Rights, Right to Asylum in the Republic of Serbia 2013, 2014, pp. 52-54.

[47] The Constitutional Court of the Republic of Serbia, no. Už-3548/2013, p. 9 even reproaches applicants for basing their claims upon "report of a single non-governmental organization which was submitted in English language, without certified translation into Serbian, whereas no UNHCR reports relating to FYRM were at-

main argument used by the Constitutional Court that the asylum seeker would not be exposed to risk of acts contrary to the principles of the Refugee Convention seems to rely on the fact that he would not be returned to Greece or Turkey but to the Former Yugoslav Republic of Macedonia. However, the Court does not attach any significance to the issue of *chain refoulement* and the possibility that the asylum seeker is further returned to the territory of Greece. Neither does the Constitutional Court deal with the question whether the former Yugoslav Republic of Macedonia itself applies the safe third country concept nor in what manner.

E. Concluding Remarks

Despite the fact that relevant jurisprudence of Serbian courts in asylum cases deals with applications submitted by asylum seekers not persons qualified for the purpose of this paper as *de facto* refugees, such an interpretation of the safe third country concept as an exception to the prohibition of *refoulement* may be expected to also apply in relation to this category of persons whose link with Serbia is even less evident and is reduced to simple presence on its territory. What is more, latest events relating to the decision to allow access to Serbian territory only to persons coming from Syria, Iraq and Afghanistan, demonstrate the susceptibility of Serbian authorities to position their asylum and refugee policies on a daily basis and make them dependent on decisions taken by other countries.[48] It is Serbia's in-

tached, nor there existed any judgment of the European Court which would suggest that there were deficiencies in the asylum system of that country".

[48] With an announcement of Slovenian and Croatian authorities that they would continue accepting only persons from Syria, Iraq and Afghanistan, Serbian authorities have immediately started using the same approach, which has been confirmed by UNHCR mission in Serbia, www.blic.rs/Vesti/Drustvo/607522/UNHCR-Srbija-i-Makedonija-pustaju-samo-izbeglice-iz-Sirije-Iraka-i-Avganistana-ostale-VRACAJU (1/12/2015). Such an approach is not in line with relevant international standards since the definition of refugees does not necessarily implicate origin from war-torn countries. Well-founded fear of persecution on any of the grounds provided for by the Convention may also exist in regard to persons who come from countries not involved in armed conflicts. Such a selective approach is clearly discriminatory, especially from the perspective of a duty to examine individual circumstances of each person and an impossibility to achieve it in situations of massive influx.

ternational obligation to allow access to its territory to refugees.[49] Even though recognition rates for nationals of these three countries are currently very high, there may be persons in need of international protection coming from other countries as well. Serbian authorities have established no procedure for determining the nationality of a person in question and absence of procedures is always the most important ally for all kinds of abuses.

An additional conclusion refers to the potential change in the understanding of the concept of refugees. In the context of current migratory flows, European countries have started to apprehend the definition of refugees as including persons who are fleeing armed conflicts or massive and serious human rights violations and who would otherwise be entitled to other forms of international protection, thus not limiting themselves to the coordinates given by the 1951 Convention? It appears that the European region has slowly started to follow the tendency of widening the refugee definition, which is already present in Africa and Latin America,[50] at least in the situation of massive refugee and migrant influx where persons arriving from war-torn countries seem to be given "priority pass" and persons who are likely to meet the Geneva Convention criteria for refugees are not. However, the practice of closing borders to any person who does not come from countries which are considered to be most endangered from the perspective of large scale violence, may have other significant consequences with regard to the interpretation and appli-

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[49] It is not by accident that Article 33 of the 1951 Convention uses the French word *refoulement*. The reason lies in the necessity to reflect relevant practices applied in both French and Belgium laws which include "*soit un éloignement du territoire par simple mesure de police ou un refus d'admission à la frontière*", which should be distinguished from the case of expelling a person based on a decision delivered by a competent judicial body. *Carlier*, (fn. 19), p. 79. See also *Wallace*, (fn. 21), p. 418. However, there are also opposite views. *O'Nions*, Asylum – A Right Denied – A Critical Analysis of European Asylum Policy, 2014, pp. 18, 50-52 argues that "once an asylum seeker reaches the jurisdictional boundary of the state, the legal obligation prohibiting *refoulement* cannot be ignored" but that "this obligation is not commensurate with an obligation to authorize entry".

[50] *Ortiz Ahlf*, The Human Rights of Undocumented Migrants, RCADI 2014, pp. 53-67; Abass/Ippolito (eds.), Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective, 2014.

cation of the existing international refugee law. Such practice, especially as regards its discriminatory and selective character, may either represent acts contrary to applicable international law, and would thus entail international responsibility of the State in question, or might serve as basis for the creation of new rules which would better reflect the challenges faced by international refugee law in the second decade of the 21st century. As rightly noted by *Pascale*, "the most striking aspect is the attempt to identify more effective ways of controlling undocumented flows, even at the cost of undermining those fundamental rights that should be inviolable, or at least by exploiting those margins of ambiguity that are left in the process of interpretation of international law".[51]

[51] *Di Pascale*, Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations, in: Rubio-Marín (ed.), Human Rights and Immigration, 2014, p. 279.

Sale of Consumer Goods under Albanian Legislation – The Influence of European Regulations and further Challenges –

Nada Dollani[*]

Abstract

According to the Stabilization and Association Agreement, in force since 1 April 2009, Albania is under the obligation to ensure the proper function of the market economy, through providing effective measures on consumer protection by the harmonization of legislation in this field with that in force in the Community (now European Union). Under this legal framework, the Albanian Parliament adopted the Consumer Protection Law in 2008, which aims to transpose the majority of the EC Directives in this field, including the consumer sales law. By opting for a separate legal act specifically dedicated to consumer protection, rather than including its provisions in the Civil Code, the Albanian legislator decided to follow the dualistic model of special regulation of consumer law. The Consumer Sales Directive 99/44 was transposed into Consumer Protection Law despite the fact that the sale contract was regulated by the Civil Code. This paper aims to analyse the overlapping regulation of sale contracts, trying to argue that the best legal technic would have been to incorporate consumer sale and guarantees into the Civil Code by specifically providing the peculiarities necessary to Business to Consumer relations.

A. Introduction

The definition of sales contract under the Albanian legislation is provided by the Civil Code (CC) and reads "the sales contract aims the transfer of ownership on a thing or the transfer or any other right in exchange for a price."

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The Civil Code was adopted in 1994[1] and the sale contract regulated in Articles 705 et seq., in the special part, with regards to the conformity of goods and remedies was modelled after the United Nations Convention in Contracts for International Sales of Goods (CISG), similar to other east European countries after the end of the cold war.[2]

After signing the Stabilization and Association Agreement in 2006, which entered into force on 1 April 2009, Albania was under the obligation to ensure the proper function of the market economy, through providing effective measures on consumer protection by the harmonization of legislation in this field with that in force in the Community (now European Union).[3] Under this legal framework, the Albanian Parliament adopted the Consumer Protection Law (CPL) in 2008,[4] which aims to transpose the majority of the EC Directives in this field, including consumer sales law. By opting for a separate legal act, specifically dedicated to consumer protection, rather than including its provisions in the Civil Code, Albania decided to follow the French or Italian model of dualistic regulation of consumer law and general private law[5] opposite to the German or Dutch approach where the same piece of legislation contains the rules both on consumer and general private law. The Consumer Sales Directive (CSD) 99/44 was transposed into CPL (Articles 29-33) despite the fact that the sale contract was regulated by the Civil Code and although the best legal technic would have been to incorporate it into the CC with slight amendments as a part of special

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1 Civil Code (Act No. 7850 of 29/7/1994), OG RAl No. 11/1994.

2 Ferrari (ed.), The CISG and Its Impact on National Legal Systems, 2008, see in particular the general report by *Ferrari*, p. 474 et seq., referring especially to the private law legislation in the former socialist countries of Eastern Europe enacted after 1991.

3 Title VI, Article 76 of Stabilization and Association Agreement between the Republic of Albania, of the one part, and the European Communities and their Member States, of the other part – Ratification Act No. 9590 of 27/7/2006 – International Agreements of the Republic of Albania, Official Gazette of the Republic of Albania No. 87/2006.

4 Law No. 9902 of 17/4/2008, On Consumer Protection, Official Gazette of the Republic of Albania No. 61/2008, amended by Law No. 10444 of 14/7/2011, OG RAl No. 103/2011 and Law No. 15/2013 of 14/2/2013, OG RAl No. 29/2013.

5 Code de la consommation/Codice del consumo as the main source of consumer law represents separate piece of legislation from the Code Civil/Codice Civile which is the general source of private law.

exception on the B2C (business to consumer) relations like it was done in Croatia.[6] The two sets of provisions amount to an internal systematic incoherence which necessary are to be solved through proper methods of interpretation. The division of norms regulating sale contracts into separate acts is the most inconsistent and impractical solution,[7] especially as we shall see in the Albanian case, where the legal ground into the Civil Code was fairly prepared to welcome the consumer sale regulations.

The problems of internal harmonization between consumer contract law and general contract law will be discussed in more detail in this paper. The consumer sale contracts in the South East European countries are deeply discussed and elaborated during both the first and second conference of the Civil Law Forum in 2010 and 2012.[8] Thus, the aim of this paper is to have a closer and more technical look in order to detect the internal inconsistencies and differentiations of the Albanian sales law and to analyse the potential impact than new regulations in the EU level might have in the improvement of *de lege lata*. Two main issues will be discuss further, first it will be shown that the conformity provisions contained in CPL are superfluous, as they are already provided in the CC and second, regarding the remedies, an unusual problem arises, that to some extend the CC offers a better protection for the consumers. Although the Albanian legislator has followed the minimalist approach, by translating several directives into a separate legal act, it will be shown that the implementation process in consumer acquis, particularly consumer sales has been a rather partial translation rather than a proper transposition of the consumer sales directive. The legislator, while being under the duty to conform the Albanian legislation with the new Consumer Right

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6 For detailed analyses on the transposition of consumer sales into the legislation of South East European countries see *Meškic at al.*, Consumer Sales Directive, in: Jessel Holst/Galev (eds.), EU Consumer Contract Law, Civil Law Forum for South East Europe, Vol III, 2010, p. 518-550.

7 *Povlakic*, Liability for Material Defects, Civil Law Forum for South East Europe, Collection of Studies and Analysis, Second Regional Conference, Vol I, 2012, p. 64.

8 *Meškic at al.*, (fn. 6), pp. 518-550; *Povlakic*, (fn. 7), pp. 61-76.

Directive,[9] may size the opportunity to cure the actual legal situation, by incorporating the sales of consumer goods provisions into the Civil Code, thus rendering them more accessible and transparent and establishing a more systematic order.[10]

B. The Definition of Consumer and Consumer Goods

First of all, the consumer sale directive is transposed in part five of the CPL under the name "contractual conformity", which is misleading considering that the Directive 99/44 deals with certain aspects of the sale of consumer goods and associated guarantees.[11] The Albanian CPL, gives a single definition of the consumer at the first general part. Initially, the consumer was defined in a very wide manner. According to Article 3(6) CPL, the consumer is every person, who buys or uses goods or services for the fulfilment of personal needs, for purposes not related to trade activity or exercise of the profession. Furthermore, non-profitable organizations used to be considered consumers, which broadened the minimum European standard of what is to be understood as a consumer. However, the Law No. 10444 of 2011, which amended the 2008 CPL, repealed this part, so that non-profit organizations were no longer considered to be consumers.[12] With regard to dual purposes contracts, the CPL is silent, while the court practice is missing in this regard. The Consumer Rights

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9 Directive 2011/83 on consumer rights, OJ L 304 of 22/11/2011, p. 64. Although Albania is not a member state, under the SAA it shall approximate and harmonise its legislation with that of the EU.

10 In legal literature there are many authors in favour of such solution, see *Hondius*, The Notion of Consumer: European Union versus Member States, Sydney Law Review 2006, pp. 89-98; *Scotton*, Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees, ERPL 2001, pp. 297-307.

11 *Micklitz*, Legal Framework of Consumer Protection in the Republic of Albania and its alignment with Consumer Acquis, 2012, p. 53 et seq. – published by the Ministry of Economy, Trade and Energy and GIZ under the program on Support for the Implementation of EU-compliant Albanian Legislation.

12 Article 2(1) of the 2011 Law amending Consumer Protection Law of 2008, (fn. 4).

Directive 2011/83 EU[13] (CRD) in Recital 17 gives some clarification in this regard by providing that in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered to be a consumer.

This question was previously dealt with by the Court of Justice of European Union (CJEU) in the *Gruber* case, which in fact gave a very restricted meaning to the notion of consumer. In this case, the CJEU held that "a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction [...], unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect".[14]

This situation regarding dual purposes of sale contracts should be taken in consideration by the relevant institution dealing with consumer issues.

With regard to consumer goods, the CPA gives a very broad definition compared to the consumer goods defined by CSD. Article 3(7) CPL provides that "Consumer good, hereinafter good – including also a good which is used in the context of providing a service – shall mean any movable or immovable item, whether new, used or repaired, which is intended for the use by the consumers or likely to be used by consumers, even it is not intended for them, under reasonably, foreseeable conditions is made available in the market in the course of an economic activity".[15]

It means that consumer goods include not only movable, but also immovable objects. Furthermore, the adjective "tangible" is omitted in defining the consumer good, so intangible objects are included as well. In that context, the Albanian law provides for a significantly wider defi-

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[13] Directive 2011/83/EU of 25/10/2011 on consumer rights, amending Directive 93/13/EEC and Directive 1944/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC, OJ L 304 of 22/11/2011, p. 64.

[14] CJEU, case C-464/01, *Johann Gruber v Bay Wa AG*, ECLI:EU:C:2005:32, para. 54.

[15] Article 3(7) CPL.

nition than the CSD 99/44/EC (Article 1(2)(b)) and the CRD 2011/83/EU (Article 2(3)). In these directives, only movable tangible items are considered to be consumer goods. Nevertheless, for the purposes of the transposition of CSD, Article 29(1) CPL stipulates that good for the purposes of the relevant chapter of the law (obligation of conformity) is understood to be only movable good in conformity with the definition given by Article 3(7) of this law. This leads to the conclusion that the exception made by the Consumer Sale Directive, such as the exclusion of goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in a limited volume or set quantity and electricity are not transposed by Albanian law. Nevertheless, such a wide definition of consumer goods is in accordance with the EU law and is also accepted in some of the EU Member State.[16] However, regarding the definitions stipulated by the CPL in general, considering that such a legal act originates from the EU *acquis*, it is appropriate to raise awareness that EU Law should be interpreted independently of national interpretations.[17] As a consequence, in order to avoid potential confusion and to provide the best possible consumer protection, it is necessary to clearly and in detail list all of relevant terms in accordance with the terms defined in European directives as interpreted by the case law of the CJEU. In accordance with that, the existence of definitions immensely facilitates the application of the law by competent authorities. Moreover, as EU-based provisions are fragmentary within national law, courts may not always be fully aware of the European origin of particular provisions of national law, which might lead the courts to interpret such provisions purely in the context of national law, especially where existing rules of national laws are deemed to comply with the requirements of a directive.[18] Admittedly, this would bring any national court into conflict

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16 *Micklitz*, (fn. 11), p. 31.

17 Cafaggi/Muir-Watt (eds.), Making European Private Law: Governance design, 2008, p. 328.

18 *Loos*, The influence of European consumer law on general contract law and the need for spontaneous harmonisation, ERPL 2007, pp. 515–531.

with its obligations under EU Law to respect the autonomous meaning of European law.[19]

C. Conformity

The definition of conformity of goods with the sales contract is provided by CC and with very slight differentiation of the wording order reflects Article 35 of the CISG. Under Article 715 of the CC, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. A presumption of conformity is expressed in a negative way:

"goods are presumed not to be in conformity with the contract if they are not fit for the specific purpose of use as provided in the contract, unless otherwise provided by an agreement. In cases when this cannot be determined, goods will be deemed not to be in conformity with the contract if they are not fit for the purposes for which goods of the same description would ordinarily be used. If the sale is agreed upon a sample or model the seller should provide goods, which possess the same qualities as the sample or model".

In addition goods are deemed not to be in conformity with the contract if they are not contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. However, the seller is not responsible for defects of goods, which the buyer knew or should have known at the moment of conclusion of the contract, except when the defects have to do with the quality that the goods should have had according to the contract or the advertisement of the seller (Article 715 CC).

While the CC defines the conformity in a negative way as lack of conformity, the CPA stipulates the presumption of conformity positively, as it transposes verbatim the Directive 99/44 Article 2, except paragraph 4. Article 29 of the CPA stipulates a general obligation according to which the seller must deliver goods, which are in conformity

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[19] *Twigg-Flesner*, Time to Do the Job Properly – The Case for a New Approach to EU Consumer Legislation, Journal of Consumer Policy 2010, p. 355 et seqq.

with the contract of sale.[20] Although the CSD itself is inspired by the CISG,[21] especially in the context of non-conformity,[22] the definition of conformity and non-conformity of goods slightly differs, i.e. the Albanian CC is silent regarding incorrect installation, while the CPA is silent regarding packaging and preservations. Other novelties brought by the CPL concern two other cases, one regarding the case when the good lacks the quality made known by third parties, i.e. from the producer or his representative by advertising or labelling, which means that the statements made by producer or their representatives although not party to the sale contract influence the consumer to conclude the contract. Their statement should, thus, be considered when analysing the conformity. The other case concerns an exception, that the good

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20 Goods are presumed to be in conformity with the contract if: they comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer through a sample or model; if they are fit for any particular purpose for which the consumer requires them and which reasons are made known to the seller by the buyer at the time of the conclusion of contract and which the seller has accepted; if they are fit for the purpose for which goods of the same type are normally used; if they show the quality and the performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

21 Bianca/Grundmann (eds.), EU Sales Directive, 2002, pp. 17-18, 119. See *Grundmann*, European sales law – reform and adoption of international models in German sales law, ERPL 2001, pp. 239-258; *Grundmann*, Consumer Law, Commercial Law, Private Law – how can the Sales Directive and the Sales Convention be so similar?, EBLR 2003, p. 237.

22 *Kruisinga*, What do consumer and commercial sales law have in common? A comparison of the EC Directive on consumer sales law and the UN convention on contracts for the international sales of goods, ERPL 2001, pp. 177-188.

is not considered as in conformity with the contract when the lack of quality originates from the materials supplied by the consumer,[23] which means that contracts to produce a work/undertaking contracts are considered as sales contract for the effect of consumer protection.[24]

The drafters of the CSD intended to follow the model of the CISG as far as possible and central parts of the directive, in particular the definition of conformity of goods and the remedies, stem more or less directly from the CISG.[25]

As the similarity of both set of norms, which stipulate the conformity and lack of conformity of goods is obvious, such transposition by the CPL seems superfluous. Certain paragraphs of the CSD could have been reached by amending Article 715 of the CC, i.e. by adding the last situation in Article 2(2)(d) CSD relating to public statements made by the seller, producer or representative. Such requirement, which has not been taken from the CISG, could have been provided by the CC as a specific provision in order to comply with the Directive 99/44. This presumption implies that the goods show the qualities and performance which are common in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. The final part of this clause was introduced because of the fact that a consumer who buys goods due to the brand often does not make his choice as a result of direct contractual negotiations with the seller. He is probably more influenced by the advertising statements of the producer and because of this reliance on such

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23 Article 2(3) CSD corresponding to Article 29(5) CPL.

24 For some considerations in other European countries see *Jeloschek*, The Transposition of Directive 99/44/EC into Austrian Law, ERPL 2001, pp. 163-175; *Cauffman*, The Impact of EU Law on Belgian Consumer Law Terminology, ERPL 2012, pp. 1341-1343; Section 651 BGB.

25 *Staudenmayer*, The Directive on the Sale of Consumer goods and Associated Guarantees – a Milestone in the European Consumer and Private Law, ERPL 2000, p. 547; *Magnus*, Sale of goods: the central contract type, in: Twigg-Flesner (eds.), The Cambridge Companion to European Union Private Law, 2010, p. 245.

statements it was decided to include them in the assessment of conformity with the contract.[26] Also, the hypothesis concerning undertaking contracts (Article 2(3) CSD), could have been included under either the provisions on sale contract or undertaking contract, specifying the subjective scope of application, as only to contracts between consumers and traders.

Furthermore, another shortcoming of the CPL is that it does not transpose the mitigation of the seller's position provided by Article 2(4) of CSD according to which the final seller is not made liable for all types of statements. Article 2(4) excludes public statements of which the seller was not, and could not reasonably have been aware of, public statements which by the time of the conclusion of the contract had been corrected, and public statements which could not have influenced the consumer's decision to buy the goods. Also, according to some authors, mere advertising puffery will not be considered as a public statement.[27]

As the legal situation stands, it results that the Albanian legislator has merely doubled the provision on sale contract conformity, rather than properly transposing the CSD with all the definitions, presumptions and exceptions.

From the legislative technic point of view, the abrogated CPA of 2003, which regarding to the non-conformity referred to the CC by adding the stipulation of public statements, advertising and labelling for setting the standard of conformity seemed more appropriate than the actual CPA which just double the almost identical standards of conformity.[28]

Furthermore, according to some commentators the interpretation of consumer sales should be identical to the CISG, whenever possible, especially in case of conformity of goods and remedies and their relationships to each other. However, when differences exist, such as the buyer's duty to notify a defect, for the purpose of protection of the

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26 *Kruisinga*, (fn. 22), p. 181.

27 *Staudenmayer*, (fn. 25), p. 552; *Kruisinga*, (fn. 22), p. 181.

28 Cf. *Parapatits*, Albania: Reform of Consumer Protection Law, ERPL 2010, pp. 165–175.

consumer, different approaches in interpretation must be followed.[29] In this context, recently the CJEU has held that "the consumer, in order to benefit from the rights which he derives from the directive, must inform the seller of the lack of conformity in good time, provided that that consumer has a period of not less than two months from the date on which he detected that lack of conformity to give that notification, that the notification to be given relates only to the existence of that lack of conformity and that it is not subject to rules of evidence which would make it impossible or excessively difficult for the consumer to exercise his rights."[30]

The Albanian CPL has not transposed Article 5(2) of CSD, which leads to the conclusion that the CC will apply with regard to the notification. Article 717 CC, however, requires that the notification of the buyer to the seller shall take place within a period of 10 days from the discovery of the defect. Such a provision is not in compliance with the CSD and the CJEU case law. Again, the CPL, while doubling some provisions, leaves out important issues with regard to consumer protection in sales contract.

D. Remedies

Both CC and CPL offers remedies to the buyer (consumer) in case of non-conformity of goods, although the CPL has not transposed Article 4 of the Directive 99/44 concerning the right of redress of the final seller.[31] Nevertheless, such a provision is criticised as vague and with no significant meaning[32] and the issue of product liability is regulated by the CC modelled after EC Directive 85/374 concerning liability

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[29] *Magnus*, (fn. 25), p. 247.

[30] CJEU, case C-497/13, *Froukje Faber v Autobedrijf Hazet Ochten BV*., ECLI:EU:C:2015:357, para. 65.

[31] For a broad and comprehensive view and analysis on this topic in many EU member states legislation and behind, see Ebers/Janssen/Meyer (eds.), European Perspectives on Producers' Liability – Direct Producers' Liability for Non-Conformity and the Selleres' Right of Redress, 2009.

[32] *Bridge*, in: Bianca/Grundmann, (fn. 21), p. 195 et seq.; cf. *Reich*, A European Contract Law – Ghost or Host for Integration?, Wisconsin International Law Journal 2006, pp. 454-456.

for defective products. Even though the CPA does not transpose Article 4 CSD, it provides for an unimplemented principle in the directive contained in a much earlier Council Resolution[33] regarding the spare parts and after sale services. Article 33 of CPL stipulates that producers and sellers provide the consumer necessary spare parts for repair and maintenance of goods until the legal or contractual guarantee.

Regarding the remedies for non-conformity of goods, the CPL transposed the two-step system,[34] stipulated by Article 3 CSD on the subject of the legal consequences of the delivery of a defective good. Pursuant to Article 31(3) CPL, in the case of lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods. The CJEU confirmed in *Quelle*[35] that the EU legislature intended to make the free of charge aspect of the seller's obligation to bring goods into conformity an essential element of the protection afforded to the consumer by the CSD, otherwise the consumer might be deterred from making use of his rights.[36]

This system gives the seller a second chance to fulfil his contractual duties by repair or replacement of the good, this being in general less expensive for the seller and, thus, more favourable to him.[37] In the view of *Grundmann*, "this is a compromise between the possibility that the purchaser abuses his rights or does not act very professionally and thus creates unnecessary costs and the danger that the seller if he has the choice abuses this position by letting the purchaser wait and molesting him. The rights to ask for delivery of a new good without defects or to have the good repaired come first. These are the rights, which keep the gain of the bargain for the seller intact and therefore are typically preferable to him. And the purchaser has no

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33 Council Resolution of 19/5/1981; *Bianca/Grundmann*, (fn. 21), p. 209.

34 Article 31 CPL transposes Article 3 CSD.

35 CJEU, case C-404/06, Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände, ECLI:EU:C:2008:231.

36 For further details in the explanation and comments on CSD see *Micklitz/Reich/Rott*, Understanding EU Consumer Law, 2009, pp. 151-176.

37 *Parapatits*, (fn. 28), pp. 165–175.

legitimate interest to get out of the contract if he receives full value. Therefore, no party has a right of choice here. If however, the seller does not act when an additional and adequate period of performance is set or if it is inappropriate the purchaser may pass on to the other two remedies. He has now the right to rescind the contract or to reduce the price. The choice between the right to ask for delivery of a new good without defects or to have the good repaired on the one hand and the choice between the right to rescind the contract or to reduce the price is with the purchaser, unless this is disproportionate."[38]

However, provisions governing the consequences of the delivery of goods, which are not in conformity with the contract, can be found not only in the CPL, but also in Articles 722 et seq. CC. While under the CPL the consumer may first only ask for repair or replacement, the remedies under the Civil Code are based on a different system. The concept of the Civil Code is modelled after the CISG. It distinguishes two types of malperformance: one being a substantial breach of contractual obligations, the other one being only an unsubstantial breach. According to Article 722 CC, in cases where the delivery of a defective good constitutes a substantial breach of contractual obligations, the buyer may ask not only for repair or replacement, but also for a reduction of the price or the dissolution of the contract. Although the Albanian CC does not *expressis verbis* stipulates the definition of a fundamental breach as Article 25 of the CISG does, considering that the whole regulation of sales contracts on movable goods is modelled after the CISG, the doctrine and case law is expected to further refer to the CISG for the interpretation of a fundamental breach of contract.[39] Although the policy behind both sets of rules is the salvation of the contract, in some cases the CC might offer a better protection to the consumer in the position of the buyer, which in fact is unusual.

The CPL, just like the CSD, does not mention the compensation for damages, unlike the Civil Code, which expressly provides that in both

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[38] *Bianca/Grundmann*, (fn. 21), pp. 17-18, 119; *Grundmann*, (fn. 21), ERPL 2001, p. 253.

[39] *Basedow*, The Europeanization of private law: its progress and its significance for China, The Chinese Journal of Comparative Law 2013, p. 14.

cases of fundamental and non-fundamental breach, the buyer is entitled to the compensation of damages cumulatively with other remedies. Nonetheless, it is certain that the consumer may avail himself of this remedy, as Article 8 CSD stipulates, that the rights resulting from this Directive shall be exercised without prejudice to other rights, which the consumer may invoke under the national rules governing contractual or non-contractual liability. This case shows that with regard to consumer sales contracts, the CPL is not comprehensive and does not cover all aspects of the contract of sale, so it is unavoidable that in a potential conflict on a consumer sale contract, the consumer would refer to both legal acts to protect himself, which leads to the indispensable need for an internal harmonization between CPL and the CC.

Another difference between the two legal acts is the moment when the conformity or lack of conformity is evaluated. The Civil Code provides that the seller is liable for the non-conformity of goods, which existed at the moment of passing the risk (Article 716 CC), while the CPL stipulates that the seller is liable for the non-conformity of goods from the moment of delivery. According to the CPL Delivery of good is defined as the taking of goods into physical possession, unless the parties have agreed otherwise (Article 3(9) CPL). The CRD law provides also that the time of delivery (the transfer of physical possession or control of goods from the trader to the consumer), shall be without undue delay after the conclusion of the contract, unless parties have agreed otherwise.[40] Article 18 has a maximum harmonization character and regulates that the delivery needs to take place without undue delay, but not later than 30 days from the conclusion of the contract (Article 18(1)1 CRD). This means that the buyer will only be able to claim remedies for non-performance of the trader's obligations when 30 days from the day of the conclusion of the contract lapses, since the trader will only then be late with his delivery. It is important to note that where the contract concerns the sale of goods and the seller is late with delivery, the buyer has the right to terminate the contract under the conditions specified in Article 18 CRD. These conditions require that the consumer gives the trader an additional time for performance, unless the seller has refused to deliver the goods or unless delivery within the agreed period is essen-

[40] Article 18 of Directive 2011/83/EU on consumer rights.

tial (Article 18(2) CRD). An almost identical provision to Article 18(2) CRD is already provided by Article 724 CC, which further support the argument that the CC provide an appropriate ground to regulate the consumer sales in a systemized manner. This means that the consumer will only after this time period be able to terminate the contract.

Although the CC accepts a general consensual system of transfer of ownership with regards to non-generic goods (Article 164 CC), the provisions regulating the contract of sale in the CC provide that the passing of risk is presumed when the sellers hands over the goods to the first carrier, to send them to the buyer (Article 738 CC, which is modelled after Article 67 CISG). Due consideration should also be given to Article 20 CRD, which is not transposed into Albanian law, that determines the moment of the passing of risk to the consumer for loss of, or damage to the goods, at the moment when the consumer or a third party indicated by him has acquired the physical possession of the goods. The risk could also pass to the consumer earlier, upon delivery of the goods to the carrier, if the carrier was commissioned by the consumer and that choice was not offered by the trader. This last addition was requested by the European Parliament, but it did not fully clarify the moment of the passing of the risk in case of so-called "IKEA situations".[41] Such a provision is clearly more consumer friendly in comparison to the Civil Code.

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[41] *Luzak/Mak*, The Consumer Right Directive, Amsterdam Law School Legal Studies Research Paper No. 2013-05. In the IKEA situation a consumer needs to first pay for the purchased goods at the trader's cashier desk, and then – if he chooses to have the goods delivered – he walks over to another desk, located in the same building, to conclude an additional delivery/carriage of goods contract with another party. It is doubtful, whether the fact that the IKEA enables a certain carrier to offer his services to consumers in its building would be seen as a carrier's choice offered by the trader to the consumer. Therefore, it remains unclear whether under such circumstances the risk of loss of or damage to the goods passes to the consumer at the moment of delivery of these goods to the carrier.

E. Internal Systematic Problems

The Albanian legislator has simply transposed the CSD into a single statutory instrument, together with other consumer directives, by merely 'partially translating' it into a separate chapter of the legal act. Such a minimalist approach, on the one hand, maintains the regime of the CSD "as it is", without touching upon the system. On the other hand, as observed by some authors, the legislator turns a blind eye to the problems of overlaps and concurring regimes, considering also that the CSD is not crystal-clear and self-explanatory as it stands since it needs further reflection and feedback with the existing sales law.[42]

Besides the CPL as the principal source of consumer law in Albania, a significant number of rules taken from the EU consumer law are also contained in other sources, either in laws or in bylaws. In terms of legislative acts, this is the case with the provisions of Directive 85/374/EEC on product liability,[43] which are contained in the Civil Code of 1994. Some other sporadic provisions originating from the EU acquis are to be found under different institutions in the Civil Code, i.e. right of withdrawal in doorstep contracts (Article 672 CC), unfair contract terms (Articles 686-688 CC), misleading advertising (Articles 635-637 CC), and unfair competition (Articles 638-639 CC). Likewise, the rules from Directive 2001/95/EC on product safety[44] have been transposed in the Albanian legal system through a separate law on product safety.[45]

In addition to this, a part of the consumer acquis is contained in bylaws. These bylaws include primarily the Decisions of the Council of Ministers and the Decisions of the National Bank of Albania. For

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42 *Hondius/Jeloschek*, Towards a European Sales Law – Legal Challenges posed by the Directive on the Sale of Consumer Goods and Associated Guarantees, ERPL 2001, pp. 157-161; for a criticism on the transposition of CSD into a separate act, see also *Scotton*, Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees, ERPL 2001, pp. 297-307.

43 OJ L 210 of 7/8/1985, p. 29.

44 OJ L 11 of 15/1/2002, p. 4.

45 Law No. 10480 of 17/11/2011 on product safety which abrogated the Law No. 9779 of 16/7/2007 on product safety, Official Gazette of the Republic of Albania No. 160/2011.

instance, the Decisions of the Council of Ministers further developed the rules of the CPL on distance contracts, package travel and contracts negotiated away from business premises, etc., whereas the National Bank of Albania passed a Decision, which provides additional rules on consumer credit.[46]

Although the CPL is the primary source for consumer protection law in Albania, it is not the only Albanian source of consumer protection law. As mentioned above, provisions dealing with consumer protection – in the form of rules that protect one contractual party – can be found in the Albanian Civil Code, inter alia in sales contracts. In some aspects, the relationship between the specific provisions in the CPL and the more general provisions in the Civil Code is not clear, as these provisions have not yet been harmonized.

Having two sets of rules alone is nothing exceptional. It is natural for a *lex specialis* that it both derives and differs from a *lex generalis*, which would be applicable if there was no special regulation. Consumer protection law mainly provides rules, which deviate from the general rules to enhance the legal position of the consumer as the weaker party.[47]

However, as a result of the lack of internal harmonization in Albanian law, an unusual conflict arises between some provisions in the CPL and in the Civil Code: the application of the general Civil Code rules is found to be more favourable to the consumer than the application of the specific rules of the CPL, i.e. with regards to the remedies provided in the fundamental breach as mentioned above. Nevertheless, such a statement is true when the seller and buyer have not agreed on the limitation of contractual liability, as it is usually the case of two contractual parties under non-mandatory provisions of the CC.

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[46] See i.e. Decision of the Bank of Albania, On approval of Regulation on Consumer Credit and Mortgage Credit for individuals, OG RAl No. 30/2009; Decision of Council of Ministers No. 63 of 21/1/2009, On Doorstep Contracts, OG RAl No. 8/2009; Decision of Council of Ministers No. 64 of 21/1/2009, On Distance Contracts, OG RAl No. 08/2009; Decision of Council of Ministers No. 65 of 21/1/2009, On Package Travel Contracts, OG RAl No. 08/2009; Decision of Council of Ministers No. 833 of 8/7/2009, On defining the rules applicable to contracts on the right to use immovable properties on timeshare basis, OG RAl No. 130/2009.

[47] *Parapatits,* (fn. 28), p. 171.

Furthermore, CPL provides that the provisions of the CPL are not applied when other legal provisions in the respective field give more favourable treatment on protection of consumer rights, which open the way of the application of general contract law when it better protects the consumer (Article 2 CPL). However, it will be difficult und cumbersome to discover the rules that offer a better protection, which is why a proper systematization should take place in the internal legislation regarding consumer protection provisions widespread in numerous unhandled legal acts. The fact that in case of the conflict between the provisions of the CPL and other law, that other law should prevail if it is more protective for consumer may be problematic since it is sometimes very hard to say what is more protective for the consumer. This fact could endanger the legal security of a consumer. This was pointed out by Advocate General *Geelhoed* in *Commission v Kingdom of Spain:*

"In order to produce the result which is most desirable from the consumer's point of view, one must [...] proceed from a consideration of the adverse effect that term may have on a consumer's interests. Thus – paradoxically – in the situation I have outlined, a 'consumer-hostile' interpretation leads to a greater degree of consumer protection."[48]

However, consumer sales law should be merged and harmonised with the general sale law in Civil Code.[49] A dual legal regime of consumer and non-consumer contracts can lead to unjustifiable differences in the overall framework of the national contract law system,[50] especially when the existing rule do not greatly differ from those newly adopted in the EU level, as it is the case in the Albanian sales law.

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[48] Opinion of AG *Geelhoed* to CJEU, case C-70/03, *Commission v Kingdom of Spain*, ECLI:EU:C:2004:279, para. 13.

[49] For a comparative overview of the regulation of consumer law in some of the major European legal systems, see *Grundmann/Schauer*, The Architecture of European Codes and Contract Law, 2006.

[50] See *Tilleman/Du Laing*, Directives on Consumer Protection as a Suitable Means of Obtaining a (More) Unified European Contract Law?, in: Grundmann/Stuyck (eds.), An Academic Green Paper on European Contract Law, 2002, pp. 81-102.

F. Conclusions

Albanian law provides two different sets of rules, not only in sales contracts, but in a number of cases mentioned above, – on the one hand regulations in the CPL, on the other hand regulations in the Civil Code – which deal with the same question.

Although CPL of 2008, as amended in 2011 and 2013 to a great extend transposes the CSD, as the CPL is not a comprehensive act and follows a piecemeal approach as many provisions, without a certain reason, are implemented in bylaws or other sublegal acts. For these reasons, internal harmonization between the CPL and similar provisions in the Civil Code is necessary to avoid systematic incoherencies in Albanian law. Due consideration should be paid to the transposition of non-transposed provision in CPL or CC, i.e. Article 4 and Article 5(2) of the CSD.

As already indicated, it is interesting that the solution regarding sale contracts have shown a great degree of similarity with the Directive 99/44 even without its transposition.[51] For the sake of a better internal harmonization, such a solution should have been considered at the time of the transposition to achieve effectiveness, applicability and systematization of the legal provision on sale contracts. Furthermore, since consumer contracts have to do with everyday relations between citizens, a Civil Code seems the natural place to regulate such contracts. Despite the risk of frequent amendments of consumer contract law, a quote from *Zimmermann* seems appropriate "a modern code of private law should rather resemble a building site, bristling with the cheery voices of craftsmen and artisans, than a museum, in which only the weary murmurs of the occasional tourist group can be heard."[52]

The Albanian legislator may size the opportunity to better regulate consumer sales at the time when it will be necessary to amend the CPL in order to bring it in alignment with the Consumer Right Directive.

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[51] *Povlakic*, (fn. 7), p. 75.

[52] *Zimmermann,* The New German Law of Obligations: Historical and Comparative Perspectives, 2005, p. 228.

Nevertheless, with regard to consumer sale, the courts should rather concentrate on what the purpose of the directive is and they should interpret the implementing national provisions in the light of that substantive purpose rather than to concentrate on formal concepts used to implement the directive, in order to achieve the better protection of consumers in sales contract.

Internalization of International Law, Europeanization of National Judiciaries, and Rule of Law: A Need for Re-Conceptualization of the Judicial Function in Southeast Europe?

Sašo Georgievski[*]

Abstract

The article offers an outline of the reasons sitting behind the resilience exhibited by the SEE judiciaries towards abandoning the inherited ex-socialist positivism and the ensuing excessive formalist method that prevents them from assuming fully their fundamental task of protecting the rule of law against abusive legislative practices under constitutional, international and European principles and rules. Given that the legal theory and the legal method is a matter of the judges' choice, the primary reason for the persistent insistence on the limited ex-socialist understanding of the law and judicial function is found in the judges' subservient mentality vis-à-vis the other branches of government that still prevails among SEE judges. SEE judges should be incited to proceed with a process of permanent self-reflection that would ease up for them reaching a new choice over understanding the law, interpretative methods and the role of the judicial function according to the liberal democratic foundations, at both collective and individual levels.

A. Introduction

The issue of internalization of international law within the judiciaries of the Southeast European (and the Central and East European) countries,[1] and of Europeanization of their national courts' jurisprudence

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[1] In this article, we use the phrase "internationalization of international law" because of the acculturalization aspects implied by it, assuming compliance to the point of "obedience" of international norms by internal actors, particularly, having in mind

in the context of the recent EU enlargement, has been subject to a vast amount of scholarly analyses in the last few decades.[2]

Latest reports on international law application by the SEE national courts indicate that, despite favourable national constitutional frameworks allowing for judicial consideration of international law, courts in Southeast Europe are "generally reluctant to apply international law".[3] Similarly, the development of jurisprudence of EU law application (primarily within the framework of the SAA agreements) by the judiciaries of the EU-candidate states from Southeast Europe has been rather slow and sporadic,[4] which does not entirely exclude even the judiciaries of the latest members of the Union from Southeast Europe (i.e. of Croatia, and to a certain extent Slovenia).[5]

However, given the chronic inclination of the governments of the SEE countries towards authoritarian practices when exercising governmental powers,[6] most worrying is the fact that SEE courts have largely proven to be generally reluctant towards exercising controlling and

"judicial internalization." See *Koh*, Why Do Nations Obey International Law, 1997, especially p. 2656 et seq.; *Koh*, Internalization Through Socialization, 2005.

2 See Rodin/Perišin (eds.), Judicial Application of International Law in Southeast Europe, 2015; Georgievski/Efremova (eds.), European Union Law Application by National Courts of the EU Membership Aspirant Countries from South-East Europe, 2014; *Kühn,* The Judiciary in the CEE: Mechanical Jurisprudence in Transformation, 2011; Lazowski (ed.), The Application of EU Law in the New Member States – Brave New World, 2010.

3 *Blockmans*, Judicial Application of International and European Law in Southeast Europe, in: Rodin/ Perišin, (fn. 2), p. 306.

4 *Georgievski*, Application of the Law of the European Union by the SEE National Courts: Comparative Overview of Current Situation, in: Georgievski/Efremova, (fn. 2), p. 184; *Mataija*, The Unfulfilled Potential of Stabilization and Association Agreements Before SEE Courts, in: Rodin/Perišin, (fn. 2), p. 28 et seq.

5 On Croatia, see *Božac/Carević*, Judicial Application of International and EU Law in Croatia, in: Rodin/Perišin, (fn. 2), pp. 149-152. On Slovenia, see *Hojnik*, Judicial Application of International and EU Law in Slovenia, in: Rodin/Perišin, (fn. 2), pp. 290-298; *Zagorc/Bardutzky*, The Application of EU Law in Slovenia: Teething Troubles of the Blue Eyed Boy, in: Lazowski, (fn. 2), p. 421 et seqq.

6 See for instance the latest EU Enlargement Strategy for 2015-2016 prepared by the European Commission, COM (2015) 611, especially those parts where it reports wide spread practices of politicization of the state institutions in most SEE countries.

corrective powers imminent to their judicial function over domestic legislation under constitutional, international and European rules.

The most common general explanation for the chronicle inability of the SEE courts to provide sufficient defence of rule of law against abusive legislation, and for their related slow opening to more intensive and methodologically correct judicial consideration of international law and EU law has been located in the failure of the SEE judges to break up with the ex-socialist legal theory on law and the judicial function, usually described as being based on *Kelsenian* positivism.[7]

In the remainder of the text I shall briefly try to explain the core reasons sitting behind the strong resilience exhibited by the SEE judiciaries towards abandoning the inherited ex-socialist positivism, that stands to the way of an enhanced application of international law and EU law domestically by judges and to assuming fully their fundamental task of serving as ultimate guardians of the rule of law.[8] It will be submitted that the primary reason for the persistent insistence by the SEE judges on ex-socialist positivist understanding of the law legal method is found in their subservient mentality of judges *vis-à-vis* the other branches of government that still strongly prevails among them despite the formal turn of their countries into liberal democracies.

B. Practical Manifestations of the Current Legal Theory and the Judicial Method in SEE

As reported by *Blockmans* in a book devoted to the subject published this year, "[the] shadow of the authoritarian and communist legal mind-set, whereby judges were supposed to follow – not to interpret – the will of the legislator, still looms large over Southeast Europe."[9]

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7 *Rodin*, Function of Judicial Opinion – A View from a Post-communist European State, in: Huls/Adams/Bomhoff (eds.), The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond, 2009, especially p. 2.

8 While doing that, I have in mind those judges who work as "true" or "honest" professionals that, luckily, hold for the majority of judges in the SEE judiciaries, and not the judges that willfully submit themselves to the will of the governmental power for political, ideological, careerist or other personal gainful reasons.

9 *Blockmans*, (fn. 3), p. 304.

According to the Court of Justice of the European Union judge and professor *Siniša Rodin*, "the communist-time reading of Kelsen was certainly specific, and the emphasis was put on the deductive approach to law and its de-contextualization. Law was and still is largely understood as being objective and its interpretation as a process of deduction, void of any contextual considerations."[10]

That urge towards alleged "objectivity" (depoliticization) of law contributed to excessive formalization of law that steadily became a "dominant legal culture" in Southeast Europe (and Central and Eastern Europe (CEE)).[11]

The actual manifestations of that legal culture could be summarily presented around the following three main features of the current SEE judges' practical operation:

a) Disregard of national constitutions: SEE ordinary judges largely perceive the Constitution as a sort of a "political document" or an act alien to the judicial function,[12] and the constitutional review of statutes – as a charge solely of the respective Constitutional Court, sitting outside of their job description. The later explains why SEE ordinary judges practically never exercise their competence to stay current proceedings and refer the matter of reviewing the constitutionality of particular legislation to the Constitutional Court, lest to set aside such unconstitutional legislation on their own, which has been always possible for ordinary judges in the SEE legal systems (at least in those systems coming from ex-SFRY).

b) Excessive formalism in law application: The limiting effect of the excessive formalism, or textual-normativism, or, what *Kühn* calls it "mechanical jurisprudence"[13] dominating the current *modus operandi* of the SEE judiciaries is that it prevents the judge from exercising broader teleological, contextualized, or comparative reasoning when

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10 *Rodin*, (fn. 7), p. 2.

11 Ibid.

12 *Bacic*, On the New Beginning Scenario for Judicial Givernance in Croatia, in: Georgievski/ Efremova, (fn. 2), p. 88.

13 *Kühn*, European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries, Croatian Yearbook of European Law and Policy, 2005.

establishing the true meaning of law, thus driving away the SEE judges' legal culture from the established European legal culture.[14]

c) Lack of judicial opinion; circular reasoning; poor drafting-style of courts' decisions: As thoroughly explained by *Rodin*, judicial decisions of the SEE courts are typically narrowly structured, concentrated on the holding of the decision, which is reached in a merely deductive, syllogistic and de-contextualized fashion and thus devoid of any more elaborate judicial reasoning that would endow the decision with a persuasive and legitimizing force, with an overall effect of neglecting the normal functions that a judicial opinion should have in legitimizing the judicial work.[15]

C. Reasons for the Persistent Presence of the Ex-Socialist Legal Theory and Method

The excessively limited ex-socialist positivist understanding of law and the judicial function described in the previous section have obvious detrimental consequences for the ability of judges to provide sufficient defence for the rule of law and fundamental rights in many cases of abusive use of governmental power.

In theory, it is not rare that *Kelsenian* legal positivism, or, more generally the "plain-fact" approach to legal interpretation have been used by many as an explanation for the failure of judges to stand up

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[14] See *Kühn*, The Application of European Law in the New Member States: Several (Early) Predictions, GLJ 6 (2005), p. 576; *Rodin*, (fn. 7); *Rodin*, Discourse and Authority in Europe and Post-Communist Legal Culture, Croatian Yearbook of Law and Policy, 2005, no. 1; *Bogojević*, Europeanisation of the Judiciary in Southeast Europe, in: Rodin/Perišin, (fn. 2), p. 65 et seqq.; *Ćapeta*, Courts, legal Culture and EU Enlargement, Croatian Yearbook of European Law and Policy, 2005, pp. 23-53. But, also note the rather cautious position of *Michal Bobek* towards the unreserved employment of the teleological (purposive) interpretation method by national judges in the EU context. *Bobek*, The New European Judges and the Limits of the Possible, in: Lazowski, (fn. 2), p. 146.

[15] *Rodin*, (fn. 7), p. 4 et seqq., especially p. 12. According to this author, the above standard routine of poor framing of judicial decisions has its deeper roots in *inter alia* the misconception by the SEE judges of the function of the judicial work as "application of laws" (which is itself a method, not a function) as opposed to the dispute-settlement function.

against authoritarian practices, especially, in the extreme cases of judges operating under the most oppressive regimes.[16]

However, as thoroughly explained by *Graver*, since it is found at the normative level of analyses, positivism or the "plain fact" approach followed by judges (as any other legal theory and method) can only explain the form and the justifying argument for the judges' assent to the particular government's oppressive authority, but it is not capable of disclosing the real cause for their submission to such authority.[17] What the choice for a positivist or "plain fact" understanding of law and interpretative method made by judges may implicitly reveal, though, because of its intrinsic nature, is the underlying readiness of judges a) for adherence to outside authority (government, the sovereign, the state) and b) for maintaining an ideology of not getting involved with political issues.[18]

The adoption of the positivist or the plain-fact (or any other) interpretative approach is a matter of choice made by judges, and behind that choice may sometimes (perhaps often) lie a hidden decision of judges to submit themselves to the rule of an assertive legislator.[19] But, other legal methods could also serve that purpose in particular circumstances as well,[20] be it teleological or any other method. The true reasons for the judge's decision not to confront an abusive legislator would have to be found by resorting to extra-legal types of analyses, including psychological, ideological, sociological and institutional analyses.

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16 See *Graver*, Judges Against Justice – On Judges When the Rule of Law is Under Attack, 2015, especially Chapter 14 et seqq. The phrase "plain fact" approach to legal interpretation has been devised by *David Dyzenhaus* to denote an approach where the judge "looks to a pattern that exists as a matter of historical fact in the legal acts and decisions of the past, mainly those of the legislator." *Dyzenhaus*, Hard Cases in Wicked legal Systems Pathologies of Legality, 2nd ed. 2010, p. 48, cited by *Graver*, p. 227.

17 Ibid., p. 237 et seqq.

18 Ibid.

19 Ibid., p. 288.

20 Ibid. In that respect, "one cannot say in advance that one method favors the rule of law whereas the other favors tyranny."

From that multilevel analytical perspective, one can easily detect the obvious case of judges that wilfully submit themselves to the will of the governmental power for political, ideological, careerist or other personal gainful reasons, including from fear of punishment or some form of reprisals by an oppressive government against the disobedient judge.

Apart from that, one typical reason is that judges usually instinctively perceive departures from positive law (legislation) as contrary to the intrinsic nature of the judicial function, and positivism as a chosen method usually fits well into that perception. Other possible reason has a deeper psychological character, and relates to a normal human reaction of judges of reducing pressures upon them when they are caught in moral dilemmas implied in the decision whether to go beyond manifestly flawed government legislation.[21] Institutional constraints, including collective pressures felt by a judge from his colleagues to stick to a particular line of operation, professional solidarity with fellow judges and professional loyalty are also valid explanations (among many others) for the judge's reluctance to stand up against abusive legislative practices.

All above reasons for judges' obedience to assertive authority were at play when the choice for the leading legal theory and method had been made in Southeast Europe somewhere during the ex-socialist reign by the judges and other members of the legal profession: the excessive textual-formalism based on a socialist version of positivism of a *Kelsenian* type. That theoretical approach suited well the desire of most of the judges to immunize themselves from political pressures inherent in the then existing authoritarian political system, even if it meant their outright submission to the will of the autocratic government. It had relieved them from the risk of possible repercussions on their professional and personal well-being that may have been experienced by them (at least hypothetically) if being involved into solving political or moral controversies while performing their

[21] That human reaction is explained by the *Robert M. Cover's* psychological theory of "cognitive dissonance". *Cover*, Justice Accused Antislavery and the Judicial Process, 1974, discussed in *Graver*, (fn. 16), p. 231 et seqq., together with "moral blindness" as another psychological explanation for judges' failure to disallow manifest breaches of rule of law.

judicial function. And, it had further relieved them from having to deal with the *Cover's* cognitive dissonance trap during their everyday judicial routine.

Needless to say, the choice of the socialist positivism as a leading theory and method perfectly suited the functioning of the ex-socialist political system itself: in a system of blurred separation of powers, where the national assembly (personifying the "rule of the working class") was the ultimate guardian of the social interest, the judiciary had been allotted the role of serving as a mere transmitter of the will of the government and the legislator as expressed in the words of statutes and executive acts (the task of "application of laws"). Judges were not expected to challenge the correctness of the policy choices embedded in the legislation,[22] even though that possibility formally existed for them even in the ex-socialist period.

When the political systems of the Southeast European countries transformed into liberal democracies in the 90s, again, underlying the preference of judges to keep alive the old theoretical and methodological pattern of judicial functioning has been (and still is) their undisrupted inclination towards maintaining a subservient position *vis-à-vis* the government and the legislator (now representing the "will of the people" instead of that of the "working class"), the reasons for which could be found in various extra-legal factors. Judges may have wanted (and still want) to continue sitting in their comfortable position of being immunized from political entanglements and from personal risks (and moral dilemmas) to which they might have been involved should they have had assumed their newly inaugurated controlling powers against the executive and the legislator, especially, given the chronic democratic deficit in most of the SEE countries where the strong hand of small authoritarian inclined political elites easily prevails over the state institutions and social life.[23] Lack of knowledge about the basic democratic concepts (including separation of powers, rule of law, equality, fundamental rights etc.), authoritarian inclined mentality of many judges themselves, and ensuing conservativism are other factors which prevent them from embracing their new demo-

22 *Rodin*, (fn. 7), p. 9.

23 See fn. 6.

cratic role. Due to various organizational and institutional constrains, even the judges that are ready and sufficiently skilled to resort towards exercising genuine controlling powers over positive legislation under constitutional or international or European rules and principles often face extremely difficult pressures within the hierarchically ordered judiciary not to depart from the established legal tradition.

D. Concluding Remarks: Re-Conceptualization of the Judicial Function in Southeast Europe?

Ten years ago, in the CEE context, *Kühn* openly suggested that "a new ideological description of the judicial function [would] be even more urgently needed."[24] Such "new ideological description" of the judicial function is urgently needed in the SEE countries as well.

What SEE judges profoundly lack is a more theoretical understanding of fundamental legal concepts and principles, including the concept of law itself and its role in a democratic society, the role of the judicial function, rule of law, constitutionality, equality, etc. In my view, education of judges at the judicial training institutions (and legal education in general) should put stronger emphasis and encourage open discussion among judges on these and other relevant theoretical aspects of law and the judicial profession (including axiological aspects) apart from offering them strictly technical professional knowledge.

In addition, efforts by many SEE countries to enrich the interpretative methods employed by judges *via* constitutional or legislative means, most notably, as regards the requirement for the interpretation of ECHR according to the Strasbourg court's jurisprudence,[25] have an obvious limitation in that, in order to achieve the desired result, they rely on the same legal method of limited textual law application that they wish to put away (judges would abandon textual-

[24] *Kühn*, (fn. 14), p. 580.

[25] See *Georgievski*, (fn. 4), p. 166 et seq., and the authors referred to on that place.

formalism because there is a corresponding duty for them written in the statute, and judges apply only written statutes).[26]

In fact, all efforts aimed at improving the quality of the judiciaries in Southeast Europe could lead up only towards partial results unless there is an indigenous decision made by judges to break up with their inherited mentality of outright obedience to the will of the government and the legislator, being it autocratic itself or not, and of assuming a stronger controlling role *vis-à-vis* the other branches of government in defence of the rule of law. SEE judges should be incited to proceed with a process of permanent self-reflection that would ease up for them reaching a new choice – a sort of a new arrangement – over their theoretical understanding of the law, interpretative methodology and the role of the judicial function according to the liberal democratic foundations, at both collective and individual levels, together with other segments of the legal profession, including practicing lawyers, and legal scholars.

[26] Note, for instance, the practice of Macedonian judges, who have so far typically responded to the statutory obligation to interpret the ECHR in accordance with the principles and the case law of ECtHR by inserting a short affirmative phrase in their decisions that the statements contained in the decision are "in conformity with the principles and the case-law of the ECtHR", without any reference to (lest analyses of) particular principle or decision of the Strasbourg court. E.g. decision of the Supreme Court of the Republic of Macedonia, Kvp. 253/2013.

Right of Establishment: Serbian Company Law

Tatjana Jevremović Petrović[*]

Abstract

This paper discusses the issue of the right of establishment from the perspective of the existing provisions of Serbian Company law. The author tries to analyse the link between positive regulation of incorporation theory, modified with real seat criteria from Private International Law with relevant provisions from the Companies Act, dealing with the companies seat. Modern company laws, as well as private international law rules dealing with company issues, determine the applicable law with the theory of incorporation, which is more in line with creditor protection, cross border activities and modern communication methods. It is also in line with the EU right of establishment, and provides more possibilities to free movement to Serbian companies, as well as free movement of EU companies to Serbia.

A. Introduction

The right of establishment represents an important part of the functioning of the internal market enabling companies to move and pursue their economic activities. It is well known how this right was developed through the interpretation of the European Court of Justice (CJEU) in the past decades. Over the years, many obstacles for the right of establishment, especially in regard to primary establishment of the companies were removed by the EU Member States in their national law as well as by the CJEU in its judgments. It is therefore more than ever possible to enjoy many benefits of the cross-border movements of companies within the internal market.[1] Still, certain issues remain unresolved even today.[2]

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[1] There are many papers and books dealing with this issue, e.g. *Barnard*, The Substantive Law of the EU: The Four Freedoms, 2010, p. 319 et seqq.; *Grundmann*, European Company Law: Organization, Finance and Capital Markets, 2007, p. 485 et seqq.;

It is the aim of this article to analyse whether Serbian law provides for an adequate legal regime in regard to the right of establishment of companies, and whether companies could use the opportunity to cross-border move and if so, under which conditions. In order to analyse these possibilities, we will focus on various provisions in company law, registration procedure, as well as private international law, as it now stands in Serbia. It is the aim of the article to show that companies could cross-border move to and from Serbia, although there are no explicit provisions in regard to cross-border conversion of companies. It is also worthwhile showing how the Serbian regime is generally in line with the existing regime of determination of the company's seat and applicable law to many EU Member States.

B. Determination of a Company's Seat

Serbian law determines the seat of a company as a place in the territory of the Republic of Serbia from where the company is being managed and which has to be determined by the articles of incorporation or by a general meeting decision.[3] A company's seat needs to be registered in the Business Register and is an obligatory information in the articles of incorporation and statute (this second only in the case of a joint-stock company).

Teichmann, Gesellschaftsrecht im System der Europäischen Niederlassungsfreiheit, ZGR 2011, p. 646 et seqq.; *Armour/Ringe*, European company law 1999-2010: Renaissance and crisis, CMLR 48 (2011), p. 140 et seqq.

[2] See initiative of the European Parliament in regard to cross border conversion: Report with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats, 2011/2046 (INI), A7-0008/2012 of 9/1/2012; as well as Report of the Reflection Group On the Future of EU Company Law of 5/4/2011, in particular p. 20 et seqq.

[3] See Article 19 Law on Commercial Companies (LCC 2011), Official Gazette of Republic of Serbia No. 36/2011 with further amendments including No. 99/2011, 83/2014 and 5/2015 available in English at www.zakon.co.rs/tekstovi-zakona-na-engleskom-jeziku. html (1/12/2015).

From this general provision, several remarks and conclusions have to be made:

1. Serbian Company law introduces two main criteria for determination of a company's seat.

2. The registration obligation of a company's seat has an important impact on the seat determination and application of the adopted criteria of a real (and statutory) seat.

3. The issue of seat determination (and possible change) is only regulated in general.

4. Finally, Serbian company law specifies that a company's seat need to be in the territory of the Republic of Serbia.

All these issues will be discussed in the following chapters.

I. Criteria for Determination of a Company's Seat

As already outlined, Serbian Company law introduces two main criteria for the determination of a company's seat. The first one is a place from where the company is being managed in fact. Therefore, the first criterion to determine a company's seat includes the real seat. Nevertheless, it combines this one with another criterion – a place determined by the articles of incorporation (or by a general meeting decision). It is, therefore, also an application of a statutory seat criterion.[4]

The issue of a parallel use of the real seat and statutory seat criterion for determination of a company's seat can be understood differently. First, parallel application of the real and statutory seat criterion could signify that both places must coincide. In the same context, this provision could introduce the presumption that these places coincide. Therefore, it is presumed that a company has its real seat in the place determined by its articles of incorporation or *vice versa*. Nevertheless,

[4] Very similar provision existed in previous Law on Commercial Companies, prescribing that a company's seat was the place from where the company was managed. Nevertheless, next paragraph presumed that a company's seat is to be determined by the Articles of incorporation and registered in the Business Agency Register. See Article 16(2) Law on Commercial Companies, Official Gazette of Republic of Serbia No. 125/2004.

this presumption is not absolute, which means that interested parties acting in good faith could invoke the real seat as the company's seat, even if it is different to the statutory (and, as will be seen later on, registered) seat of the company. In a reverse situation, where an interested third party invokes the statutory seat (which is also usually same as registered seat), the presumption is absolute, and the company cannot invoke to have its real seat in other place, not stated in its articles of incorporation (and later on, registered).

Nevertheless, the existing provision must be understood to accept the real seat criterion as the prevailing one. Therefore, a cumulative application of the statutory seat criteria could be understood to introduce an obligation of the company to change its statutory seat if or when a company has in fact a different seat. Still, there are no consequences prescribed in the case if that is not the case.

It can also be concluded that although there is a legal presumption of identity of the place of the real and statutory seat, these places could be different in practice. Therefore, it is the most probable that the provision of the seat determination actually has a dual purpose. The first one is to set a criterion for seat determination – which is the real seat of the company, while the second purpose is to set a method of the company's seat determination. This interpretation could lead to a conclusion that a company will need to determine its seat for various legal purposes either by the articles of incorporation (statute) or by a general meeting's decision. This concept has very important consequences not only for a seat determination, but also for its change, as will be discussed later.

In addition to the general provision on the seat determination, if a company is permanently pursuing its activities in a place different from its seat, third parties can also invoke this place for the purpose of determination of court jurisdiction.[5] This provision has the obvious intention of third party protection, especially in the case when the place of exploitation does not coincide with real and statutory seat (and registered seat of the company). Apart from that, the place of exploitation has no other impact on the determination of the seat, nor on the applicable law to the company.

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5 Article 19(2) LCC 2011.

II. Registration of a Company's Seat

As already suggested, a company's seat needs to be registered in the Business Register.[6] Registration procedure is regulated by the Law on Registration procedure into the Business Agency Register.[7] The Business Register is a central electronic database for all data and documents relevant for the registration. It operates under the principles of publicity, accuracy and protection of third parties.

The registration procedure is acted upon the administrative procedure rules, by the registrar, who performs registration upon an application under the fulfilment of certain conditions. For this paper it is relevant to underline that the person performing the registration needs to decide on the application, whereby this decision needs to be in the affirmative in the case where all conditions for application are met. Nevertheless, only formal requirements, and not the authenticity and credibility of data or documents enclosed with the application form are relevant for the positive registration decision.

Provisions of Serbian law in regard to registration procedure provide for an obligation of the registrar to take into account whether information on the registration application is identical to that on the documents provided. It should, therefore, be presumed that for the registration of the company's seat, the registrar will perform registration of the company's seat as stated in the registration application, and if that place is the one contained in the articles of incorporation (or statute in the case of joint-stock company). Bearing in mind these formal requirements, it is hard to imagine the possibility that the statutory and registered seat is different from the beginning, after the company's registration. On the contrary, any subsequent change of the statutory seat could lead to a difference between the statutory and registered seat.

From the perspective of the registration procedure, the practical relevance of the real seat of the company becomes less important. This is particularly the case if further provisions on the registration

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6 Article 19(4) LCC 2011.

7 Law on Registration procedure into the Business Agency Register (Law on Registration), Official Gazette of Republic of Serbia No. 99/2011 and 83/2014, available in English at www.zakon.co.rs/tekstovi-zakona-na-engleskom-jeziku.html (1/12/2015).

are taken into account, especially bearing in mind those general provisions dealing with the effects of registration. Namely, third parties may rely on all registered data, documents and particulars (positive effect of registration) and they cannot have negative effects if the registered information was incorrect.[8] Therefore, third parties can rely on information in regard to the company's seat contained in the register, irrespective of consideration whether they are true and irrespective of the real (and statutory) seat of the company.

Therefore, although Serbian law applies the real seat criterion to determine a company's seat, it is the statutory and registered seat that is in fact (more) relevant for third parties. Of course, third parties could invoke the real seat as the prevailing one if that is their interest and if this is relevant for the protection of their rights.

From this regulatory framework, one can ask the question what may be the consequences of the discrepancy between the place of the real and statutory (and registered) seat. Unfortunately, they only fall within provisions in regard to obligation for the company to apply for registration within 15 days for all new or changed data or documents necessary for registration.[9] Therefore, the application of the real seat criteria is rather a formal legal requirement, not being particularly in line with other provisions of the company law, as well as other provisions in connection to the registration procedure. The existing regime of the Business Register organization and functioning, and especially principles of positive effects of registration provide more legal certainty and are in line with modern provisions on company's information, including its seat. It is therefore clear that the provision on the real seat of the company is rather relict of tradition established during previous legislation. It was also under clear influence of the French tradition in this respect, which is a more sophisticated and logical solution, giving prevalence to the statutory seat, but

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[8] For registration effects see Article 6 LCC 2011, and in particular Article 3(1) and (2) Law on Registration. On this issue see further *Marković*, Negativan publicitet registra privrednih subjekata (Negative effects of registration of commercial companies), Pravo i privreda (Law and Commerce) 1-4/2008, p. 138 et seqq.

[9] See in particular Article 10 in regard to obligation to apply for registration, as well as Article 45 Law on Registration on criminal penalty prescribed for the case when untrue or false data or document was applied for registration.

including the possibility to third parties to invoke the real seat of the company.[10]

It is, therefore, my suggestion to improve the existing regime of the company's seat determination by introduction of the registration (statutory) seat concept with a possible modification of the real seat, which could be invoked if it is in the best interest of third parties acting in good faith.

III. Correspondence Address

Apart from the seat, companies can also register the correspondence (mail delivery and receipt) address in the Business Register, which can be different from its (registered) seat, which is presumed to be the place for all business correspondence.[11]

Therefore, in the case of unsuccessful mail delivery (if delivery is registered and includes a return receipt) to the registered seat or registered address (different from the company's seat if such address is registered) there is an obligation for a second attempt of registered mail delivery with at least 15 days between the first and second mail delivery attempt. If the second mail delivery to the registered seat or registered address (if there is any) is unsuccessful it shall be presumed successful eight days after the second unsuccessful attempt for delivery to the registered seat or address (if there is any). These provisions are relevant for all business correspondence, but special provisions deal with mail delivery in the court, administrative, tax or other procedures. They are also irrelevant for the statutory issues of the company.

The company may have an additional electronic address for business communication. If this is the case, the electronic address is registered in the Business Register. The electronic address is an optional (not obligatory) address and can be used for easier business communication. It is irrelevant for other issues, especially determination (and possible change) of the law, applicable to all statutory issues for the company.

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[10] See French Code civil, Article 1837(2), Loi no. 78-9 of 4/1/1978.

[11] Article 20 LCC 2011.

C. Change of a Company's Seat

As already suggested, in Serbian law, the company's seat is understood as the real seat. Nevertheless, it has to be determined either by the company's articles of incorporation (or statute in the case of joint-stock company) or by a general meeting's decision. This method of determination of a company's seat is also applicable for a change of a company's seat. Also, it is explicitly underlined that once determined, a company's seat can be changed by a general meeting's decision or in another way provided in the articles of incorporation (or statute in the case of joint-stock company).[12] It is the question on how this provision can be interpreted, bearing in mind the possibility to change not only the real, but also the statutory seat, as well as the fact that change may affect only one of these places.

It is hard to make any conclusion in regard to the effects of the change of the real seat of the company. Internal effects of the real seat change can be seen in relation to an obligation of the company to make the registration application after changes of certain information, whose registration is obligatory. This obligation is due 15 days after the change occurred.[13] Although the registration provisions should affect efficient and true information to interested parties, sanctions prescribed for their breach are not complete, since they provide only for criminal liability in the case of application of false (untrue) information or documents. Bearing in mind that the registrar can only make a (positive) registration decision by considering only formal requirements, and not the authenticity and credibility of data or documents enclosed with the application form. It can therefore happen that the factual situation does not coincide with the registered one. Additionally, this may happen from the moment of incorporation, as well as later on, during the performance of business activities. Therefore, it must be understood that change of the real seat should not affect third parties rights, especially when acting in good faith. The same conclusion can be made in the case of the change of the real seat not only within the territory of the Republic of Serbia, but also outside its borders, which we will discuss further in detail below.

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12 Article 19(3) LCC 2011.

13 See Article 10 Law on Registration.

The cited provision on the seat change has in mind only the effects of the domestic change of the company's seat, bearing in mind that the general provision of the seat determination mentions that it must be the place in the territory of the Republic of Serbia. Therefore, it must be concluded that Serbian company law allows change of the seat within the borders of the Republic of Serbia, which means that a domestic company is not allowed to have its seat outside of its territory. But the real limit to the change of the company's seat can be applied only to the change of the statutory seat, affecting the obligatory registration. Therefore, the Registration Agency will deny registering a place outside the territory of the Republic of Serbia as registered – statutory (and therefore real) seat of domestic company. This means that a company may have a real seat outside of the territory of the Republic of Serbia (from the beginning or by change later on), but this fact will have no effect on other registered data or the company's nationality (except those in relation to criminal liability in the case of untrue or false registration). It is, therefore, clear that the true nature of the accepted criteria in Serbian law to determine a company's seat must be either the statutory or registered seat. Therefore, this formalistic approach of the real seat criteria can be unpractical and difficult to apply.

This particular provision is very similar to the well-known situation of the *Cartesio* case in front of the CJEU, because the provisions of Hungarian law (in the time when this case occurred), were very similar to those of Serbian law.[14] Nevertheless, conclusions made from this case imply that every national law (of a Member State) has the power to define the connecting factor (including the real seat of the company) in order to determine and maintain the nationality of the company.[15] It is, therefore, upon the national authority to determine the condi-

[14] See CJEU, case C-210/06, *Cartesio*, ECLI:EU:C:2008:723; and the very good analysis of the Hungarian law and this case in *Korom/Metzinger*, Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06, ECFR 2009, p. 148 et seqq.; as well as *Gerner-Beuerle/Schillig*, The mysteries of freedom of establishment after Cartesio, ICLQ 59 (2010), p. 320.

[15] See in particular CJEU, case C-210/06, *Cartesio*, ECLI:EU:C:2008:723, para. 110-119.

tions and requirements for the registration procedure, as well as the criteria affecting domestic companies.[16]

D. Determination of the Applicable Law

Finally, in regard to the change of the (statutory or) registered seat of Serbian company, one must take into account provisions in regard to the determination (and change) of the applicable law.

The Law on resolving conflict of laws provides for the basic rule to determine a company's nationality as well as the *lex societatis* for companies.[17] This rule implies the application of the theory of incorporation, modified with the real seat concept.

Namely, nationality of the legal person (including commercial companies) shall be determined according to the law of the country where it has been incorporated.[18] Nevertheless, if a legal person has its seat in a country other than a country of incorporation and if that country considers the legal person to have its own nationality, this criterion shall prevail.[19] Done under strong influence of Swiss Law on Private International Law provision in regard to determination of applicable law, this regime is generally introducing the theory of incorporation, while allowing for modifications.[20] Namely, there is a possibility to apply national law of the company's seat only in the case where a country considers a company to have its own nationality only on the criteria of seat.

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16 This is also in line with adopted opinion that „companies are creatures of the [...] national law". See in particular CJEU, case 81/87, *Daily Mail*, ECLI:EU:C:1988:456, para. 19 and CJEU, case C-210/06, *Cartesio*, ECLI:EU:C:2008:723, para. 112.

17 Law on resolving conflict of laws with regulations of other countries (Law on conflict of laws), Official Gazette of SFRY No. 43/1982, further amended in No. 72/1982, 46/1996 and Official Gazette of RS No. 46/2006, available in English at www.zakon.co.rs/tekstovi-zakona-na-engleskom-jeziku.html (1/12/2015).

18 Article 17(1) of the Law on conflict of laws.

19 Article 17(2) of the Law on conflict of laws.

20 Compare Article 154 of the Swiss Private International Law, Loi fédérale of 18/12/1987 sur le droit international privé (LDIP), RS 291, RO 1988, 1776, www.admin.ch/ch/f/rs/c291.html (1/12/2015). See also the very similar provision in Hungarian law in *Korom/Metzinger*, (fn. 14), p. 143 and fn. 52.

This provision could be subject to different interpretations and could lead in practice to unexpected situations, especially in connection to the regime of seat determination.[21] Namely, the real seat of the company may be different to the statutory and registered one, although the general presumption is that these places coincide. In that case, the real seat could be different to these places from the incorporation, or could occur later on, during a business operation of the company.

According to the general principle of incorporation in Serbian conflict of law regime, a company will be considered to be domestic one if incorporated in Serbia. This provision would even be applicable in the situation when a company's real seat was outside of Serbia from the moment of incorporation. It could also be possible that a secondary criterion of the real seat is applicable, but only when a country considers the company to have its own nationality only on the seat criteria. Although it is evident that this provision was introduced to minimize the risk of circumvention of laws, its practical application remains very complicated and hardly imaginable. This is particularly the case in all countries applying the real seat criterion, because it is common that they also require a company to be incorporated there, in order to be able to have their nationality.[22] Therefore, it is the opinion of Serbian legal writers that the criterion of the real seat in a foreign country will not be applicable if foreign law does not accept a company having its own nationality, when the general provision of the incorporation criterion will be (once more) applicable.[23]

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[21] See in Serbian literature *Varadi et al*., Međunarodno privatno pravo (Private International Law), Službeni glasnik, 2007, p. 281 et seq.; *Stanivuković/Živković*, Međunarodno privatno pravo: Opšti deo (Private International Law: General Part), Službeni glasnik, 2007, p. 122 et seq.

[22] See e.g. for German law *Roth*, Recognition of Foreign Companies in Siège Réel Countries: A German Perspective, in: Wouters/Schneider (eds.), Current Issues of Cross-Border Establishment of Companies in the European Union, 1995, p. 30 et seqq.; for French law, which could accept application of French law, but not also French nationality see *Goldman/Lyon-Caen/Vogel,* Droit commercial européen, 5th ed. 1994, p. 91 et seq.; *Rigaux*, Droit international privé, Tome 1, Théorie générale, 2nd ed. 1987, p. 96 et seq.

[23] *Varadi et al*., (fn. 21), p. 64.

Provisions in regard to the alternative application of the real seat criteria for the purpose of private international law are also inapplicable to foreign companies, which was the probable explanation of introduction of this criterion to Serbian law.[24] In this case, companies cannot be regarded as Serbian companies; bearing in mind that the general requirement for this is the incorporation into the Business Register in the Republic of Serbia, although Serbian law does not contain any provision in order to define the notion of "domestic company".[25] It can therefore be concluded that it should be impossible to consider a foreign company as Serbian, if not incorporated in Serbia, even in the situation when the company has its real seat in Serbian territory. That would imply the application of the general provision introducing the incorporation criterion, and could lead to the inapplicability of the additional criterion.

Finally, in the situation of the real seat transfer to another country the only possible conclusion must be made in line with previous conclusions. Although Law on Commercial Companies puts priority to the real seat in defining its seat concept, practical relevance of the registered seat has primacy. This will lead to the conclusion that a company may have its real seat in other country than the country of incorporation and that there will be no consequences in regard to incorporation legality or further legal existence of the company. The registrar performing the registration will be obliged to perform the registration if all documents and data are the same as in the registration application, without material control of the facts, including where the real seat of the company is situated. The same is also the result of the consequent change of the company's real seat to another country, because the company will keep its legal connection to a domestic legal system, as long as it is registered in the Business Register.[26] This leads to the most important question whether the application of the real seat criterion in Company Law, as well as in Private International Law is still needed, when there is usually no practical relevance of its

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[24] See *Stanivuković*, Tačke vezivanja za komercijalna pravna lica u međunarodnom privatnom pravu (Connecting factor to commercial legal persons in private international law), Pravni život (Legal life) 2/2003, p. 450.

[25] See *Stanivuković/Živković*, (fn. 21), p. 123.

[26] Similar conclusion in *Stanivuković*, (fn. 24), p. 440.

application. The only exception valid for the application of the real seat could be third parties protection, as suggested while discussing seat determination issues, or other exceptional situation, including *fraus legis*. This conclusion will also be in line with the European Union's right of establishment, and would provide easier access to the Serbian market to foreign companies as well as easier access to free movement to Serbian companies.[27]

E. Cross-border Conversion

Current Serbian law does not contain any provision on the cross-border conversion of domestic companies, nor does it explicitly allow that foreign companies are to be conversed to domestic ones.[28] It is hard to predict how Serbian authorities would react upon such a request, but it can be estimated that the Registration Agency would refuse to make such a conversion without explicit legal ground. It is hard to imagine that legal continuity of the foreign company would be recognized once a foreign company submits its application for registration. It would rather be the case when all provisions on the new registration would be applicable. The same could be the case of the conversion of Serbian to foreign company, although Serbian law recognized domestic conversion in regard to the change of one legal

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[27] See similar conclusion in Croatian law *Babić*, Sloboda kretanja trgovačkih društava u EU (Free movement of commercial companies in the EU), in: Parać et al. (eds.), Liber Amicorum Jakša Barbić, 2006, p. 211; *Bouček*, Osobni statut trgovačkog društva i specifičnih europskih trgovačkih društava u europskom međunarodnom privatnom pravu (Proper Law of Commercial Companies and specific European company forms in European Private International Law), in: Parać et al. (eds.), Liber Amicorum Jakša Barbić, 2006, p. 143.

[28] On the issue of cross-border conversion see in particular *Mörsdorf*, The legal mobility of companies within the European Union through cross-border conversion, CMLR 49 (2012), p. 642; *Szydlo*, The Right of Companies to Cross-Border Conversion under the TFEU Rules on Freedom of Establishment, ECFR 2010, p. 428 et seq.; *Biermeyer*, Shaping the space of cross-border conversions in the EU, Between right and autonomy: Vale, CMLR 50 (2013), p. 120; *Vossestein*, Modernization of European Company Law and Corporate Governance, 2010, p. 71 et seq. In Serbian law see *Jevremović Petrović*, Regulisanje prekograničnih konverzija (Cross-border conversion regulation), Pravo i privreda (Law and Commerce) 4-6/2014, pp. 89-113.

company form to other domestic form without dissolution and with legal continuity of the same company.[29]

Although there is a project to modernize Serbian Private International Law, existing drafts do not include the possibility of the change of the applicable law. They only provide for provisions in the case of cross-border mergers, also not explicitly regulated in the current Law on Commercial Companies, nor on the Law on Conflict of Laws.[30] The inclusion of the possibility of cross-border conversion for companies either in prospect changes of the Law on Private International Law, or Law on Commercial Companies can, therefore, be welcomed.

F. Conclusion

An improvement of the current regime of determination of the company's seat include an introduction of modern criteria, which is more in line with modern company law making as well as the European Union's right of establishment. It can, therefore, be suggested that the applicable law should be the law where the company has been incorporated, without imposing any additional criteria, and that a company's seat should be determined by the registration data, about which creditors, as well as other interested parties could be informed easily. The real seat criterion should be avoided, unless necessary for domestic company law cases, where creditors could use this place if it is different from the registered seat. The incorporation criterion should be accepted in private international law without an additional criterion, and public interest in the case of circumvention of laws could be protected by public order rules.

While the company's establishment and functioning is in the competence of national laws, the same applies to cross-border conversions completed according to provisions of the home and host country. In that regard it is still desirable that particular regulations on the company's cross-border restructurings is adopted in Serbian law, in

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[29] See in particular Articles 478 et seqq. LCC 2011.

[30] See Articles 57 and 59 of the Draft Law on Private International Law from May 2012, http://arhiva.mpravde.gov.rs/cr/news/vesti/zakon-o-medjunarodnom-privatnom-pravu-radna-verzija.html (1/12/2015).

order to define provisions on cross-border conversion procedure, as well as necessary protection of rights of interested persons. This would improve legal certainty and create a competitive and efficient business environment, especially for small and medium size enterprises.

Potential Jurisdictional Bases for Bringing Corporate-Related Human Rights Abuse Cases before Croatian Courts

Ivana Kunda and Eduard Kunštek[*]

Abstract

In situations in which human rights abuses are related to corporate activities abroad the issue of international jurisdiction arises whenever the victim contemplates the judicial redress. The problem lays in the means to bring the corporation to justice where human rights abuses were committed in the context of business activity by a company established abroad, usually in a less developed country, and belonging to a transnational corporation originating from a developed country. While, for variety of reasons, the redress in the victim's home country may be ineffective, the access the justice in a developed country might not be as easy as desirable. The authors explore the options for establishing jurisdiction over such cases before Croatian courts focusing primarily on domestic provisions regarding jurisdiction by attraction and adhesive jurisdiction related to criminal proceedings.

A. Introduction

In the past century, various reasons have induced domestic corporations to establish their presence in other countries.[1] On a legal level,

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[1] An account of the origins and the then characteristics of the transnational corporations is provided in *McLean*, The Transnational Corporation in History: Lessons for Today?, Indiana Law Journal 79 (2004), pp. 363-377.

a transnational corporation (TNC)[2] consists of a parent or a controlling company based in a developed country and the subsidiaries or otherwise controlled entities (such as subcontractors in certain circumstances) located in one or more less developed countries. The ever increasing number and size of TNCs prompt debates about different aspects of their complex structures and operations.[3] TNCs' operations have been seen as problematic for avoiding taxes by virtue of transfer prices, meddling in overseas political affairs, or endangering human lives and health frequently resulting from polluting the environment. Such TNC's operations may for legal purposes translate into violation of virtually any of the internationally recognised human rights. Such violations may further on be processed under criminal or civil law, and may take the form of direct wrongdoing such as where the corporation itself commits the actual wrong or indirect wrongdoing where it is involved by aiding and abetting the act committed by the overseas government forces.[4]

It is often very difficult or even impossible to obtain satisfactory redress from the subsidiary directly involved in the violation, for instance where the subsidiary has no assets or where the overseas justice system does not guarantee effective protection.[5] In the

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2 One of the definitions of TNC is "incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake." United Nations Conference on Trade and Development, www.unctad.org/en/Pages/DIAE/Transnational-corporations-%28TNC%29.aspx (1/12/2015). Despite the use of the term TNC, this paper, however, is not limited in its scope to the companies connected by means of share in the equity capital, but also all other ways in which the control by the domestic company may be exerted over a foreign company.

3 For an insight into the economic structures and features of TNCs and place of TNCs in the economic-geographic globalisation see *Dicken*, Global Shift: Mapping the Changing Contours of the World Economy, 7th ed. 2014, chapter 5.

4 *Baughen*, Human Rights and Corporate Wrongs: Closing the Governance Gap, 2015, p. 4 et seq.

5 *Augenstein*, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, 30/10/2010, www.en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf (1/12/2015), p. 61.

absence of adequate protection and/or enforcement options before the overseas courts, such cases have been brought against the parent company before courts in the US, EU, Canada etc. This paper is first intended to provide a brief overview of the judicial responses to the attempts to bring these categories of cases before the courts in the mentioned jurisdictions. The follows an overview of the international, EU and domestic legal sources governing jurisdiction issues, along with explanations of the basic properties of jurisdictional rules in civil matters and listing of pertinent grounds for exercising international jurisdiction. The focus is primarily put on the jurisdiction by attraction and adhesive jurisdiction related to criminal proceedings.

B. Summary of Selected Comparative Case Law

One of the early cases concerned the Bhopal gas tragedy in 1984, in which a toxic gas leaked out of a chemical plant owned and operated by Union Carbide India Limited (UCIL), whose majority owner was the US company Union Carbide Corporation, causing the death of several thousand people and injuring many more. Relying on the doctrine of *forum non convenience*, the US court in *Bhopal* ruled that "the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability".[6]

More recently, the Québec Superior Court of Canada considered the Israeli courts to be in a better position to judge in *Bil'in*.[7] This is the case brought by heirs of a Palestinian landowner and the council of a Palestinian town against two Canadian companies established in Quebec, claiming that by being involved in constructing residential buildings and other settlement infrastructure on *Bil'in* territory, located on the West Bank in the Occupied Palestinian Territories, they were assisting Israel in war crimes, in particular the violation of Article 49(6) of the Fourth Geneva Convention. While the court stated that war crime constitutes civil wrong in Canada and confirmed it has jurisdiction, it dismissed the case on the grounds of *forum non convenience* explaining that "the plaintiffs have selected a forum having little con-

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6 *In Re Union Carbide Corp Gas Plant Disaster*, 634 F Supp 842 (SDNY 1986).

7 *Bil'in (Village Council) v Green Park International Ltd and Green Mount International Ltd*, 2009 QCCS 4151.

nection with the Action in order to inappropriately gain a juridical advantage over the Defendants".[8]

The recent example from the US is the *Kiobel* case. The residents of Nigeria, who claim that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing violations of the law of nations, sought damages under the Alien Tort Statute (ATS).[9] Affirming the Second Circuit decision (*Kiobel I*),[10] the US Supreme Court held that a presumption against extraterritorial application of the ATS applied to the facts of *Kiobel*.[11] Around the same time, some other US district courts interpreted the ATS to the contrary,[12] and afterwards confirmed the US court jurisdiction under the *Kiobel II* criteria finding that

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8 For the criticism of this decision see e.g. *Weill*, The Role of National Courts in Applying International Humanitarian Law, 2014, pp. 112-114; *Yap*, Corporate Civil Liability for War Crimes in Canadian Courts, Lessons from Bil'in (Village Council) v Green Park International Ltd, Journal of International Criminal Justice 8 (2010), pp. 631-648.

9 The Alien Tort Statute (28 USC. § 1350), also called the Alien Tort Claims Act (ATCA), is a section of the United States Code that reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since 1980s, courts have construed this 1789 Act to allow foreigners to seek remedies before US courts for human rights violations committed outside US territory.

10 *Kiobel v Royal Dutch Petroleum Co*, 621 F3d 111 (2d Cir 2010).

11 *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013). The essential elements of the decision have been summarised by Justice *Breyer*, concurring with the judgment but for other reasons, as follows: "The Court sets forth four key propositions of law: First, the 'presumption against extraterritoriality applies to claims under' the Alien Tort Statute. Second, 'nothing in the statute rebuts that presumption'. Third, there 'is no clear indication of extraterritoria[l application] here', where 'all the relevant conduct took place outside the United States' and 'where the claims' do not 'touch and concern the territory of the United States [...] with sufficient force to displace the presumption."

12 See *Doe v Exxon Mobil Corp*, 654 F3d 11 (DC Cir 2011) vacated on other grounds, 527 Fed Appx 7 (DC. Cir 2013) (establishing that corporations in foreign countries may be liable under ATS for torts committed by their agents); *Flomo v Firestone Nat Rubber Co*, LLC, 643 F3d 1013 (7th Cir 2011) (holding that while ATS allows claims against foreign corporations, the plaintiffs did not prove that violations have happened). See also references in *George*, The Enterprise of Empire: Evolving Understanding of Corporate Identity and Responsibility, in: Martin/Bravo (eds.), The Business and Human Rights Landscape: Moving Forward, Looking Back, 2016, p. 43, fn. 173.

the plaintiffs' claims on human rights violations "touch and concern" the US "with sufficient force to displace the presumption" against extra-territoriality in applying the ATS, and may be heard by the US court.[13]

In 2013, the District Court of The Hague released its decision in the five cases on Shell's liability for the oil spills in Nigeria.[14] Nigerian farmers, supported by the Dutch environmental NGO *Milieudefensie*, initiated proceedings against the Royal Dutch Shell Plc and its Nigerian subsidiary Shell Petroleum Development Company, claiming liability of both companies for failure to deal with several oil spills in Nigeria. The Court accepted jurisdiction on the basis of the Article 7(1) of the Dutch Code of Civil Procedure.[15]

The same year of 2013, the Paris Court of Appeal ruled that French courts have jurisdiction to hear the case against COMILOG International and COMILOG France brought by more than 850 former local COMILOG workers, claiming unfair dismissal and requesting compensation.[16] The dismissal followed the railway accident in which the COMILOG train transporting manganese from Gabon collided with a passenger train in Congo Brazzaville after which the Gabonese company filed for bankruptcy. The decision on jurisdiction was confirmed by the French Court of Cassation on the grounds of co-employment

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[13] *Doe v Exxon Mobil Corp*, 45 ELR 20136 No 01-1357, (DDC, 7/6/2015) (finding that the alleged violations were committed while the military personnel was providing security services for the Exxon's business in the Aceh Province of Indonesia in 2000 and 2001, noting that the "primary inquiry in deciding whether the presumption against extraterritoriality is displaced is the location of the conduct at issue" and finding that plaintiffs alleged that Exxon's executives located in the US had made decisions regarding the deployment of military personnel as security on the Indonesian premises).

[14] The most important of the judgments is Rechtbank Den Haag, *Friday Alfred Akpan and Vereniging Milieudefensie/Royal Dutch Shell Plc. and Shell Petroleum Development of Nigeria Ltd*, LJN BY9854, 30/1/2013.

[15] The provision of Article 7(1) of the Dutch Code of Civil Procedure reads: "If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency." Cited according to www.dutchcivillaw.com/civilprocedureleg.htm (1/12/2015).

[16] Cour d'appel de Paris of 20/6/2013.

by COMILOG France, COMILOG Holding and COMILOG International in conjunction with general heads of jurisdiction because the companies had "*siège social*" in France.[17]

Against the background of the US retreat from exercising jurisdiction to adjudicate the cases of corporate human rights violations,[18] the EU seems to have the opportunity and perhaps even the interest to step in the leading position.[19] While the scope of obligation to extraterritorially protection of human rights is still under discussion in the EU,[20] the possibilities to do so within specific EU Member States are worth exploring. This paper is intended to provide an overview of issues from the Croatian perspective. Admittedly, Croatia might not be listed among developed countries[21] or might be so simply due to its accession to the EU[22] and, unlike some other EU Member States, Croatia does not locate on a large scale its manufacturing business segments in less developed countries. Nevertheless, some features of the Croatian traditional jurisdictional scheme might be helpful in this context.

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17 Cour de cassation, civile, Chambre sociale of 28/1/2015, n° 13-22994. Curiously, the cited provision is Article 2(1) of the Council Regulation (EC) No 44/2001 of 22/12/2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16/1/2001, p. 1. See infra E.I.1.

18 The opinion has been submitted that the US courts applying the ATS were not concerned with law only, but with the US objectives and positions, thus creating double standards for equivalent cases. This has been explained as the result of balancing between two opposing US interests: to present itself as the leader in human rights protection abroad, and to prevent its officials and allies from being responsible for human rights violations abroad. *Weil*, The Role of the National Courts in Applying International Humanitarian Law, 2014, p. 114.

19 *Kirshner*, A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses, Northwestern Journal of International Human Rights 13 (2015), pp. 1-26.

20 See e.g. *Augenstein*, (fn. 5), p. 6 et seq.

21 World Economic Outlook, Uneven Growth, Short- and Long-Term Factors, International Monetary Fund, April 15, www.imf.org/external/pubs/ft/weo/2015/01/pdf/ text.pdf (1/12/2015), p. 51, table 2.2. (Croatia is listed under Emerging and Developing Europe).

22 UN World Economic Situation and Prospects 2015, Country Classification, 2015, www.un.org/en/development/desa/policy/wesp/wesp_archive/2015wesp_full_en.pdf (1/12/2015), p. 139, table A (Croatia is listed among the developed economies).

C. Legal Sources

Croatia is not a party to any multilateral international convention, which contains rules on international jurisdiction relevant to this report.[23] The only pertinent multilateral conventions are those which regulate arbitration issues;[24] however, the focus of this paper is not on arbitration, but on court jurisdiction. There are a few bilateral conventions containing provisions on international jurisdiction.[25]

When Croatia joined the EU on 1 July 2013, regulations concerned with international jurisdiction became directly applicable. At first, the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)[26] applied, subsequently replaced by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and

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[23] Croatia is a party to multilateral conventions regulating international jurisdiction in tort cases involving, e.g. vessel collisions, nuclear damage, oil pollution and transport.

[24] The most important of these conventions are: the New York Convention on Recognition and Enforcement of Arbitration Decisions of 1958, Official Journal of the SFRY – International Treaties 11/1981 and Official Gazette of the Republic of Croatia – International Treaties 4/1994; the European Convention on International Commercial Arbitration of 1961, Official Journal of the SFRY – International Treaties 12/1963 and Official Gazette of the Republic of Croatia – International Treaties 4/1994; the Washington Convention on Settling the Investment Disputes between the States and Nationals of Other Sates of 1965, Official Gazette of the Republic of Croatia – International Treaties 2/1998; and the Protocol on Arbitration Clauses of 1923, Official Journal of the FPRY – International Treaties 4/1959 and Official Gazette of the Republic of Croatia – International Treaties 4/1994 and the Convention on Execution of Foreign Arbitral Awards of 1927, Official Journal of the FPRY – International Treaties 4/1959 and Official Gazette of the Republic of Croatia – International Treaties 4/1994.

[25] Some of these conventions ceased to apply when Croatia joined the EU. A case in point is the 1960 Convention on Legal Assistance in Civil and Criminal Matters with Poland, Official Journal of the SFRY – Addendum 5/1963, which was in force from 5/6/1963 to 1/7/2013. Its Article 43 provided for jurisdiction in tort cases, by listing several alternative criteria: the place where the tortious act was committed, the place of the defendant's residence, and the place where the defendant's property is located.

[26] OJ L 12 of 16/1/2001, p. 1.

the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation).[27]

The basic domestic legal source is the Resolution of Conflict of Law with the Laws of Other Countries in Certain Relations Act (PIL Act).[28] This Act dates back to the early 1980s and was only slightly modified when incorporated into Croatian law in 1991.[29] This codification of both the conflicts and procedural rules relevant to matters having international elements applies whenever international treaties in force in Croatia, the EU regulations or special domestic laws do not contain a specific rule. Another act particularly relevant to the topic of this paper is the Civil Procedure Act (CivPA).[30]

Inevitable under this topic are the UN Guiding Principles on Business and Human Rights proposed by UN Special Representative on business and human rights John Ruggie, and endorsed by the UN Human Rights Council in Resolution 17/4 of 16 June 2011.[31] These

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27 OJ L 351 of 20/12/2012, p. 1.

28 Official Journal of the SFRY 43/1982 and 72/1982; Official Gazette of the Republic of Croatia 53/1991.

29 Although there had been an initiative to draft new legislation, it had been losing momentum, probably due to the anticipated Croatian membership in the European Union, after which the EU legal instruments on private international law will become applicable on these basis. Nevertheless, discussion yielded a proposal on the conflicts rules and partial response, as well as some sporadic opinions. See *Sajko/Sikirić/Bouček/Babić/Tepeš*, Izvori hrvatskog i europskog međunarodnog privatnog prava (Sources of Croatian and European Private International Law), 2001, pp. 259-340; *Šarčević/Tomljenović*, Primjedbe na teze za zakon o međunarodnom privatnom pravu, autora prof dr Krešimira Sajka, prof dr Hrvoja Sikirića i doc dr Vilima Boučeka (Remarks to the Thesis for the Private International Law Act Proposed by Prof. Dr. Krešimir Sajko, Prof. Dr. Hrvoje Sikirić and Assistant Prof. Dr. Vilim Bouček), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Law Faculty of the University of Rijeka) 22 (2001), pp. 655-75.

30 Official Journal of the SFRY 47/1977, 36/1977, 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991; Official Gazette of the Republic of Croatia 53/1991, 91/1992, 58/1993, 112/1999, 88/2001 and 117/2003.

31 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, adopted by the United Nations Human Rights Council Resolution 17/4, Human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/L.17/Rev.1 of 16/6/2011, www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (1/12/2015).

Principles are addressed to states, companies and other stakeholders who may improve protection of individuals and communities from adverse corporate violations of human rights. They are based on the three-pillar protect-respect-remedy framework: the state's duty to protect, the corporation's duty to respect and the effective access to judicial and non-judicial remedies.[32] Their soft law character, however, prevents them from being more than a moral authority when it comes to judicial assessments of such business activities.

D. Rigidness of Jurisdiction Rules

The provision of Article 27 of the CivPA provides that the Croatian courts are competent to hear international cases if provided by a statute or an international convention, meaning that the Croatian legal system does not allow judicial discretion similar to the common law doctrines of *forum non conveniens* or *forum conveniens*. Consequently, a Croatian court may establish its jurisdiction in an international case only where there is a provision conferring such jurisdiction upon the Croatian courts and the circumstances of the case fall within it. It may decline its jurisdiction only where such a provision does not exist or where the application of the provision to the circumstances of the case does not result in the international jurisdiction of the Croatian courts.[33]

The situation is similar under the Brussels I bis Regulation. In *Owusu v Jackson*,[34] the CJEU ruled that the Brussels regime precludes a Member State court from declining the jurisdiction conferred on it on the ground that a court of a non-Member State would be a more appropriate forum for the trial. Thus, the provisions of the Brus-

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[32] *Sanders*, The Impact of the 'Ruggie Framework' and the 'United Nations Guiding Principles on Business and Human Rights' on Transnational Human Rights Litigation, in: Martin/Bravo (eds.), The Business and Human Rights Landscape: Moving Forward, Looking Back, 2016, p. 293.

[33] See *Dika*, in: Dika/Knežević/Stojanović, Komentar Zakona o međunarodnom privatnom i procesnom pravu (Commentary on the Statute on Private International and Procedural Law), 1991, p. 176.

[34] CJEU, case C-281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and others*, ECLI:EU:C:2005:120.

sels I bis Regulation may not be affected by national jurisdictional doctrines such as *forum non conveniens*.[35]

In both EU and Croatian domestic legal systems, the court's task of establishing or declining jurisdiction is not contingent on the parties' submissions, because the court must *ex officio* verify its international jurisdiction to adjudicate *in casu*.[36]

E. General and Special Jurisdiction Grounds

The rules of the Brussels I bis Regulation and the PIL Act that are pertinent to establishing the international jurisdiction of the Croatian courts and other bodies in cases related to human rights abuses in the context of corporate activities are divided into rules on general and special jurisdiction.

I. General Jurisdiction

1. EU Law

Under Article 4(1) of the Brussels I bis Regulation, persons domiciled in a Member State may be sued before the courts of that Member State. The natural person's domicile is to be determined under the law of the Member State in which the alleged domicile is located. The legal person's domicile is wherever any of the three is located: statutory seat, central administration and principal place of business.[37]

[35] There is a window for application of the *forum non conveniens* doctrine in the Brussels I bis Regulation contrary to the reversal of the decision in *Owusu v Jackson*, as suggested by some commentators. The window is limited to situations in which there is a *lis pendens* in a non-member state under specified conditions (Articles 33 and 34).

[36] See Article 28(1) of the Brussels I bis Regulation and Article 15 of the CivPA.

[37] Articles 62 and 63 of the Brussels I bis Regulation.

2. Croatian National Law

Under Article 46 of the PIL Act,[38] the Croatian courts shall have international jurisdiction if the defendant is domiciled (for natural persons) or has its seat (for legal persons) in Croatia.[39] It is questionable whether this provision would apply at all in relevant situations, because the Brussels I bis Regulation permits resort to national rules on international jurisdiction only in situations in which the defendant does not have its domicile in any EU Member State.

II. Special Jurisdiction

Special heads of jurisdiction concern specific legal relations, including contracts and torts, and although none of them specifically refers to human rights violations, they may apply in these cases as well.

1. EU Law

Under the Brussels I bis Regulation, applicable as against the defendants domiciled in any EU Member State in matters relating to a contract, courts for the place of performance of the obligation in question have jurisdiction, while two situations differ. The first situation applies in the cases involving the sale of goods and the provision of services, and is based on the characteristic performance criterion: jurisdiction is established in the place of delivery of the goods or provisions of the services. The second situation encompasses all other contracts and the in the courts for the place of performance of the obligation in question are competent to hear the case.[40] Additionally, in matters relating to tort, delict or quasi-delict, the lawsuit may be brought before the courts for the place where the harmful event

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[38] Two other provisions of Article 46 of the PIL Act on subsidiary general jurisdiction are of lesser relevance as they contain heads of jurisdiction limited to natural persons: The Croatian courts shall have jurisdiction if the defendant is domiciled neither in Croatia nor in another country, but has residence in Croatia. If the litigants are Croatian nationals and the defendant has residence in Croatia, the Croatian courts shall have international jurisdiction to hear any type of case.

[39] This is to be understood as the company's registered seat. See *Dika*, (fn. 33), p. 169.

[40] Article 7(1) of the Brussels I bis Regulation.

occurred or may occur. These provisions have been interpreted on many occasions but further discussion is beyond the scope of this paper.

2. Croatian National Law

Provided that the defendant is not domiciled in any EU Member State, Croatian courts would apply the PIL Act. Special rule of jurisdiction for torts in PIL Act provides that the Croatian courts shall have jurisdiction if the damage has occurred on the territory of the Republic of Croatia.[41] Croatian scholarship is divided on the meaning of this provision. Some commentators tend to believe that the phrase "damage occurring in the Republic of Croatia" should be construed in a limited sense to encompass only those situations in which the place of the damage, i.e. the consequences of tortious act (*locus damni*), is in Croatia.[42] Other scholars hold that, irrespective of this phrase, a broader interpretation would be consistent with the doctrine of ubiquity, according to which the damage occurs both in the place where the tortfeasor acts (*locus actus*) and in the place where the consequence of such wrongful action is felt (*locus damni*).[43] However, this interpretation would exclude the possibility of bringing a lawsuit in Croatia if only an indirect damage occurs there, as has been confirmed several times over the past 15 years by the Supreme Court of

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41 Article 53(1) of the PIL Act.

42 *Dika*, (fn. 33), p. 197.

43 *Sajko*, Perspektiva razvoja međunarodnog privatnog prava: O Briselskoj i Luganskoj konvenciji o nadležnosti i izvršenju odluka u građanskim i trgovačkim predmetima i kako Hrvatsko pravo uskladiti s tim konvencijama (Development Prospect of Private International Law: On the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and How to Harmonise Croatian law with these Conventions), in: Gavella et al., Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug (Croatian Civil Regulation and Eurocontinental Legal Circle), 2nd ed. 1994, p. 239; *Tomljenović*, Posebna međunarodna nadležnost u sporovima izvanugovorne odgovornosti za štetu – neka otvorena pitanja tumačenja i kvalifikacije (Special International Jurisdiction in Non-Contractual Disputes – Some Open Questions of Interpretation and Qualification), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Law Faculty of the University of Rijeka) 19 (1998), p. 907 et seq.

the Republic of Croatia.[44] Additionally, the international jurisdiction in tort may be based on the tacit prorogation where a defendant enters a plea in merits without challenging the jurisdiction.[45]

In contracts, the international jurisdiction of Croatian courts may be based on the abovementioned general headings as well as on several special headings of jurisdiction provided in the PIL Act. Regarding a claim involving an economic interest[46] (Croatian *imovinskopravni zahtjev*, corresponding to the German notion of *vermögensrechlicher Anspruch*), the Croatian courts shall have jurisdiction if the defendant's property or the object claimed in the lawsuit is located in Croatia.[47] Likewise, the Croatian courts shall have international jurisdiction with respect to obligations that were created during the defendant's stay in Croatia.[48] In the proceedings against a natural or legal person seated abroad, and concerning the obligations created in the territory of Croatia or to be performed in the territory of Croatia, the Croatian courts shall have international jurisdiction provided that this person's representative or agent is located in Croatia or that a company which has been entrusted to carry out the business on its behalf is located in Croatia.[49] The mentioned criteria must be fulfilled cumulatively, meaning that the fact that the defendant's agent is in Croatia is insufficient;

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44 In the Supreme Court of the Republic of Croatia decision Rev 2390/94 of 3/9/1997, published in Sudska praksa (Court Practice) 4 (1998), p. 91, it was clearly stated that the term "occurrence of damage" means the bodily injury, death or damage to a thing. This was transformed into legal opinion accepted at the meeting of the Supreme Court Civil Law Section (III/07) Su-IVg-46/2007-3 held on 26/2/2007. See also the Supreme Court of the Republic of Croatia decisions Rev-758/1995-2 of 6/5/1998, www.sudskapraksa.vsrh.hr and Revt-51/03-2 of 27/2/2007, www.sudskapraksa.vsrh.hr (1/12/2015).

45 Article 50 of the PIL Act.

46 This does not include the rights *in rem* in an immovable or tenancy rights. Pursuant to Article 56 of the PIL Act, the actions concerning such rights are subject to the exclusive jurisdiction of Croatian courts if the immovable is located in the territory of Croatia.

47 Article 54(1) of the PIL Act.

48 Article 54(2) of the PIL Act.

49 Article 55 of the PIL Act. For more details on the interpretation of the provision see *Babić*, Međunarodna nadležnost za ugovorne sporove u europskom, hrvatskom i američkom pravu (International Jurisdiction for Contractual Disputes in European, Croatian and American Law), 2005, pp. 241-250.

the obligation either has to be created or has to be fulfilled in Croatia.[50] Additionally, the parties may explicitly agree to confer the jurisdiction in contract to the Croatian court, provided that at least one of them is a Croatian national or a legal person having its seat in Croatia.[51] The jurisdiction in contract may also be based on the tacit prorogation where a defendant enters a plea on the merits without challenging the jurisdiction.[52]

Some commentators hold that the *forum solutionis* rule determining the domestic territorial jurisdiction in the CivPA[53] can be used as the special heading of international jurisdiction for both torts and contracts.[54] This seem to be an incorrect approach, since the provisions on domestic territorial jurisdiction may be "converted" into the provisions on international jurisdiction only under the condition that there is no special provision on international jurisdiction for these types of legal relations in Croatian law.[55] Given that there are such special provisions, cited above, there is no room for expanding the international jurisdiction of Croatian courts in these matters.[56]

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50 The Supreme Court of the Republic of Croatia, Rev-79/91 of 21/1/1992, cited in *Sajko et al.* (fn. 29), p. 160 et seq.

51 Article 49(2) of the PIL Act.

52 Article 50 of the PIL Act.

53 Article 58(3) of the CivPA.

54 *Babić*, (fn. 49), p. 220 et seq.; *Babić,* Međunarodna nadležnost prema mjestu ispunjenja ugovorne obveze u europskom i hrvatskom pravu (International Jurisdiction Based on the place of Performance of Contractual Obligation in European and Croatian Law), in: Tomljenović/Čulinović Herc/Butorac (eds.), Hrvatska na putu prema europskom pravosudnom području: Rješavanje trgovačkih i potrošačkih sporova (Croatia on the Way to the European Judicial Area: Resolving Commercial and Consumer Disputes), 2009, p. 112 et seq. See also the decisions of the High Commercial Court, Pž-2826/93 of 1/2/1994, Pž-2698/96 of 14/1/1997, Pž-2622/99 of 6/7/1999 (in contracts) and Pž-2468/96 of 25/11/1997 and Pž-3092/97 of 9/12/1997 (in torts).

55 Article 27 of the CivPA.

56 *Grbin*, Nadležnost sudova u građanskim stvarima s međunarodnim elementom (Jurisdiction of the Courts in Civil Matters with and International Element), Pravo u gospodarstvu (Law in Economy) 35 (1996), p. 234; *Tomljenović*, Pravila o mjesnoj nadležnosti u funkciji pravila o međunarodnoj nadležnosti: kada i kako? (The Rules on Territorial Jurisdiction as Rules on International Jurisdiction: When and How?), Vladavina prava (The Rule of Law) 2 (1998), p. 104.

F. Jurisdiction by Attraction

The abovementioned heads of jurisdiction have proved to be of limited use in the context of the cases this paper deals with. However, jurisdiction by attraction appears to have a stronger potential.

Prior to discussing the details regarding the jurisdiction by attraction, a brief note on its categorization seems appropriate. In the Brussels I system, this type of jurisdiction is classified under the heading of Special Jurisdiction, while in the Croatian domestic system, it is classified under the article on general provisions.[57] The discrepancy is simply in nomenclature and not in substance, owed merely to different outlooks. In the Croatian doctrine on private international law, the notion of general jurisdiction means that the jurisdiction thus prescribed is not limited to specific types of legal relations but extends to all legal relations, while the special jurisdiction means that it is designed specifically for a particular type of legal relationship (such as contacts, torts, marriage, adoption, succession etc.).[58] It seems that the notion of general (jurisdiction) within the Brussels regime connotes the basic jurisdiction while other provisions relate to special cases regardless of their subject-matter scope, although mostly reflecting the division between types of legal relationships.[59] Irrespective of this difference in perspectives, jurisdiction by attraction is a similar concept in both legal instruments and is important for tackling the problems of international jurisdiction in cases of human right abuses by companies established abroad and belonging to a TNC.

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[57] This category also includes a provision on jurisdiction in the proceedings against a Croatian national who lives abroad where he or she has been sent on duty or to work by a state body, a company or another legal person. In such a case, the Croatian courts shall have jurisdiction, provided that the Croatian national in question was domiciled in Croatia (Article 46(1)-(4) of the PIL Act) and the rule on the so-called retorsion head of jurisdiction, e.g. where the law of a foreign State provides a criterion for establishing the jurisdiction of its courts in the proceedings against a Croatian national, the same criterion, although not provided in Croatian law, may be used for establishing the jurisdiction of the Croatian courts in the proceedings against the national of that foreign State (Article 48 of the PIL Act).

[58] *Vuković/Kunštek*, Međunarodno građansko postupovno pravo (International Civil Procedure Law), 2005, pp. 35-36 and 57.

[59] See also Article 7(5) of the Brussels I Regulation which is not defined by the type of legal relation, which may perhaps be regarded as a subsidiary general jurisdiction.

I. EU Law

Article 8(1) of the Brussels I bis Regulation states that a person domiciled in one Member State may be sued in another, as one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The provision, aimed typically to pursue connected claims against co-debtors or joint tortfreasors, has been subject to interpretation by the CJEU, and its requirements (in particular, the close connection and irreconcilability of judgments) have been thoroughly discussed in the commentaries and other scholarship.

II. Croatian National Law

With a similar aim, the jurisdictional rule on joinder of parties in the PIL Act provides that if two or more defendants are sued in the capacity of co-litigants under substantive law (Croatian *materijalni suparničari*, which corresponds to the German notion of *materielle Streitgenossenschaft*), the Croatian courts shall have supplemental jurisdiction to adjudicate the case against all defendants, provided one of those defendants has its domicile or seat in Croatia.[60] This provision resembles a provision applicable in the national context with respect to jurisdiction *ratione loci* in Article 50 of the CivPA.[61]

1. The Concept of "Materijalni Suparničari"

Article 196(1)(1) of the CivPA states that a relevant connection between defendants exists if, they are in a legal community regarding

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[60] Article 46(1)-(4) of the PIL Act. Where a provision of the PIL Act designates jurisdiction to Croatian courts or other bodies based on Croatian nationality, for stateless person such jurisdiction shall exist provided that he or she is domiciled in Croatia (Article 51 of the PIL Act).

[61] Official Journal of the SFRY 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991; Official Gazette of the Republic of Croatia 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013 and 89/2014.

the subject matter of the dispute (such as where they are both heirs of the deceased person, or they are co-owners of the property, provided their community is connected to the matter of the dispute) or if their rights or obligations derive from the same factual and legal basis – *idem factum, idem ius* (such as where the same contract or the same tortious act constitute the basis for the claims which are subject to the same law).[62] In the latter case, which might be particularly relevant for the topic of this paper, the same legal and factual ground of the lawsuit must already exist between the co-defendants at the time the lawsuit is brought before the court.

There are specific cases in which the law qualifies certain persons as *materijalni suparničari*,[63] but those are outside the topic of this paper. According to legal commentaries, the legal community, as a precondition to characterise persons as *materijani suparničari*, exists where the persons are jointly and severally liable.[64] Furthermore, if the claims against the defendants are not based on the same legal ground, the conditions for joinder of *materijalni suparničari* as co-defendants are not met.[65] However, the notion of *idem factum, idem ius* has been broadly interpreted to cover not only the situation in which the facts and the legal provisions are identical, but also where the factual background is the same and the claims are based on the same type of liability.[66] The co-defendants are considered *materijalni*

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[62] Joinder of defendants in Croatia has been regulated since at least the mid-19th century under the Temporary Civil Procedure. See *Ivošević*, Suparničarstvo (Co-Litigation), 1979, pp. 32 and 34.

[63] *Dika*, Građansko parnično pravo: Stranke njihovi zastupnici i treći u parničnom postupku (Law on Civil Litigation: Parties, their Representatives and Third Parties in Litigation), 2008, p. 134.

[64] Ibid., pp. 137-138 and 139.

[65] High Commercial Court of the Republic of Croatia, Pž-2123/94 of 13/7/1994 – this and all further judgments accessible at www.iusinfo.hr (1/12/2015). There was an international element to this case (the plaintiff was foreign natural person); however, the court mistakenly referred only to the CivPA, and not to the PIL Act. Nevertheless, this does not affect the finding on the concept of *materijalni suparničari*.

[66] *Dika*, (fn. 63), p. 137. The author further explains that the fact that different persons participating in the same harmful event might have different injuries and that they might claim different categories of material or immaterial damage do not affect the status of *materijalni suparničari*. However, this conclusion focuses on victims, while

suparničari provided that the claims assert their liability for the same harmful event.[67] This interpretation seems to embrace the situations in which the parent (or controlling) company and the daughter (or controlled) company acted together causing the same violation of human rights. Unfortunately, as it is often difficult to prove, it is necessary to search for another legal basis.

Despite the fact that the concept of *materijalni suparničari* has been interpreted in the case law mostly related to jurisdiction *ratione loci* in the CivPA, it is pertinent in relation to establishing international jurisdiction under the PIL Act. However, in cross-border situations one has to be mindful of the applicable law and of the delineation between procedural and substantive issues. While the joinder of defendants who are *materijalni suparničari* is a provision of procedural law and the forum procedural law sets the criteria that have to be fulfilled, assessment of the facts and law in order to establish whether the criteria are met is predominantly a question of substantive law. The type of liability as well as other issues related to liability and non-contractual relationship as a whole are to be resolved by the applicable law based on the conflict of law rules of the forum.[68] Croatian court dealing with cross-border cases concerned with civil liability for violation of human rights would be in the position to apply the provisions of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[69] If, however, the event taking place had not happened and the proceedings have not been commenced

this paper is dealing with characterising wrongdoers as *materijalni suparničari* for the purpose of establishing international jurisdiction over them.

67 County Court in Varaždin, Gž.359/05-2 of 1/3/2005. Likewise, there is a legal community between the main debtor and the guarantor who are jointly and severally liable for the performance of the obligations towards the creditor which makes them *materijalni suparničari*. High Commercial Court of the Republic of Croatia, Pž-4248/09 of 18/9/2009; see also High Commercial Court of the Republic of Croatia, Pž-7645/04 of 20/2/2007.

68 See also *Dika*, (fn. 33), p. 170.

69 OJ L 199 of 31/7/2007, p. 40. See in particular Article 15 which operates in relation to the conflict of law provisions.

on 1 July 2103 or later,[70] the Croatian national provisions in the PIL Act would apply.[71]

2. The Special Case of Piercing the Corporate Veil

Company law offers certain solutions for those attempting to join by attraction a foreign company and its domestic parent or controlling company. Under the provision of Article 1(2)(f) of the Rome I Regulation, the issues related to company law, including the personal liability of its officers and members, are excluded from the scope of the Regulation and left to the applicable national law. The Croatian Companies Act (CompA)[72] regulates several situations in which, in addition to the company itself, another person may be liable for damage. This is an institute well-known in comparative law as "piercing the corporate veil".[73] Under specific circumstances, Croatian law permits the court to disregard the company's imitated liability and hold its shareholders or directors personally liable for the company's actions or debts. In such situations, a company and its shareholder or its director may be considered *materijalni suparničari*.

In the situation in which the company director is liable for the debts which the company has towards its creditors because the director

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[70] Croatia became an EU Member State on 1/7/2013, and the Rome II Regulation is in force in Croatia as of that date. Following the reasoning of CJEU, case C-412/10, *Deo Antoine Homawoo v GMF Assurances SA*, ECLI:EU:C:2011:747, it may be concluded that the Rome II Regulation does not apply in Croatia to events that have occurred before its entering into force in Croatia.

[71] See Article 53 of the PIL Act.

[72] Official Gazette of the Republic of Croatia 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013 and 110/2015.

[73] It is submitted that in many cases courts faced with a transnational corporate liability case focus on the parent company's duty of care in order to avoid the complex issues related to piercing the corporate veil; consequently the parent company is held liable for its own violations rather than for the violations of its subsidiaries as different legal entities. *Wouters*/*Ryngaert*, Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction, The George Washington International Law Review 4 (2009), pp. 939, 947.

failed to exercise the due care in managing the company,[74] the plaintiff has the option to join the company and the director as the co-defendants before the same court.[75] More importantly, pursuant to Article 10(3) of the CompA, a shareholder in a company who misuses the rule limiting its liability, shall be liable for the company's obligations in question. This general provision is supplemented in Article 10(4) by an exemplary list of circumstances in which the abuse is presumed (and need not be proven): 1. if a shareholder uses the company to achieve the goal which is otherwise prohibited, 2. if a shareholder uses the company to damage the creditors, 3. if a shareholder, contrary to the law, manages the company assets as if they were his own, 4. if a shareholder, for its own benefit or for the benefit of another person, reduces the company assets, despite the fact that it knew or had to know that the company will not be able to meet its obligations. The provision on piercing the corporate veil in the CompA is a concretization of the principle of prohibiting abuse of rights.[76]

Thus, the court shall pierce the corporate veil where the first defendant as the controlling company uses the operations of the second defendant as the controlled company owned by the first defendant for a purpose which a joint stock company would otherwise not be able to achieve. The facts indicate the following activities: a) mixing the assets of the controlling company and the controlled company in the course of business of the controlled company (in bankruptcy), b) managing the business operations in both companies by the same person, in the same premises, using the same work tools, c) both companies' bank accounts were blocked, and d) not keeping the company's accountancy books orderly. In such a situation, the first defendant-controlling company as a shareholder of the second defendant has to submit to the second defendant's creditors request for its assets with the purpose of collecting debts owed by

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[74] This liability exists under the CompA: for joint stock companies under Articles 252, 272 and 272k, and for the limited liability companies under Articles 430 and 439.

[75] High Commercial Court of the Republic of Croatia, Pž-2775/03 of 10/12/2002. This was decided based on the former Courts Act, Official Gazette of the Republic of Croatia 3/94, 100/96,115/97, 137/97, 129/00, 67/01 and 5/02, which in Article 19 contained the definition of *materijalni suparničari* (also contained in Article 196(1)(1) of the CivPA).

[76] *Barbić*, Pravo društava: Opći dio (Company Law: General Part), 2005, p. 300.

the second defendant-controlled company. In the court's opinion this was a clear case of mixing the company's assets with the assets of the company's shareholder resulting in the impossibility to tell whether individual and/or all items forming the assets belong to the company's assets or the assets of the company's shareholder.[77]

The four listed descriptions are only the most common ones, while the case law has confirmed that there might be other circumstances in which piercing of corporate veil is possible, such as in relation to liability towards the employees where the former employee of the trade (*obrt*) was not given the employment contract with the newly-founded company (although working for it) and the tradesman (*obrtnik*) was the only shareholder and the only director in the new company,[78] or where the employees of the first defendant company are engaged in one of the sixteen subsidiaries forming a holding founded by the first defendant company, each with only a small share capital, while at the same time the parent company as the only shareholder in the subsidiaries, withheld significant assets.[79] The court pierced the corporate veil because of the mixing of assets where a tradesman owning and managing a company was using the same company name and trade name, the same address and the same business memoranda in the context of the same type of business operations.[80]

The fact that the subsidiary was concluding the simulated contracts does not itself amount to a misuse of the circumstance that shareholders' liability is limited to their shares in the company. The court further explained that the *onus probandi* is on the plaintiff claiming the piercing of corporate veil.[81] Conversely, the court found that requirements for piercing the corporate veil were met where the

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77 Supreme Court of the Republic of Croatia, Pž-6369/03 of 17/2/2004.

78 Supreme Court of the Republic of Croatia, Rev-58/00 of 14/2/2001.

79 High Commercial Court of the Republic of Croatia, Pž-9140/03 of 17/1/2006, Informator (Informer) 5572-5573 of 1/8/2007.

80 *Barbić*, (fn. 76), p. 302, and the case cited therein: High Commercial Court of the Republic of Croatia, Pž-1008/98 of 7/4/1998, ING Pregled sudske prakse (ING Court Practice Overview) 4 (1998), p. 27 (No. 221.32).

81 Supreme Court of the Republic of Croatia, Revt 60/04-2 of 6/10/2004, Izbor VSRH 2/2004.

company established another company and concluded simulated transactions with the sole aim of transferring assets from one company to the other (such as intermediary contracts entailing high intermediary fees). In fact, one company was doing business through another company by selling goods or providing services, while the former company was collecting payments.[82]

Most frequently, the Croatian courts find that the conditions for piercing the corporate veil exist in cases where a company is owned by a single person, who is at the same time the company's manager and legal representative. However, the general provision presents ample possibilities to prove abuse and provide the court with basis to pierce the corporate veil in other situations. In order to rely on this legal institute, the party suffering damage has to sue both the company and its shareholders. If their liability is joint and several, deriving from the same factual circumstances and is based on the same legal ground, they are considered *materijalni suparničari*. This would be sufficient to sue them both before the Croatian court if this is where one of them has its domicile or seat.

3. Characteristics of the Proceedings Joining "Materijalni Suparničari"

The fact that co-defendants, being the main debtors and guarantors, are jointly and severally liable, does not put them in the position of the same party because the decisions on the merits need not be identical towards all of them, either under the law or owing to the nature of their relationship. Therefore, where a decision is rendered in relation to one of the guarantors who is jointly and severally liable, others may be subject to a separate decision because the obligation terminates where the creditor has received the claimed amount.[83] For the same reason, the fact that the plaintiff has obtained a final decision against the first defendant does not constitute an obstacle for the court to issue an order against the second defendant to jointly

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[82] *Barbić*, (fn. 76), p. 302, and the case cited therein: Supreme Court of the Republic of Croatia, Revt-60/04 of 27/10/2004, Pravo i porezi (Law and Taxes) 8 (2006), p. 72.

[83] County Court in Varaždin, Gž.1831/05-2 of 22/11/2005.

and severally fulfil the respective obligation.[84] Where one of the co-defendants who is jointly and severally liable with others and who may be subject to different decisions on the merits (e.g. where they are *materijalni suparničari*), objects to the court's jurisdiction *ratione loci*, the court may decline jurisdiction in relation to this defendant only, again because they are all treated as separate parties and their activities or omissions in the course of a trial do not benefit or harm any other co-defendant.[85] For the same reason, where co-defendants are subject to possibly different decisions on the merits and where there are reasons to stay the proceedings in relation to one of them (such as where the company has been erased from the company register and cease to exist), the court may stay the proceedings in relation to that defendant only, but not in relation to others.[86] Unlike purely domestic situations where the CivPA applies, in cross-border cases under the PIL Act, it is irrelevant whether the defendant who is domiciled or seated in Croatia is the main or accessory debtor.[87] The order in which co-defendants who are *materijalni suparničari* are listed in the statement of claim has no bearing over establishing the court jurisdiction.[88]

G. Adhesive Jurisdiction in connection with Criminal Proceedings

In many countries, civil claims related to violation of human rights might be brought before the courts not only within separate civil proceedings, but also in connection with the criminal proceedings.

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84 High Commercial Court of the Republic of Croatia, Pž-2184/91 of 26/10/1993. Under the Croatian substantive law, once one of the debtors fulfils the entire obligation towards the creditor, the creditor can no longer request other debtors to fulfil the same obligation.

85 Supreme Court of the Republic of Croatia, Gr1 250/08-2 of 15/7/2008.

86 High Commercial Court of the Republic of Croatia, Pž-1502/08 of 16/3/2009.

87 *Dika*, (fn. 63), p. 138.

88 High Commercial Court of the Republic of Croatia, Pž-5505/09 of 30/9/2009.

I. EU Law

The Brussels I bis Regulation in Article 7(3) provides that a person may be sued as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the Member State court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings. This provision limits the type of proceedings to those in which damages or restitution is claimed and makes the jurisdiction conditional upon the national procedural rules of the forum.

II. Croatian National Law

In Croatia, civil claims may be applied for in the course of the criminal proceedings. The provision of Article 153 of the Criminal Procedure Act (CrimPA)[89] states that, at the request of the entitled persons,[90] a claim involving an economic interest (Croatian *imovinskopravni zahtjev*, corresponding to the German notion of *vermögensrechlicher Anspruch*) resulting from the criminal offence shall be adjudicated in the criminal proceedings, unless this would cause considerable delay in the latter proceedings.

1. Basic Characteristics of Adhesive Proceedings

Such civil proceedings are, in Croatian scholarship, termed as adhesive proceedings (Croatian *adhezijski postupak*).[91] They are considered to be civil proceedings (*actio civilis*) within the criminal proceedings and, hence, subject to rules of civil substantive law and, in general, to rules of civil proceedings.[92] Following the 2008 amendments to the

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89 Official Gazette of the Republic of Croatia 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013 and 152/2014.

90 Article 154 of the CrimPA provides that a claim involving an economic interest may be brought by a person entitled to bring such claim in litigation.

91 Pravni leksikon (Law Lexicon), 2007, p. 12; *Pavlović*, Zakon o kaznenom postupku (Criminal Procedure Act), 2014, p. 316.

92 *Pavišić*, Komentar zakona o kaznenom postupku (Commentary on the Criminal Procedure Act), 2015, p. 204; *Kunštek*, Actio civilis u kazennom postupku – prijedlog

CrimPA, types of civil claims that may be adjudicated by the criminal court comprise all claims that may be brought in the civil proceedings, i.e. litigation, including the claim for compensation of damages, return of an object, or declaration of nullity.[93] The criminal court may refuse to rule on the civil claim if that would cause considerable delay in the criminal proceedings. The criminal court may never decide that the civil claim is unfounded and reject it; it may only render a decision upholding the claim entirely or partially, while it will refer the claimant to the separate civil proceedings with regard to the portion of the claim it did not uphold.[94] A decision on the merits in the adhesion proceedings, although rendered by a criminal court, must have all of the elements as the decision rendered by the civil court.[95]

2. Scope of Jurisdiction

Given that the Croatian PIL Act does not provide for a specific provision which would resemble the one in Article 7(3) of the Brussels I bis Regulation,[96] a theoretical question arises as to whether such international jurisdiction of Croatian courts exists. Two lines of reasoning may help to resolve this issue.

Firstly, according to Article 27 of the CivPA, international jurisdiction has to be prescribed, *inter alia*, by the statute, whether the PIL Act or another. Jurisdiction in criminal matters is determined by the CrimPA in conjunction with the Criminal Act (CrimA).[97] The court is competent *ratione loci* if the criminal offence was committed or at-

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novele (Actio civilis in the criminal proceedings – reform proposal), in: Pavišić (ed.), Decenium moztanicense, 2008, pp. 201-216.

93 *Šago/Pleić*, Adhezijsko rješavanje imovinskopravnog zahtjeva u kaznenom postupku (Ancillary Adjudication of Civil Claims in Criminal Proceedings), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Law Faculty of the University of Rijeka) 33 (2012), pp. 967-999, especially pp. 977-981.

94 The situations in which the court may or must refer the claimant to the separate civil proceedings are discussed in detail in the scholarship. See e.g. *Pavišić*, (fn. 92), p. 213 et seq.

95 Supreme Court of the Republic of Croatia, Kž-34/07-6 of 22/3/2007.

96 Such normative choice is not common elsewhere either.

97 Official Gazette of the Republic of Croatia 125/2011, 144/2012, 56/2015 and 61/2015.

tempted in its territory.[98] Croatian criminal law adopts the ubiquity theory in relation to the crimes committed at distance: The crime is considered to be committed both in the place where the person was acting and in the place where the consequence of such acting was realised. Where more than one person acts in committing the crime, the offence is considered to have been committed also in the place where any of these persons acted and in the place where the consequence was realised.[99] Croatian criminal law also provides for a) extraterritorial jurisdiction in relation to: a1) acts against the Republic of Croatia and similar acts committed by whoever and wherever, as well as acts causing pollution to the environment if committed in the ecological-fishing belt, epicontinental belt or open seas,[100] a2) acts committed by or against Croatian citizens punishable in the country where committed,[101] and b) universal jurisdiction[102] in relation to: b1) acts of foreigner committed abroad and punishable in the country where committed provided they are punishable in Croatia by five or more years imprisonment,[103] b2)[104] genocide, acts against humanity, war crimes, terrorism, torture, slavery or human trafficking, acts which the Republic of Croatia is obliged to prosecute under an international treaty, as well as the criminal offences proscribed in Article 5 of the Statute of the International Criminal Court,[105] criminal offences against values protected by international law and other criminal offences within the jurisdiction of international criminal courts and prosecution for criminal offences against international

98 Article 20(1) of the CrimPA.

99 Article 9 of the CrimA.

100 Article 13 of the CrimA. This provision enforces the protective principle. *Turković et al.*, Komentar Kaznenog zakona (Commentary to the Criminal Act), 2013, p. 36.

101 Articles 14 and 15 of the CrimA. These provisions enforce the active and passive personal principles. *Turković et al.*, (fn. 100), p. 37 et seq.

102 The term universal jurisdiction is understood here both in the sense of substantive and procedural law.

103 Article 17 of the CrimA. This provision enforces what is sometime understood as the universal principle in the wide sense. *Turković et al.*, (fn. 100), p. 37 et seq.

104 Article 16 of the CrimA. This provision enforces the absolute universal principle. *Turković et al.*, (fn. 100), p. 38 et seq.

105 Official Gazette of the Republic of Croatia – International Treaties 5/2001.

justice.[106] Jurisdiction under a2) and b1) is restricted where the convicted person has served the sentence or was found not guilty or in the absence of the private indictment necessary for instigating the proceedings in the country where the act was committed.[107] Likewise, jurisdiction under b2) is restricted to cases in which the persecution has not been initiated before the International Criminal Court or the court of another state or no fair trial may be expected in the country where the act was committed.[108] In all these cases (a1), a2) b1) and b2)) the proceedings shall be instigated only if the perpetrator is located on the Croatian territory.[109] Given that the criminal law itself provides for international jurisdiction in certain cases and the provision on adhesive proceedings is not specifically restricted, one may conclude that a civil claim may be applied for in the criminal proceedings regardless of its cross-border character. This interpretation reinforces the rationale of this provision – to enhance the economy of the proceedings.

Secondly, under the last sentence of Article 27 of the CivPA, the Croatian courts shall be competent to decide a cross-border case irrespective of the fact that neither international treaties nor domestic statutes provide for any grounds of international jurisdiction for a specific type of legal matter (a subject-matter international jurisdiction), based on subsidiary application by analogy of the rules on jurisdiction *ratione loci* to the cross-border cases. Arguably, such an analogy in tort cases related to violation of human rights could not be made because tort cases are already covered by Article 53 of the PIL Act. The opposite conclusion would require wider interpretation arguing that the jurisdiction rules *ratione loci* in the Criminal Procedure Act (CrimPA) are equally relevant for establishing jurisdiction. These rules are not only the rules of *ratione loci* jurisdiction in criminal matters, but also in civil matters as they indirectly determine jurisdiction in relation to civil claims raised in the course of the criminal proceedings.

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[106] See Article 1 of the Statute of the International Criminal Court and Persecution of the Crimes against International War and Humanitarian Law Implementation Act, Official Gazette of the Republic of Croatia 175/2003, 29/2004, 55/2011 and 125/2011.

[107] Article 18(2) of the CrimA.

[108] Article 18(3) of the CrimA.

[109] Article 18(4) of the CrimA.

3. Related Developments in Case Law and Legislation

Irrespective of the theoretical basis for using the adhesion proceedings with the aim of establishing international jurisdiction in cross-border cases, these proceedings appear to have the potential of being an important instrument facilitating the bringing of corporate offenders before Croatian courts. Two elements relevant for the *ratione materiae* and *ratione personae* scopes of the criminal and thus also adhesion proceedings, add to the potential of the latter:

First is the line of judgments in which the Croatian criminal courts practically "pierced the corporate veil" (with no reference to the CompA) in the criminal law context by holding owners of the companies guilty for economic crimes,[110] such as fraud in commercial operations.[111] Also relevant in the context of this paper might be criminal offences against the health of people,[112] the environment,[113] the public security,[114] etc. By doing so, the Croatian courts open the door for civil redress related to the same criminal offences.

Second is the Legal Persons Responsibility for the Criminal Offences Act (LPRCOA),[115] which provides that a legal person, including a foreign legal person, shall be punished for a criminal offense if that offense violates a duty of the legal person or if the legal person realised or should have had realised, based on that offense, an economic benefit for oneself or another person.[116] Thus, it is possible that the criminal proceedings are brought against domestic (or even foreign)[117]

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[110] Title 24 of the CrimA is consists of 20 criminal offences specifically committed in the context of commercial operations.

[111] E.g. Supreme Court of the Republic of Croatia, I Kž 724/01-7 of 3/8/2005; Supreme Court of the Republic of Croatia, I Kž 818/12-9 of 27/11/2013; Supreme Court of the Republic of Croatia, I Kž 324/11-4 of 30/4/2014; Supreme Court of the Republic of Croatia, I Kž 108/13-4 of 15/5/2014; Supreme Court of the Republic of Croatia, I Kž 626/14-6 of 20/11/2015.

[112] See Title 19 of the CrimA.

[113] See Title 20 of the CrimA.

[114] See Title 21 of the CrimA.

[115] Official Gazette of the Republic of Croatia 151/2003, 110/2007, 45/2011 and 143/2012.

[116] Articles 3 and 1(2) of the LPRCOA.

[117] See abovementioned situations of extraterritorial or universal jurisdiction.

companies owning, controlling and/or managing[118] foreign companies. Liability of a company derives from the liability of the person responsible for its operation; hence they both have to be subject to the criminal proceedings. Aside from the option to prosecute a person *in absentia*, a natural person responsible for the operation of the company would have to be in Croatia, or in another EU Member State wherefrom he or she could be relocated to Croatia based on the European Arrest Warrant (EAW).[119] The statistical data regarding the criminal proceedings against legal persons reveal that at first quite moderate rate of court convictions in relation to criminal reports made to the State Attorney tends to increase over time. While in the period from 2005 to 2009 there were 2566 reports, as opposed to only 361 indictments and 208 convictions,[120] in the period from 2010 to 2014 there were 5611 reports to the State Attorney, 1591 indictments and 676 convictions. This means that in the period from 2005 to 2009 out of the total reports there were only 14 % indictments and 8 % convictions, while 58 % of all indictments ended with conviction.[121] In the following period from 2010 to 2014, out of the total reports, 28 % resulted in indictments and 12 % in convictions, with 42 % indictments ending with convictions. These figures show the tendency of total and relative increase in figures, except for the five-year ratio of convictions in the indictments where slight decrease is present. Such changes indicate more openness of the system to effectively deal with criminal liability cases related to corporate activities.

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[118] The companies among themselves may be connected in various ways, and it should not be relevant whether the control is exercised *de iure* or *de facto*, as long as it is possible to prove it.

[119] See 2002/584/JHA: Council Framework Decision of 13/6/2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190 of 18/7/2002, p. 1.

[120] Croatian Bureau of Statistics, Criminal Liability of Legal Persons for Criminal Offences 2005–2009, 2010, www.dzs.hr/Hrv/publication/studije/Studije-i-analize_108.pdf (1/12/2015), p. 16.

[121] Croatian Bureau of Statistics, Legal Entities Perpetrators of Criminal Offences, by Type of Decision, 2014, No. 10.1.4., www.dzs.hr/ (1/12/2015), p. 1.

This having been said, there are certain practical considerations, which tend to weaken the potential of the adhesion proceedings in Croatia in general, not only with respect to the cases falling within the topic of this paper. In the absence of the statistical data regarding the share of claims that were decided upon in the adhesion proceedings in the total amount of claim made in the adhesion proceedings, the random survey made by the authors indicates that this share is quite low.[122] In the prevailing number of cases, the Croatian criminal courts reject the application to decide on the civil claim within the adhesion proceedings. Such rejection is possible if deciding on the civil claim would cause considerable delay in the criminal proceedings. The question naturally rises as to what delay should be regarded considerable. It seems that such assessment should be made on the case-to-case basis. In reality, the criminal courts are prepared to deal with civil matters only in straightforward cases, such as where there was a conviction for fraud for the exact amount of money, which is then ordered to be repaid to the person suffering damage. On the contrary, the courts are in principle not willing to hear adhesion claims entailing taking of evidence which is not necessary for deciding on the criminal liability. This is unfortunate since the institute permitting a civil claim in the context of the criminal proceedings is aimed at not only achieving the efficiency of the court proceedings, but also attaining the purpose of the criminal persecution and conviction.[123] The above-mentioned 2008 extension of the types of civil claims that may be adjudicated by the criminal court was also intended to contribute to both goals.

The unwillingness of the Croatian judges to adjudicate civil claims in the adhesion proceedings is at least to some extent a consequence of the fact that they are under constant pressure to reduce the length

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[122] There is no judgments database in Croatia available publicly which contains all judgments. Therefore, it is impossible to make a survey based on a representative sample.

[123] *Grubišić*, Imovinskopravni zahtjev prema okrivljeniku odgovornoj osobi kada je kaznenim djelom pribavio imovinsku korist za pravnu osobu (An indemnity claim against an accused person who committed a criminal offence as a responsible person of a legal person gaining assets from such offence), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Law Faculty of the University of Rijeka) 35 (2014), pp. 741-760, especially p. 745.

of the proceedings. Moreover, under the applicable rules,[124] their performance is of equal value regardless of whether they decide the civil claim in the adhesion proceedings or refuse to do so and leave it to the civil courts (turning the issue of jurisdiction back to the above-mentioned civil grounds for international jurisdiction). Perhaps the Croatian criminal courts, not so willing to engage into deciding the civil cases (especially if they are more complex), could be motivated to reverse their practices if their efforts are properly recognised in the system of judicial performance evaluation. In a view of the overall advantages of the adhesion proceedings and recent legislative efforts to intensify their use, it would be advisable to recognise the judges' work where they decide to deal with the adhesion proceedings by adding credits to their performance account.

H. Forum Necessitatis

In 2011, the Croatian Government has established the Working Group to draft the new Croatian PIL Act. The draft version of October 2015 contains a provision on *forum necessitatis*. If this provision survives the legislative process, the Croatian courts shall be competent against defendants not domiciled in the EU if: 1. the proceedings cannot be conducted abroad or it would be unreasonable to expect that the proceedings be conducted there, and 2. the subject matter of the proceedings is sufficiently closely connected to Croatia that it is reasonable to conduct the proceedings in Croatia.

Because this provision would be entirely new in Croatian private international law it is difficult to offer any guidance or explanations at this point. Nevertheless, its potential in the civil cases related to a violation of human rights abroad seems sufficient to merit its mention in this paper.

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[124] See Metodologija izrade ocjene sudaca (Methodology for Evaluation of Judges), www.dsv.pravosudje.hr/index.php/dsv/propisi/metodologija_izrade_ocjene_sudaca; and Okvirna mjerila za rad sudaca (Framework Criteria for the Performance of Judges), https://pravosudje.gov.hr/UserDocsImages/dokumenti/Pravo%20na%20pristup%20informacijama/Zakoni%20i%20ostali%20propisi/Okvirna%20mjerila%20za%20rad%20sudaca.pdf (1/12/2015).

I. Conclusion

An analysis of the EU and particularly Croatian national rules on jurisdiction reveal several grounds on which civil claims for corporate related human rights violations committed abroad may be adjudicated before Croatian courts. Due to the fact patterns in these cases, the classical heads of jurisdiction based on the defendant's domicile and place where the harmful event occurred are rendered essentially immaterial. Conversely, the jurisdiction by attraction of wrongdoers as co-defendants in the same proceedings, where at least one of them is domiciled in Croatia, seems to be of high importance. Especially in conjunction with a claim aimed at piercing the corporate veil, the jurisdiction by attraction may be a likely instrument for brining such claims before Croatian courts. This having been said, one should be aware of the Croatia's limited potential in serving as a jurisdictional venue in cases of jurisdiction by attraction due to its economy not as developed as in western EU Member State and a few companies or corporations operating on an international level, they being rather regionally oriented. Although the forthcoming amendments to the PIL Act might remove the basis for adjudicating based on attraction in national law (extending the *ratione personae* scope of application of the Brussels I bis Regulation irrespective of the defendant's domicile), they might bring about another potentially important basis – *forum necessitatis*. Whether its interpretation will stretch wide enough to capture the incidents amounting to violations of human rights committed by TNCs abroad, and, if so, under which specific conditions, is however hard to predict.

Another jurisdictional basis for civil claims arising out of the corporate related human rights violations abroad, and the one with some gravitational potential towards Croatia, is the adhesion civil proceedings before the Croatian courts seized with the corresponding criminal proceedings. Two different aspects require special emphasis. First, there is some uncertainty as to this jurisdictional basis owed to the absence of a specific provision in the PIL Act. The rules on criminal procedure provide for adhesive jurisdiction without special reference to cross-border situations. While this appears to be easily overcome in cases where the criminal law provides for universal jurisdiction, the remaining cases might be less straightforward. However, following the interpretation proposed in this paper, such jurisdiction is likewise possible in all cross-border cases. Building on that assumption, the

links in the chain of legal base include the Criminal Act, the Criminal Procedure Act and the Legal Persons Responsibility for Criminal Offences Act. Jointly, they create the basis for adjudicating civil claims in the context of criminal proceedings for acts committed abroad by both Croatian and foreign companies. Broadest basis but perhaps less important practically is the universal jurisdiction for adjudicating international crimes, under condition of presence in the Croatian territory (or in another EU Member State, if the EAW is effectively used). Furthermore, Croatian courts have jurisdiction to adjudicate in a criminal, and thus also in a related civil case, against a foreign company owned by a Croatian company. It is likewise possible to bring before a Croatian criminal court a case against a foreign company owned by foreign company. In both situations the persecution is possible provided that the company/company's director (or another responsible person therein) is present in Croatia (or in another EU Member State, if the EAW is effectively used) irrespective of his or her nationality or domicile, and that the criminal offense at stake is punishable in the country where committed, as well as in Croatia (in Croatia by no less than five years of imprisonment). The second emphasis is on the practical considerations revealing that only a small number of cases in which application are made to the criminal court to decide on the civil claim end with a decision on the merits. In the vast majority of cases the civil claim would have to be brought before the civil court, meaning that merely the civil jurisdiction bases may be relied on. In the light of the legislative amendments aiming at intensifying the use of adhesion proceedings, the complementing amendments to the rules on evaluating the judges' performance could be welcome.

How long before a Bundle of Treaties becomes Sovereign? A Legal Perspective on the Choices before the EU

Maja Lukić[*]

Abstract

Several developments in the development of institutions, as well as in respect of the interpretation of European Union law by the Court of Justice of the European Union (CJEU), in the past five years are indicative of the final phase of transformation of the European Union from an association of sovereign states into a genuine political community, having its own claim to sovereignty. A comprehensive reform of EU fiscal and banking regulation following the sovereign debt crisis shows not only the resolve for overcoming difficult challenges on the part of most Member States, but also their readiness to circumvent the EU law whenever EU law becomes an obstacle for the realization of their common political will. The establishment of the European Public Prosecutor's Office and of the border guard, in response to the unfolding refugee and migrant crisis, represent a crucial step in the direction of a sovereign political community, for both institutions would be the first EU-level authorities in the realm of security, judicial and police cooperation. The CJEU is contributing significantly to this latest development, by affirming the principle of primacy, unity and effectiveness of EU law in contrast to both the human rights constitutional standards in Member States, as well as to the European Convention on Human Rights and the European Court for Human Rights.

A. Introductory and Historical Notes

The European Union (EU) has developed thus far primarily as a result of the exponential growth of its law, and much less by virtue of a democratic will. The EU has become a sovereign political community through law-making and law-enforcement. In relation to EU law, a number of situations may be recognized today that not only repre-

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sent symptoms of EU sovereignty, and pose challenges not only to its further growth, but also to its very continuation. The aim of this paper is to provide elements for assessing the choices with which the EU is faced in order to be able to tackle the challenges it is faced with.

I. A Conceptual View on Sovereignty

Sovereignty is associated primarily with nation states, as had been announced by Jean Bodin in the 16th century and formalized by virtue of the Peace of Westphalia in 1648. If, however, the attribution to nation states is omitted from its definition, so that it is understood more broadly as "supreme authority within a territory",[1] then it becomes clear that it has had many facets throughout the history of political communities in Europe – the Holy See was sovereign, as were many kingdoms and principalities within the Holy Roman Empire. These particular examples are material for the case of the present-day EU, because they formed a system which comprised a division of sovereignty between various levels of Christian medieval Western Europe. Another claim about sovereignty by Philpott may be instrumental for assessing the choices faced by the present-day EU: "revolutions in sovereignty result from prior revolutions in ideas about justice and political authority", both within states and on the plane of international relations.[2]

II. The Genesis of Elements of Sovereignty in the Development of the EU until Present

It may be argued that the case-law of the CJEU has done more for the erection of the EU edifice than the very treaty-making activity of its Member States – from the principles of direct effect and primacy of Community law, to the doctrine of implied competences, to constitutional principles of the EU defeating obligations under international

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1 *Philpott,* Sovereignty, Stanford Encyclopedia of Philosophy 2010, www.plato.stanford.edu/entries/sovereignty/ (1/12/2015).

2 *Philpott,* Revolutions in Sovereignty: How Ideas Shaped Modern International Relations, 2001, pp. 4, 6.

law, to self-standing EU citizenship.[3] While looking at such a magnificent string of achievements, a careful spectator may notice, in addition to the creative and activist role of the CJEU, an overall and continued readiness to abide by these new rules on the part of the public authorities – executive, judicial, and even legislative – of Member States. On the other hand, the process has almost completely side-tracked democratic legitimation.

The present-day EU possesses its own law-making and economic regulatory capacities, but lacks law enforcement, intelligence and military capabilities. A fiscal authority of the EU is still in the making.

B. Symptoms of and Challenges for EU Sovereignty

I. On the Institutional Level

1. Reactions to the Sovereign Debt Crisis

The sovereign debt crisis that erupted in 2009 in Europe possessed a certain peculiarity in comparison with the global financial crisis of 2007/2008 that had triggered it. It was the vicious circle between fiscal irresponsibility of certain EU Member States and neglect of systemic risks posed by certain new categories of financial assets, which proved to be toxic, on the part of the banks across the European Union. The response of the Union was therefore three-pronged – at first, it set up *ad hoc* mechanisms for bailing out both troubled states and banks, and then it targeted both elements of the vicious circle with more permanent and systemic solutions: a sweeping reform of the rules on fiscal discipline of Member States, i.e. of the so-called Stability and Growth Pact, was coupled with structures designed to enhance discipline within that Pact, whereas the issue of banking supervision was tackled by establishment of the Banking Union.

The Stability and Growth Pact (SGP) was created in 1998, in the wake of the introduction of the Euro, with the purpose of crucial institutional importance for the European Monetary Union (EMU): to

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[3] *Lukić*, Relevance of Conceptualizing the Relationship between International and National Law for the Legal Nature of the European Union, in: Thematic Conference Proceedings of International Significance – Archibald Reiss Days, Vol. 2, Academy of Criminalist and Police Studies 2015, pp. 331-339.

compensate for the lack of an EU-wide fiscal power in spite of presence of a strong EU monetary power. Paper money issued by sovereigns ultimately derives its value from the trust of its users in the issuing sovereign's power to levy taxes. In the case of the Maastrichtera EU, such a trust was supposed to be based on the perception that the Member States as a whole shall lead coordinated and responsible fiscal policies. A decade later, the sovereign-debt crisis revealed that the SGP had failed.

The initial and temporary solutions were put in place in spring of 2010 in the form of the European Financial Stability Facility (EFSF) and the European Financial Stabilization Mechanism (EFSM). While the former was a company established under private law, owned and funded by EU Member States, the latter was essentially a treaty-based authorization of the EU Council that enabled the Commission to borrow funds in the financial markets and from financial institutions using primarily the EU budget as collateral.

A permanent structure for financial assistance to Eurozone members became operational in 2012 – the European Stability Mechanism (ESM). Although it was agreed upon within the framework of EU bodies, with the purpose of supporting the Eurozone, the ESM is an intergovernmental/international organization by nature, having been based on a treaty separate from the EU treaties. In its purpose and effect, however, the ESM remained inseparable from the EU and the Eurozone – the financial assistance it is supposed to provide was made conditional upon observance of the SGP, its Board of Governance is made up of finance ministers of EU Member States, etc. In fact, an amendment of the Treaty on Functioning of the EU (TFEU) was necessary for the ESM to become operational as a permanent financial assistance facility – Article 136(3) TFEU was introduced in 2011, and entered into force in May 2013, whereby Eurozone countries were expressly allowed to "establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made to strict conditionality." The ESM even conferred new tasks upon the Commission and the European Central Bank (ECB). The CJEU rejected the claims that the ESM infringed upon exclusive competence of the EU in the realm of monetary policy, as well as that it contravened the prohibition of EU Member States contained in Article 125 TFEU. The latter interpretation encompassed a

reference to the aim of ensuring sound budget policies of Member States.[4]

The ESM conditioned financial assistance to any given Eurozone member not only upon that member's observance of the SGP, but also on its accession to another international treaty that paralleled EU treaties – the so-called Fiscal Compact.[5] The Compact obliged its signatories to adopt commitments to strict budgetary discipline, including automatic correction mechanisms, "preferably" on the constitutional level. As in the case of the ESM, the fact that the Fiscal Compact was an instrument separate from the EU treaties in terms of legal form did not prevent it from vesting the CJEU with competence to enforce obligations under the Fiscal Compact, as well as the Commission with the task of monitoring budgets of Member States. A rather conspicuous trait of the Fiscal Compact is the generalization of the "reverse qualified-majority voting" that it introduced in respect of the Excessive Deficit Procedure.[6] Although it is a self-standing instrument under international law, the Fiscal Compact concedes its temporary purpose at the level of substance – it comprises an undertaking of its signatories to have its key provisions enacted within the framework of EU law. The introduction of the Fiscal Compact has been ascribed primarily to the insistence of Germany and its conditioning of its financial support and credibility not only to over-indebted Member States, but to the Eurozone as such, upon acceptance of strict budgetary discipline. Notable authors, however, have pointed out to the fact that the

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4 CJEU, case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 137: "Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy."

5 The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, http://europa.eu/rapid/press-release_DOC-12-2_en.htm (1/12/2015). Signed in March 2012, the treaty entered into force on 1/1/2013 between the countries that ratified it. The Czech Republic, alongside the UK, did not sign the treaty at first, but only later, in 2014.

6 Reverse qualified-majority voting means that a qualified majority of Member States is necessary in order that a Commission's proposal be rejected by the Council.

Fiscal Compact has proved to be ineffective, as well as that it is slowly disappearing from the policy debates.[7]

In parallel with the ESM and the Fiscal Compact, the SGP has been strengthened by virtue of instruments available under the EU treaties.[8] Out of the total of eight legislative acts adopted with that aim, half are binding only upon Eurozone members. The second batch of legislative acts that strengthened the SGP, the so-called "six-pack" introduced into EU law a number of elements of the ESM and of the Fiscal Compact.

Finally, in order to remove the systemic risk of banking system failure, the Commission undertook to put in place a comprehensive set of rules and regulatory mechanisms for enforcement thereof, which it refers to as the "Banking Union". The basis of the undertaking

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[7] Structurally imbalanced budgets of Italy and France for 2015 are cited as examples for such a finding. *Gros/Alcidi*, The Case of the Disappearing Fiscal Compact, Center for Economic Policy Studies, Commentary of 5/11/2014.

[8] By virtue of the so-called "six-pack" legislative package the SGP was reformed (Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16/11/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Council Regulation (EU) No 1177/2011 of 8/11/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure), and several sets of instruments were introduced – for prevention and correction of macroeconomic imbalances (Regulation 1176/2011 of the European Parliament and of the Council of 16/11/2011 on the prevention and correction of macroeconomic imbalances), for enforcement of measures that correct excessive macroeconomic imbalanced (Regulation 1174/2011 of the European Parliament and of the Council of 16/11/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area), for guaranteeing effective budgetary surveillance (Regulation (EU) no 1173/2011 of the European Parliament and of the Council of 16/11/2011 on the effective enforcement of budgetary surveillance in the euro area), as well as for setting the requirements for the budgetary frameworks of the Member States (Council Directive 2011/85/EU of 8/11/2011 on requirements for budgetary frameworks of the Member States). The so-called "two-pack" ensued in 2013. One of its components pertained to all euro area Member States, whereas the other one introduced rules for Member States facing increased financial difficulties. In essence, the aim was to introduce a set of rules for coordination of national economic policies at EU level, as well as to put in place a variety of budgetary surveillance mechanisms, so that various levels of financial difficulties may be matched by adequate level of scrutiny. The two-pack vested the Commission with the power to give opinion on Member States' budgetary plans.

consists of unified rules that limit risk-taking by all banks of certain size that is deemed significant. The Banking Union itself comprises three pillars. The first, the Single Supervisory Mechanism, has been put in place within the framework of existing EU and EMU law, by way of vesting the ECB with new regulatory and supervisory responsibilities and of establishment of the European Banking Authority. The second pillar, the Single Resolution Mechanism, aimed at securing orderly resolution of failed banks. Its key instrument, the Single Resolution Fund, is based again on an intergovernmental, rather than an EU treaty.[9] The third pillar, a single European deposit-insurance scheme, insuring all deposits below 100,000 Euro in all EU banks, is still subject to negotiations.

2. Substantial Criminal Law, the European Public Prosecutor's Office and Border Protection

Due to sanctions at its disposal, which involve state apparatus of force, as well as due to the object it aims to protect, criminal law in general, and substantive criminal law in particular, is an area of great sensitivity for constitutional values, constitutional identity and sovereignty of any given legal order. Unlike in any other area of EU law, the Lisbon Treaty enabled direct harmonization of certain areas of substantive criminal law, and introduced mechanisms for asymmetric harmonization of law and, consequently overall integration, primarily by virtue of the so-called "enhanced cooperation".[10]

Two important developments can be witnessed in the fields related to security and police cooperation: the negotiations on the establishment of the European Public Prosecutors Office, as well as on the transformation of *Frontex* into a full-fledged European border and coast guard. At present, the Commission's proposal for the regulation on the establishment of the former is undergoing discussions within

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9 Agreement on the transfer and mutualization of contributions to the Single Resolution fund of 14/5/2014, http://europa.eu/rapid/press-release_DOC-12-2_en.htm (1/12/2015).

10 *Lukić*, The New Theatre of the Struggle for EU Unity – EU Criminal Law confronts Member State Sovereignty, 2016 (forthcoming).

the Council and its preparatory bodies.[11] The establishment of the latter has been urged by the migrant and refugee crisis, and related risks of terrorism, that unfolded in the course of 2015. Both projects are significant because realization thereof would mean that for the first time genuine operational capacity at EU level appears in an area closely-related to security, judicial and police cooperation. So far, these areas have been dominated by mechanisms based purely on cooperation of national authorities.

II. Symptoms of, and Challenges to the EU Sovereignty Presented by the Case-Law of the Court of Justice of the European Union

1. Primacy, Unity and Effectiveness of EU Law

The judgment of the Grand Chamber of the CJEU in the *Melloni* case, rendered in February 2013, has introduced a new limitation for guarantees of human rights and freedoms under Member State constitutions – such guarantees may not endanger primacy, unity and effectiveness of EU law.[12] The ruling gained prominence particularly because it accorded primacy to an implementing measure secondary legislation enacted before Lisbon Treaty in the area of judicial and police cooperation – the European Arrest Warrant – which lacked direct effect over constitutional standards of human rights of a Member State. The concept of "primacy, unity, and effectiveness of EU law" seems thus to have replaced the long-standing concept of "autonomy" of EU law, that had played a crucial role in the design and promotion of constitutional principles of the EU over several decades.[13]

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[11] For the state of legislative proceedings and the text of the proposal see EUR-Lex, Procedure 2013/0255/APP, www.eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52013PC0534 (1/12/2015).

[12] CJEU, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107.

[13] In particular by virtue of reasoning in the judgments of CJEU, case 26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1; case 6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66; case C-459/03, *European Commission v Ireland*, ECLI:EU:C:2006:345 and joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, ECLI:EU:C:2008:461.

2. Accession to ECHR Stopped on the Grounds of Autonomy

Following the Lisbon treaty reform, the Treaty on the European Union has been expressly stipulating the obligation of the EU to accede to the European Convention on Human Rights and Fundamental Freedoms (the ECHR). The negotiations were opened in 2010, and a draft treaty to that effect was negotiated, but the process was effectively stalled when in December 2014, the CJEU proclaimed that treaty incompatible with EU law.[14] The CJEU based its ruling on a number of findings, all of which were grounded in the assumption that since the EU was not a state, its specificities needed to be taken into account. Among numerous reasons, the CJEU cited that the accession, as envisaged in the draft treaty that was the subject of its review, would comprise primacy, unity and effectiveness of EU law, since the subject matters of the ECHR and the European Charter of Fundamental Rights overlapped, and the draft treaty failed to provide any mechanisms of coordination between the two. In such circumstances, the EU bodies would be subjected to parallel external control of two separate judicial bodies, which would force them to take into account two different sets of interpretations – those of the CJEU and of the European Court for Human Rights (ECtHR). The CJEU also found that treating the EU and its Member States as independent contracting parties to the ECHR would undermine the obligation of mutual trust between Member States and consequently also the "underlying balance of the EU and the autonomy of EU law." Furthermore, having regard to the fact that the ECHR would become an integral part of EU law, the right of the Member States to ask advisory opinions of the ECtHR, would, in view of the CJEU, undermine autonomy and effectiveness of the preliminary ruling procedure before the CJEU.

C. Lessons for Understanding the Choices before the EU

It is undisputed that the EU has not yet reached the level of full-fledged sovereignty, in the sense that it does not yet exercise supreme authority in all areas in which such authority would be expected from a typical modern state. The EU enjoys a remarkably high level of supreme authority in the fields of law-making and economic

[14] CJEU, Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU*, ECLI:EU:C:2014:2454.

governance, but its competences are fairly limited in the areas of law enforcement, intelligence and the military.

The reaction of the EU, and particularly of its core constituent, the Eurozone, to the sovereign debt crisis, shows a clear pattern of the manner in which a challenge is confronted – the reforms, consisting in greater integration, are put in place in asymmetrically at first, so that the remaining Member States follow once the respective reform process starts moving forward. The same reaction allows for an even more important insight into the very nature of the European Union – although it presents itself as a community of law, its existing legal framework has been repeatedly circumvented whenever important and politically difficult reform steps were undertaken. While the causes of the sovereign debt crisis were to a great extent structural, most responses to it have been put in place by relying on legal powers outside of the architecture of the founding treaties of the EU – from the EFSF as private entity backed by sovereign Member State funding, to the Fiscal Compact as a parallel treaty. This perceived paradox in fact shows that the institutional architecture is far from settled, whereas the political will that the community be preserved and strengthened seems to be relatively stable and firm. The constitutional articulation of that community is still in the making.

The sheer number of intergovernmental contractual instruments that have been concluded outside of the scope of EU treaties, that introduced significant reforms with wide-spread constitutional significance for the EU, testifies that not all members of the EU share the same vision on how much closer the Union should become in the future. The position of the United Kingdom stands out, for its objections were the primary reason why certain key steps in the reform of the monetary union had to be taken by virtue of intergovernmental agreements, outside the realm of EU law, in spite of the fact that the UK itself was not a member of the EMU.

The will for overcoming the challenges presented by the sovereign debt crisis, as well as by the presently unfolding migrant crisis, shown by the vast majority of Member States, is also a symptom of the existence of a tacit or at least implicit agreement over future strengthening of the Union. Both crises have also pointed out to the greatest danger for the realization of such an agreement – the lack of will for accepting difficult compromises on the part of ordinary

citizens. The danger is easily understandable from the point of view that takes into account that the most often repeated objection to the institutional reforms of the EU in the past decade has been the lack of democratic legitimation. In order that further strengthening of the EU may continue, the EU shall need to devise a process whereby such legitimation will become possible.

The negative opinion of the CJEU on the draft agreement on accession to the ECHR has revealed a number of principled objections to such accession that may hardly be overcome by renegotiating or redrafting the subject draft.

Taken together, the pattern that has emerged in the course of overcoming challenges and achieving greater fiscal integration that has emerged in the wake of the sovereign debt crisis, the negotiations on the establishment of EU-level institutions in the realm of security, judicial and police cooperation, namely the European Public Prosecutor's Office and the border guard, and the rejection of the ECHR accession by the CJEU, grounded in the principles of autonomy, primacy, unity and effectiveness of EU law, all show that the EU is on the brink of being recognized as a political community independent and separate from its Member States, which shall put forth its own and genuine claim to sovereignty.

Relationship between International, European and the Albanian Environmental Legislation

Erjon Muharremaj and Oriona Mucollari[*]

Abstract

This paper strives to offer a brief overview of the relationship between international, European and the Albanian environmental legislation, in the framework of the European integration of Albania, as a candidate country for EU membership. It starts with a short introduction of the role of the environmental principles that play a special role in the international environmental legislation, which has generally the character of "soft" law, in order to entice states to take measures for the protection of the environment and increase the cooperation between them. The paper continues with the relationship between general international law and the Albanian domestic law, and then with the relationship between the acquis communautaire and the Albanian domestic law. Because of their particular position, the paper continues with the role of the courts and their relationship in the protection of the environment, and in the end, the conclusions emphasize the importance of not only harmonizing the environmental legislation, but also its strict implementation in practice.

A. Introduction

In domestic legislation, the general principles are usually stipulated in the constitution, as the fundamental law of the country. Based on these principles the domestic legal framework is built up. In comparison to domestic law, in the absence of a supreme international authority that guarantees the enforcement of the norms, in international law general principles play a different role. They constitute the third main source, after the treaties and customary law,[1] while their implemen-

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1 Article 38 of the Statute of International Court of Justice.

tation in practice serves the fulfilment of the interests of the subjects that enter into relations with each other in the international arena. Among these subjects, states remain the most important ones, as the main actors of the international governance in general, and the environmental governance in particular. However, important changes have happened nowadays in international environmental law, changes that have transformed to a certain degree the role of the states, by increasing significantly the role of environmental non-governmental organizations (e-NGOs). Several attempts towards the creation of a "single community" of e-NGOs have been made, but to no avail. In reality, just as a fragmentation tendency exists in international law, the same fragmentation exists in international environmental law. Non-governmental organizations have played an important role in the protection of the environment, at a time when the individual has also become an increasingly important actor in international environmental law.

General principles of international environmental law derive mainly from state practice, aiming at the protection of the common environment, and not from a binding international document. The analysis of these principles falls outside the scope of this study, but due to their omnipresence in international, European and Albanian legislation, the analysis will continue with the position of international law in the domestic Albanian legislation.

B. Relationship between General International Law and Albanian Domestic Law

The relationship between general international law and Albanian domestic law has been defined in several articles of the Albanian constitution. In the beginning, in its Article 5, it is stated that the "Republic of Albania respects the international law that is binding upon it." At first sight, this provision can be understood as a general formulation made by a country that declares its willingness to act according to the generally accepted norms of the community of states in the international arena. In their entirety these norms would include the treaties, the customary law, the general principles, the doctrine and case law, where both the latter serve as secondary, complementary sources to the first three, which are considered as

the main sources, within the meaning of Article 38 of the Statute of International Court of Justice (ICJ).

A narrow meaning of this provision, however, would restrict it into the confines of a formal declaration with no specific value, because the norms of international law expect states to act according to these rules. Pursuant to this narrow understanding, this provision would, therefore, not represent any novelty. As such, a wider meaning to Article 5 should be attributed, referring to other provisions of the Albanian constitution, despite the opinion expressed that "[t]his article [Article 5] must be interpreted in such a narrow manner, closely linked only to Article 122 of the constitution, which means that [the] Republic of Albania recognizes and abides by the ratified international treaties, which are published in the Official Gazette, because in this manner they become part of the domestic legal system of our country."[2]

Treaties to which Albania is a party, including the environmental ones, have become part of the domestic legal system through the ratification of laws by the Parliament. With regard to this, Law No. 8216 as of 13 May 1997 can be mentioned, which adhered Albania to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Law No. 8294, as of 2 March 1998, which ratified the Berne Convention on the Conservation of European Wildlife and Natural Habitats; law No. 8556, as of 22 December 1999, which adhered Albania to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD); Law No. 8672, as of 26 October 2000, which ratified the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; Law No. 9021, as of 6 March 2003, which adhered Albania to the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Law No. 10277, date 13 May 2010, which adhered Albania to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, etc.

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[2] *Zaganjori*, Vendi i së Drejtës Ndërkombëtare në Kushtetutën e Republikës së Shqipërisë (Position of international law in the constitution of the Republic of Albania), Jeta Juridike, Nr. 2, February 2004, p. 32.

Usually, international treaties become part of the domestic legal system of the states after the enactment of a domestic legal act. In the United Kingdom, for example, before the constitutional reform of 2010, the "Ponson by Rule" was applied,[3] which, in fact, was a constitutional practice, according to which the treaties signed by the government would lay in Parliament for a period of 21 days, before the government could proceed with the ratification and the publication of the law. With the enactment of the Constitutional Reform and Governance Act 2010, the constitutional practice was transformed into a specific law, which gives the opportunity to the two chambers of Parliament to withhold the government from ratifying the treaty, by postponing it through 21 day intervals.[4] Whereas in the United States of America, the "Supremacy Clause", Article 6(2) of the Constitution stipulates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."[5]

With regard to the self-executing treaties, the analysis of the judgment of the U.S Supreme Court in the case *Medellin v. Texas* is of particular interest.[6] In their reasoning, the majority of judges ruled that the ICJ judgment in the case *Concerning Avena and Other Mexican Nationals*,[7] for a review of the judgment in the *Medellin* case, would not be directly applicable in the USA. In contrary to this reasoning, the dissenting judges argued that the USA have the obligation to abide by the judgment of the ICJ, an obligation deriving from Article 94(1) of

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3 The rule has taken the name of the Parliamentary Under-Secretary of State for Foreign Affairs in 1924, *Arthur Ponsonby*.

4 The Constitutional Reform and Governance Act 2010, www.legislation.gov.uk/ukpga/2010/25/pdfs/ukpga_20100025_en.pdf (1/12/2015).

5 Constitution of the USA, www.archives.gov/exhibits/charters/constitution_transcript.html (1/12/2015).

6 For a detailed analysis of the judgment see *Zaganjori*, Jurisprudencë dhe praktikë ndërkombëtare (International case law and practice), 2012, p. 247.

7 ICJ, *AVENA and other Mexican Nationals, Mexiko v. United States of America*, ICJ reports 2004, p. 12.

the UN Charter,[8] which stipulates that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Since the USA have ratified the UN Charter, they are obliged to comply with the ICJ judgment, without the need of a specific law of the Congress, because with the ratification, the Charter has become part of the domestic legal system of the United States. The dissenting judges further argued that "the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States; and that the Clause answers the self-execution question differently than does the law in many other nations."[9]

Following this analysis, it is understandable that the obligations undertaken by Albania in the framework of its engagement with the other countries by becoming a party to many international environmental treaties have now, through ratification by law, become part of its domestic legal system.

C. Relationship between Acquis Communautaire and the Albanian Domestic Law

Following the analysis above, and in order to analyse the relationship between the *acquis communautaire* and the Albanian domestic law, it is necessary to firstly analyse the relationship between the *acquis communautaire* itself and general international law.

In the framework of the EU legislation, environmental issues fall in the category of the common competencies shared between the Union and its members, where state members exercise their competencies when these are not exercised by the Union itself. In this sphere are included, among others, the environment, agriculture and fisheries (with the exception of the protection of marine biological resources), energy, etc. The Treaty on the European Union, in its Arti-

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8 The UN Charter and the Statute of the ICJ, https://treaties.un.org/doc/publication/ctc/uncharter.pdf (1/12/2015).

9 U.S. Supreme Court, case *Medellin v. Texas*, dissenting opinion of Judge *Breyer*, Judges *Souter* and *Ginsburg* concurring, http://www.supremecourt.gov/opinions/07pdf/06-984.pdf (1/12/2015).

cle 3(5) stipulates that "[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, *the sustainable development of the Earth,* solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." Further, in Article 21, the EU undertakes to pursue common policies and actions in order to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty and to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

Regarding the duality of the EU members that are also members of the UN Security Council (France and UK), Article 34(2) of the Treaty requires that "in the execution of their functions, they should defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter. When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position."[10]

The UN Charter is considered not only as an international treaty, but also as a "Constitution" of the world community. This can be derived from an interpretation of its Article 2(6), together with Article 103, where the UN undertakes to ensure that even the non-members will act in accordance with the general principles of international law and that in cases of a conflict between the obligations of the members under its charter and their obligations under any other international agreement, their obligations under the Charter will prevail. From these provisions it can be inferred that the UN Charter has

[10] For a more detailed analysis of the relationship between EU law and general international law, especially obligations arising out of the Security Council resolutions, see CJEU, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, ECLI:EU:C:2008:461.

a quasi-constitutional character, because other international treaties must be in accordance with its provisions.[11]

Concerning the EU legislation, in the texts of the treaties there are no provisions to be found which stipulate the supremacy of the *acquis communautaire* towards the domestic legislations of the member states. This supremacy, however, has been sanctioned by the Court of Justice of the European Union (CJEU), notwithstanding the fact that it is neither stated in the Treaty Establishing the European Community (TEEC), nor in the Treaty on European Union (TEU). For the first time, the environment was included in the sphere of the competencies of the Community in the Single European Act (SEA) and from the wide interpretation of Article 2 TEEC that stipulated the objectives of the Community. By striving to balance the economic interests in the freedom of movement of goods, with the interests for the protection of the environment, the CJEU accepted the latter as obligatory, which could legitimize restrictions on trade. As far as the proper legal basis for the protection of the environment, CJEU has applied the concept of the "centre of gravity", which implies allowing the use of the provisions of the TEEC for the harmonization of the domestic legislations, in order to guarantee the protection of the environment.[12]

However, in order to confirm this principle, consolidated by the CJEU case law, Declaration 17 has been attached to the Lisbon Treaty, stipulating the supremacy of the *acquis communautaire*. It is stated in this declaration that in conformity with the consolidated case law of the CJEU, EU treaties and legislation are superior to the domestic legislation of member states. The declaration is accompanied by the Opinion of the Legal Service of the Council, No. 11197/07, date 22 June 2007, which stipulates that "[i]t results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the

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[11] *Macdonald*, The Charter of the United Nations as a World Constitution, in: Schmitt (ed.), International Law Across the Spectrum of Conflict, Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday, 2000, p. 272.

[12] *Krämer*, The Single European Act and Environmental Protection, Reflections on Several New Provisions in Community Law, CMLR 24 (1987), pp. 682-688.

first judgement of this established case-law,[13] there was no mention of primacy in the treaty. This is still the case today. The fact that the principle of primacy was not included in the future treaty should, however, not in any way change the existence of the principle and the existing case-law of the Court of Justice."[14]

Moreover, Article 216 of the Treaty on the Functioning of the European Union (TFEU), stipulates that "[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

Under these circumstances, as the protection of the environment is one of the objectives of the EU and as the European Union itself has become a party to many environmental treaties, even if one of the member states is not a party to these environmental treaties, this member state still has the duty to comply with the obligations stemming from the EU membership.

On the other hand, the case law of the CJEU has been continuously consolidated since the landmark judgment in the *Costa v. ENEL*, because "it [CJEU] interprets the Treaty and other parts of the legislation in such a manner, by emphasizing the spirit, and not the letter of the Treaty. The Court sees the Community as a living organization, which grows, thinks, and interprets the meaning of the provisions of the Treaty and the secondary legislation of the Community and reacts in a flexible manner."[15]

Through its everyday judgments that serve as a precedent and constitute an important source of life for the European norms of the protection of the environment and their interpretation, the CJEU plays

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13 CJEU, case 6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

14 European Council, Opinion of the Legal Service, No. 11197/07 of 22/6/2007, www.cvce.eu/en/obj/opinion_of_the_legal_service_on_the_primacy_of_ec_law_22_june_2007-en-4692675c-dea2-4360-b6b6-42f769ee0d8a.html (1/12/2015).

15 *Tatham*, EC Law in Practice, A Case-Study Approach, 2006, p. 21.

an important role in safeguarding the implementation of the European environmental law in practice.[16]

Apart from ensuring the practical implementation of the *acquis communautaire* in general, the CJEU possesses the mechanism of the judicial review of the uniform or *quasi* uniform implementation of the European environmental law, having, thus, a crucial role in the development of the European environmental legislation.[17]

According to a former CJEU legal advisor, "the protection of the environment, as a public interest, was awarded a constitutional status by the CJEU even before a legal basis existed in the text of the Treaty. It was established as a fundamental objective of the Community, which in certain circumstances and conditions prevails even over the principles of free trade."[18] Here, the author refers to the CJEU judgment in the case *Danish Bottles*,[19] in which the court confirmed once again what it had ruled in its previous judgment No. 240/83, of 7 February 1985, *Procureur de la République v Association de défense des brûleurs d'huiles usagées*, that the protection of the environment is one of the main objectives of the Community, which can justify some restrictions on the principle of the free movement of goods, stipulated in Article 30 TEEC. In the *Danish Bottles* case, the CJEU went further, ruling that "protection of the environment is a *mandatory requirement* which may limit the application of Article 30 of the Treaty." However, in the view of the Court, measures adopted to protect the environment must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection".[20] Following this, the CJEU ruled that the restrictions imposed by Denmark were disproportionate to the objective pursued.

Compared to the time of the aforementioned judgments in the 1980's, nowadays it can be said that European environmental law is

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16 *Kiss/Shelton*, Manual of European Environmental Law, 1993, p. 22.

17 *Bándi*, CJEU Environmental Jurisprudence – The Role of Explanatory Provisions, in: Bándi (ed.), The Impact of CJEU Jurisprudence on Environmental Law, 2009, p. 11.

18 *Jacobs*, The role of the European Court of Justice in the Protection of the Environment, Journal of Environmental Law 18 (2006), p. 194.

19 CJEU, case 302/86, *Commission v. Kingdom of Denmark*, ECLI:EU:C:1988:421.

20 Ibid., para. 11.

not simply a sectoral policy, of a single direction, but it has reached such a stage that it impacts the drafting to the policies of other sectors. Again, in this regard, the CJEU has played an important role. In its case *Commission v. Ireland*,[21] the CJEU analysed the responsibility of Ireland regarding the implementation of Articles 4, 5, 8, 9, 10, 12, 13 and 14 of the Council Directive 75/442/EEC on waste. The Court ruled that, in principle, nothing stops the Commission from finding that apart from the fact that Ireland has not implemented these specific provisions of the Directive, to reach the conclusion that this infringement derives from conflicting practices adopted by the national authorities, which are only demonstrated in the case under consideration.[22] Considering these different cases, it can be concluded that a general practice of non-implementation of the *acquis communautaire* by a member state can include other sectors, apart from the environment.

D. The Role of the Courts and their Relationship in the Protection of the Environment

The majority of the environmental cases adjudicated by the CJEU are initiated by the Commission against the member states based on Articles 258 and 260 of TFEU. If the Commission holds the opinion that a member state has not fulfilled an obligation deriving from the Treaties, it issues a reasoned opinion on the issue, after granting the possibility to the member state to provide its own comments. If the member state does not comply with the opinion within the deadline set by the Commission, the latter may take the case to the CJEU, after the state has presented its comments. If the CJEU rules that the member state has not complied with the decision of the Commission, it may fine the state. When the Commission takes the case to the CJEU pursuant to Article 258 due to a member state not fulfilling its obligations under the Treaty to notify the measures for transposing a directive enacted according to the legislative procedure, it can set the amount of the fine that has to be paid by the member state, as it may deem reasonable in the circumstances. If the CJEU considers that

21 CJEU, case C-494/01, *Commission v. Ireland*, ECLI:EU:C:2005:250.

22 Ibid., para. 27.

there is an infringement, it can rule on the amount, or it can fine the member state, which cannot be higher than the amount set by the Commission. The obligation to pay begins on the date set by CJEU in its judgment.

In order to reduce the length of the proceedings before the CJEU and to avoid delays in delivering justice, before issuing the judgment, the court hears the Opinion of the Advocate General, because CJEU, apart from the 28 judges, one for each member state, includes 9 Advocates General, elected by agreement between the member states, for a six-year mandate, with the possibility of re-election. The role of the Advocate General is very important, because he is the first to deliver an opinion on the legal qualification of the case and refers it to CJEU. Statistics show that in about three quarters of its judgments, the CJEU follows the opinion of the Advocate General.[23]

With regard to the implementation of the directive into the domestic legislation, the CJEU ruled in the case *Marleasing SA* that it is the obligations of the member states to reach the objective set by the directive by that derive from a directive, in order to reach an objective set by the directive itself, oblige the member states to taking all necessary measures, be them of general character or specific measures.[24] This would be compulsory for all the authorities of the member states, including the domestic courts. When applying domestic law, the domestic legal provisions would have to be interpreted as far as possible in the light of the meaning of the wording and the objective of the directive, in order to reach the result aimed at by the directive. As the CJEU has ruled in other cases, the general exclusion of the possibility of the individual to rely on these directives is contrary to the compulsory character of the directives, stipulated in Article 249 of TEEC. This would be especially true in the cases of directives that aim

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[23] The composition and functioning of the CJEU, the procedure followed in the judgments, including the environmental cases, www.curia.europa.eu/jcms/jcms/Jo2_9089/?hlText=environment (1/12/2015).

[24] CJEU, case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA*, ECLI:EU:C:1990:395.

at the control and reduction of pollution, drafted with the purpose of protecting public health.[25]

Domestic courts of member states are in fact those who interpret the *acquis communautaire* during their everyday work, including the environmental *acquis*. This is done together with the CJEU, which guarantees the uniform implementation of the EU legislation and avoids the possibility of different or opposite interpretations by the domestic courts. The latter can refer their cases to the CJEU for an interpretation of the *acquis*, where it decides whether or not the legislation of that member is in line with the *acquis communautaire*. Through a request for a preliminary ruling, domestic courts may even request the evaluation of the validity of an EU legal act. In these cases, the CJEU ruling is not simply an answer given to the domestic courts through an opinion, but it is given in the form of a fully reasoned judgment, which is binding on the domestic courts for the solution of the dispute at hand. The judgment is directed not solely to the requesting court, but to all the other domestic courts of the EU member states that are ruling on disputes that have a similar object. It is precisely through such requests for preliminary rulings that every EU citizen can request the interpretation and clarification of the norms that have an impact on him/her. Notwithstanding the fact that such a request can only be initiated by a domestic court, all the parties to a dispute, together with the member states and the EU institutions, can take part in the proceedings before the CJEU. It is through such rulings, that many principles of the *acquis communautaire*, the environmental ones included, have been interpreted by CJEU.[26]

Differing from the domestic courts, which operate in a narrower framework and within an environment more or less homogenous, and where it is dominant a unique legal culture, the CJEU must undertake the role of the interpreter of a heterogeneous legal culture, because its judgments, including those related to the protection of

[25] Ibid.

[26] Further information on CJEU rulings related to the protection of the environment can be found at www.curia.europa.eu/jcms/jcms/Jo2_9089/?hlText=environment (1/12/2015).

the environment, are issued in a context where different legal cultures co-exist.[27]

The role of the courts in the protection of the environment is so important, that they can even widen the scope of the territorial application of the legal norms themselves. In the case *Commission v. United Kingdom*, the CJEU emphasized that "it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive [Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora] is to that extent applicable beyond the Member States' territorial waters. It follows that the directive must be implemented in that exclusive economic zone."[28]

Considering such a relationship between *acquis communautaire* and the domestic legislation of the EU member states, since for many years now, the main objective of the foreign policy of the Republic of Albania has been the obtainment of EU membership and its main efforts have been put in the European integration process, the same relationship should exist between the *acquis communautaire* and the Albanian domestic law. In fact, Albania has the status of a candidate country for EU membership, and at this stage of the integration process, a fundamental document is the Stabilization and Association Agreement (SAA), signed on 12 June 2006 and entered into force on 1 April 2009.

The constitutional basis for the membership of Albania into the EU can be found in Articles 122(3) and 123 of the Constitution of the Republic of Albania, which stipulate the primacy of the norms deriving from an international organization over domestic law, in case of conflict between these norms, and the transfer of state competencies to the international organizations, for certain issues, pursuant to agreements with these organizations.[29] Despite some earlier opinions

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27 *Krämer*, EC Environmental Law, 2007, p. 51.

28 CJEU, case C-6/04, *Commission v. United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2005:626, para. 117.

29 Constitution of the Republic of Albania, www.parlament.al/web/pub/kushtetuta_perditesuar_15171_1.pdf (1/12/2015).

for a non-certain status of the EU law *vis-á-vis* the Albanian legislation,[30] these constitutional provisions give to the EU the status of a higher organization.[31] A very recent development is the proposed amendment of the Constitution in the framework of the justice system reform, which is currently under way in Albania. According to the proposal of the Group of Experts of High Level, Article 122(2.1) of the amended Constitution stipulates that "[t]he European Union law shall prevail over the domestic law of the Republic of Albania".[32]

This is a clear provision of the absolute primacy of EU law over the domestic law of a country which has not even opened the accession negotiations yet with the EU, let alone become a member. This happens at a time when even the current EU members do not have such formulations in their constitutions, taking into account the debate over the supremacy of EU law within the organization itself.

However, in the current stage of the integration process, in the framework of the SAA, Albania's undertakings regarding the environment are stipulated in its Article 108, which states that "[t]he Parties shall develop and strengthen their cooperation in the vital task of combating environmental degradation, with the aim of promoting environmental sustainability. Cooperation shall mainly focus on priority areas related to the Community acquis in the field of environment."[33]

The approximation of the Albanian environmental legislation with the *acquis communautaire* is part of the National Plan for the Imple-

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30 *Kellermann*, Impakti i anëtarësimit në BE në rendin e brendshëm ligjor të Republikës së Shqipërisë (Impact of EU membership in the domestic legal order of the Republic of Albania), E drejta parlamentare dhe politikat ligjore, No. 1, 2007.

31 *Omari/Anastasi*, E drejta kushtetuese (Constitutional law), 2010, p. 61.

32 Consolidated version of the Constitution integrating the draft constitutional amendments, www.euralius.eu/images/Justice-Reform/Consolidated-version-of-the-Constitution-Integrating-the-draft-Constitutional-Amendments.pdf (1/12/2015).

33 Article 108 of the Stabilization and Association Agreement between the European Communities and their member states, of the one part, and the Republic of Albania, of the other part, www.ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf (1/12/2015).

mentation of the Stabilization and Association Agreement (NPISAA) drafted with this specific purpose.[34]

After the 1990's, all Albanian governments have had the approximation of the domestic law with the *acquis communautaire* and its effective implementation as one of their main priorities. Understandably, our country must ensure that the current and future legislation should strive towards the gradual approximation with the *acquis communautaire*, but it is equally important to understand that the "approximation" does not simply mean "copying and pasting" of the European legislation, but the drafting of a comprehensive legislation, and most importantly, its implementation in practice. As far as the approximation is concerned, according to Article 70 of the SAA, the approximation will be done in two phases. In the first transition phase of ten years, the approximation shall include the main areas of the common market, competition, trade, public procurement, intellectual property, and the standardization and certification of products. In the second phase the approximation will continue in the remaining areas.

Challenges of the EU itself for the implementation of this legislation arise firstly from the fact that it is very wide and diverse, including matters related to climate change, protection of air, water, soil, biodiversity, up to the management of chemicals and waste. Also, the environmental *acquis* includes diverse techniques, beginning with those that guarantee the standards of products in order to reach the environmental objectives, continuing with the restrictions and prohibitions, the use of economic instruments, the defining of delicate zones that require a higher level of protection, the evaluation of plans and programs that have an impact on the environment, up to those that guarantee the participation of the public in environmental decision making. Further, the environmental *acquis* must also be implemented in diverse conditions and natural environments, as diverse as the world that surrounds us, beginning with the diverse national and regional environments, different administrative divisions, and different regions that intertwine issues of transnational relations. Apart from

[34] National Plan for the Implementation of the Stabilization and Association Agreement, www.integrimi.gov.al/al/dokumenta/dokumente-strategjike/plani-kombetar-per-integrimin-evropian (1/12/2015).

these aspects, the implementation of the environmental *acquis* is further complicated if taken into account the fact that it includes issues for which the public is very sensitive and always ready to put into action the mechanisms at its disposal that challenge the decision making of the authorities, by using administrative and the judicial review. In addition to this, the challenges that are related to the lack of attention by the national authorities to respect the deadlines set by the environmental *acquis*, the lack of knowledge and capacities in the domestic public administrations, deficiencies in the capacities of the domestic law enforcing authorities, and the lack of investment in the infrastructure that guarantees the abatement of pollution and the protection of the environment can be added. Lastly, but not less important, there are the challenges that stem from the continuous enlargement of the EU, including countries that come from former totalitarian systems, with mentalities and capacities entirely different from those of the existing member states.[35]

The environmental EU legislation is adopted by the member states (by the same token it is also adopted gradually by the candidate countries) almost exclusively through the directives. In these circumstances, these rules are not directed to the legal subjects, but to the member states, in the form of "requests" to harmonize their legislation, which as a consequence oblige the subjects to act in accordance with the domestic harmonized norms.[36] As stipulated in the Sixth Program of the Environmental Action of the Community of 2007, EU legislation stands behind 80 % of the domestic environmental legislation.[37]

Regarding the role of the directives in the domestic Albanian law, the Supreme Court of the Republic of Albania has ruled in its judgment of the Civil Bench, No. 22, judgment of 19 January 2011:

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[35] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementing European Community Environmental Law, SEC(2008) 2851, SEC(2008) 2852, SEC(2008) 2876, p. 3.

[36] Ibid., (fn. 27), p. 65.

[37] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-term review of the Sixth Community Environment Action Programme, SEC(2007) 546, SEC(2007) 547, p. 3.

"Regardless of the fact that our country is not yet a full member of the European Union, its directives (regulations) are a guidance for our legal practice."

Also, in another *dictum* of the Supreme Court, it is mentioned that Albania will ensure that its existing and future legislation will be properly implemented and imposed (Article 70 of the Stabilization and Association Agreement, ratified by Law No. 9590, as of 27 July 2006), as it has been confirmed in the firmly held stance of the Albanian judiciary.[38]

The fact that the Albanian judiciary is already referring to the EU legislation is a very positive and welcoming development, even for its procedural aspects. In its unifying judgment No. 2, judgment of 27 March 2012, the Joint Benches of the Supreme Court ruled regarding the deadlines that:

"The same position is held by the Regulation (EEC Euratom) Nr. 1182/71 of the Council, date 03.06.1971, that sets the applicable norms for the time periods, dates and deadlines, which are applied for the acts of the Council or the Commission, which are approved or will be approved, based on the Treaty that established the European Economic Community or the Treaty that established the European Community of Atomic Energy."

E. Conclusion

This analysis on the relationship between international, European and the Albanian environmental legislation, and the role of the courts in the protection of the environment, has shown that in this stage of the European integration of Albania, the implementation of the SAA and the approximation of the Albanian environmental legislation with the *acquis communautaire* are of crucial importance. Certainly, even drafting a comprehensive legal framework, even if it is approximated with the *acquis communautaire*, does not, *per se,* guarantee the protection of the environment, if it is not adhered to, strictly. More so, at a time when even the EU countries themselves face problems with

[38] Unifying judgment of the Joint Benches of the Supreme Court of the Republic of Albania, Nr. 1, judgment of 17/1/2011, p. 13.

the implementation of the environmental *acquis*, problems can only be solved through close and coordinated cooperation, in order to guarantee the protection of the environment as a common good, which belongs not only to us, but also to the future generations.

How to Protect Trade Secrets: Fitting the Legal Framework of the Intellectual Property Law

Ana Pepeljugoska[*]

Abstract

The term "trade secret" commonly refers to a type of information that is economically valuable because it is kept secret. Authorities differ on whether trade secrets should be protected by tort or contract law, disputing their general nature, and often contrasting them with patents and copyrights. Nevertheless, the author of this paper suggests that trade secrets should be considered as a specific part of intellectual property. This is so, because on the one hand, like the other types of intellectual property, trade secret protection provides an incentive for productive activity. On the other hand, trade secret protection is different in the sense that it does not grant exclusive rights, it rather protects against wrongful access to information. Although, little is done to specifically regulate the protection against misappropriation, there is a tendency of moving forward. The Trade Secrets Directive is the first step in harmonizing the domestic laws and fulfilling the aim to protect trade secrets as intellectual property.

A. Introduction

Trade secret law is a relative latecomer to the intellectual property (IP) umbrella. While there were forms of trade secret protection on the European continent dating perhaps as far back as Roman times,[1] modern trade secret law is primarily an Anglo-American doctrine.

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[1] *Actio servi corrupti* was used to protect slave owners from third parties who would "corrupt" slaves (by bribery or intimidation) into disclosing their owners' confidential business information. The law made such third parties liable to the slave owner for twice the damages he suffered as a result of the disclosure – for further info see *Schiller*, Trade Secrets and the Roman Law: The Actio Servi Corrupti, Colum. L. Rev. 30 (1930), p. 837.

Even today, trade secret law is not well established outside of common law countries, which is evident from the fact that the latest proposal for Trade Secrets Directive in the scope of the European Union is dated back in 2013. The countries on the European continent such as Republic of Macedonia[2] also do not have any explicit indication in their legislation as regards the protection of trade secrets by intellectual property law. The reason for not having legislation that regulates trade secrets is found mainly in cultural norms of assumed trust, which made it uncomfortable to insist on formal confidentiality agreements, and that long-term employment eliminated many trade secret issues associated with employee mobility.[3]

The aim of this paper is to show the necessity of trade secrets regulation and thus by intellectual property law. By showing its various characteristics this paper will demonstrate that there is legal and economic justification of protecting the trade secrets by intellectual property law and one of the main reasons for having such protection is the fact that it will encourage inventions and social and economic development.

B. Defining "Trade Secrets"

A trade secret is "information that has economic value from not being known or readily ascertainable by those who could gain value from its use or disclosure and is subject of reasonable security measures".[4] Related to the question of the mixed legal basis for trade secrets is the question of what sort of information can qualify as a trade secret. The problem here is that "information" has no conceptual boundary and the three usual qualifications on what information trade secrecy protects – the information must be used in business, provide a competitive advantage, and be secret – are similarly broad.

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2 The Republic of Macedonia is a Candidate state for membership of the EU since 2005.

3 *Lemley*, The surprising virtue of treating trade secrets as IP Rights, John M. Olin Program in Law and Economics Stanford Law School Working Paper No. 358, June 2008, p. 6.

4 *First*, Trade secrets and Antitrust law, New York University Working Paper no. 11-06, March 2011, p. 4.

The result is that calling something a "trade secret" tells us very little about the type of information that we are being asked to protect.[5]

Arrow[6] interpreted invention broadly as the production of knowledge through the use of research inputs, a process considered risky in the sense that the output of the production process cannot be predicted perfectly from the applied inputs. He also viewed information obtained through invention as "indivisible", meaning that one person's use of the information does not limit its use by others. Information thus obtained from an invention process may be easily transferred at low or zero cost, making it relatively easy and costless for others knowledgeable in the field to take advantage of the transmitted information. If there is no mechanism to protect the valuable information, a sub-optimal amount of investment in innovation will occur along with the adverse consequences of such under-investment.

In principal, it is widely known that the following are considered as trade secrets: customer lists, manufacturing methods, chemical processes, formulas and related equipment, computer program code, marketing data and strategies, blueprints for machines, geological data gained from surveys, genetic information etc.[7] In light of this there is one common feature in almost every jurisdiction worldwide and that is that the trade secrets have not been so far characterized as monopolies, unlike other intellectual property rights.

Protection of trade secrets is different from copyright, patents and trademarks, which grant exclusive rights in various categories of information. By contrast, trade secrets law does not grant exclusive rights, rather it protects against wrongful access to information.[8] In light of this the most common question is, why one would not apply for patent or copyright protection, rather than choosing the trade secret path?

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5 Ibid.

6 For further info see *Arrow*, Economic Welfare and the Allocation of Resources for Invention, in: Nat'l Bureau of Econ. Research, The Rate and Direction of Inventive Activity, 1962, pp. 609-626.

7 *McJohn*, Intellectual Property: Examples and Explanations, 2003, p. 288.

8 Ibid., p. 289 et seq.

The trade secret law is commonly referred to as common law, due to the fact that the rules of trade secret law are not written in any statute.[9] When assessing the trade secret case, the judges often apply: property law (referring to trade secrets as intangible property), contract law (agreement between the owner of the trade secret with others to maintain secrecy), tort law (someone has disclosed the trade secret and thus committed a wrongdoing), criminal law (the disclosure of information as criminal offense) or even unfair competition law (if the using the trade secret is made to gain competitive advantage with the real owner). Even though the definition of the trade secret is ambiguous, the requirements of a trade secret are very simple. Namely, the trade secret, being a secret does not mean that it must be an absolute secret confined to a single person. It can be known by others in the company who need to use and utilize the trade secret. It can also be known to outside consultants, but it cannot be known to the general public or in the course of general trade.[10]

As it seems the answer PRO trade secret law is mainly due to the fact that the other regimes are not eligible for being legal substitutes. Patents provide a clearer property right, because of the registration and specification requirements, but they also come with a fixed, limited term. Trade secrets are undefined until it is time to litigate, and they last as long as the firm can keep a secret. In order to qualify for a patent protection the invention must fulfil the conditions of novelty, inventive step and industrial applicability[11] and it is tested by government examination before being accorded protection. On the other hand, copyrighted work has to be original. Trade secrets may be valuable because they are secret, but there is no threshold of originality for protection except in cases where the public availability of the secret information undercuts the claim that it had been kept secret. So, for example, information in a database may be protected by trade

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9 For example the Dutch Supreme Court (Hoge Raad) established the trade secrets protection in the epoch-making judgment of 1919, *Lindenbaum v. Cohen*, ECLI:NL:HR:1919:AG1776.

10 *Foster/Shook*, Patents, Copyrights and Trademarks, 2nd ed. 1993, pp. 208-210.

11 Article 52(1) of the Convention on the Grant of European Patents (European Patent Convention).

secrecy, while at the same time, the database will be unprotected by copyright because it lacks originality.[12]

The use by someone of the trade secret information is not alone sufficient to convince a court to stop the use and award damages. The vast majority of trade secret actions are brought by businesses claiming usage of wrongful means to learn the trade secret, fraud, violation of the secrecy clauses etc. Hence, the trade secret misappropriation cases can be divided in several categories: business v. former employee, employer v. next employer, business v. former partner or potential partner, inventor or author v. business, business v. competitor, and business v. person who makes the information public and business v. agency or court.[13]

The nature of the trade secret cases imposes an obligation to the courts to weigh the competing interests in order to determine what fair conduct is and what should be done to remedy the unfair conduct.

C. The Trade Secrets from a Legal Perspective

As a consequence of historical evolution, the current situation at EU level is that the legal protection afforded by Member States to trade secrets varies significantly from one state to another; this is especially true for trade secrets since there exist no uniform level of protection of trade secrets on EU level.[14] However it is upon my view that this is a general problem in the entire European countries, and also in the Republic of Macedonia, as a candidate state.

The trade secret protection is important even though there were no specific rules about trade secrets in the Treaty Establishing the European Community. It is clear from Articles 30 and 295 that the Treaty recognizes Intellectual Property Rights within its framework.[15]

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12 *First*, (fn. 5), p. 8.

13 *McJohn*, (fn. 7), pp. 291-293.

14 *Bochon*, Shaping the EU Legal Protection for Trade Secrets: A Comparison with Trade Secrets Law in the United States, Research project, www.law.stanford.edu/wp-content/uploads/sites/default/files/project/441264/doc/slspublic/Bochon_Abstract.pdf (1/12/2015), p. 1.

15 *Dabbah*, EC and UK Competition Law: Commentary, Cases and Materials, 2004, p. 201.

All countries of the EU are members of the WTO and have implemented to their national legislation standards provided in the TRIPS Agreement. To this effect, Article 39 of TRIPS sets out minimum levels of protection for intellectual property rights of WTO Members. The Article 39(2) is considered to be the pillar for the protection of trade secrets. Namely, natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

The first and most immediate consequence of the lack of a common legal framework is that no uniform definition of "trade secrets" exists within the legal codes.[16] Indeed, even European Union Member States that have specific provisions on civil redress and protection against misappropriation of trade secrets, fail to provide a definition of what information may be protected as a trade secret. However, within the USA, the Uniform Trade Secrets Act[17] defines trade secrets as "means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[18]

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16 *Cohen/Gutterman*, Trade Secrets Protection and Exploitation, BNA Books, 1998, p. 69.

17 The UTSA aimed to codify and harmonize standards and remedies regarding misappropriation of trade secrets that had emerged in common law on a state to state basis.

18 Uniform Trade Secrets Act §1(1)(4) – Definitions.

Despite the lack of a uniform definition in the EU, the review has shown the certain common requirements to qualify information as trade secrets: (i) it is technical or commercial information related to the business; (ii) it is secret in the sense that it is not generally known or easily accessible; (iii) it has economic value consisting of conferring a competitive advantage to its owner; and (iv) it is subject to reasonable steps to keep it secret.

Another consequence of the absence of common legal framework is that actions available in case of trade secrets violations vary in each state. In order to successfully bring a civil action for violation of trade secrets, evidence must be provided of: (i) the existence of a protectable secret; (ii) the infringement of the same; and (iii) the unlawful nature of the misappropriation or use by the defendant.[19] Since there is not established unified procedure for obtaining court protection, it often happens that the plaintiff has different burden of proof for different type of procedure. Respectively in tort matters the plaintiff is obliged to demonstrate the defendant's fault and the causal link between infringement and damage. In case of an unfair competition action, the plaintiff is usually required to provide evidence of the infringer's intention to compete with the real owner. If the action is based on breach of contract, the plaintiff should demonstrate the existence of a contractual obligation and its breach.[20]

The main factor which is an obstacle for enforcement of trade secrets in court derives from the lack of adequate measures to avoid trade secrets leakage in legal proceedings. Another factor impairing enforcement – again, strictly related to the fact that trade secrets are not ranked as IP rights – is the general impossibility of enforcing a trade secret against a third party who obtains the information in good faith, unless the third party has acquired or used the secret information

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[19] European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM(2013) 813 final, 2013/0402, p. 4.

[20] Study on Trade Secrets and Confidential Business Information in the Internal Market, Prepared for the European Commission, Contract number: MARKT/2011/128/D, April 2013, p. 5.

negligently (i.e. in breach of the ordinary duty of care).[21] As a general rule, a key requirement to bring a civil action for trade secret infringement is indeed misappropriation or unlawful use of the secret information, or at least the knowledge that the information is confidential.[22]

I. Tort Law

This tort-based view gained significant currency at the beginning of the 20th Century, in part because of the *Masland* case[23] but also since the conceptions of property were changing. By 1939, the American Law Institute firmly classed trade secret law as a tort, including it in the Restatement of Torts. The ultimate expression of the tort view would replace trade secrets entirely with a general tort of wrongful misappropriation of information.[24]

The problem with the tort view is that it is ultimately empty. It presupposes a wrong without offering any substantive definition of what is considered to be wrong. On the one hand, it is treated as a breach of a confidential relationship and on the other hand, many trade secret cases arise out of a "duty" explicitly stated in a contract. However, this theory does not differentiate between the trade secret law and regular contract law and refers the plaintiff to a standard action for breach of contract which can be explicit or implicitly. The mere fact that the breach in question is related to something called a trade secret adds up to the publicity of the case.

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21 Ibid., p. 7.

22 The recent study (fn. 20) preceding the passing of a Trade Secrets Directive on the EU Level shows that in most Member States the owner of a trade secret has no action at all against third parties acting in good faith; exceptions are limited to Austria, the Czech Republic, Denmark, Estonia, Finland, Germany, the Republic of Ireland, Latvia, Lithuania and Portugal where remedies are potentially available regardless of the recipient's good or bad faith.

23 U.S. Supreme Court, *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917).

24 For such a proposal, see *Paepke*, An Economic Interpretation of the Misappropriation Doctrine: Common Law Protection for Investments in Innovation, Berkeley Technology Law Journal 2 (1987), p. 2.

In the case *du Pont v. Christopher*,[25] the court found photographers liable for flying above a chemical plant under construction and taking pictures of the design of the plant, because the pictures disclose secrets concerning the process that would be implemented in the plant. The court acknowledged that they did not act contrary to the law. Nonetheless, the court found that their "schoolboy's trick" was improper.

According to *Lemley*: "Without some reason to protect a secret, the tort theory of secrecy is likely to devolve into challenges to a variety of competitive information gathering, with courts unable to resolve those challenges on any principled basis, instead making ad hoc judgments based on their perception of the defendant's intent. It may also have similar deterrent effects on departing employees: courts are more likely to impose obligations on departing employees and to punish those deemed to have acted unfaithfully if it views 'bad acts' and breach of contract as the central justifications for trade secret law."[26]

II. Contract Law

Court or commentators have periodically suggested that trade secret law is coextensive with contract. However, in my opinion the problems with contract as a one of the explanations for trade secret law are the following: First, contract theory cannot explain an important subset of trade secret cases: those determining legal rights between strangers. This includes not only the improper means cases, but also those in which a trade secret is acquired by accident or mistake, and those in which liability extends not merely to those in privity with the trade secret the defendant's intent in adopting the mark. At best, then, contractual relations could be only a partial explanation for trade secret law. Second, even in the subset of cases dealing with parties in a contractual relationship, contract theory cannot explain the various ways in which trade secret law departs from enforcing the bargain those courts have struck. Nor can a contract theory explain

[25] U.S. Court of Appeals for the Fifth Circuit, *E.I. DuPont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970).

[26] *Lemley*, (fn. 3), p. 17.

the strong remedies afforded trade secret owners. In no other area of contract law do we impose criminal penalties.[27]

III. Competition Law

At EU level, both the Technology Transfer Regulation EC/316/2013 and the Research and Development Block Exemption Regulation EC/1217/2010 recognize the relevance of trade secrets. The Macedonian Law on protection of the competition does not say anything regarding trade secrets as such, unless the information is used to create anticompetitive effects.[28] These cases do not involve the use of legal mechanisms to redress misappropriation, but rather practices such as a refusal to deal or discriminatory contracting policies by the trade secrets owner.

In particular, an issue under competition law may arise when access to the trade secrets is crucial to market entry and the trade secret holder is in a dominant position. It is also important to mention that the number of decisions adopted by National Competition Authorities[29] in relation to trade secrets is very limited. This suggests that only in very exceptional cases are trade secrets considered the cause of serious competition problems.

However, the value of trade secrets for the market players is not diminished. If applied to unilateral practices implemented by dominant undertakings, the problem is that undertakings have no clear indication as to the conditions under which a refusal to provide access to a trade secret might be deemed illicit (if at all) under competition law rules. The question of what exactly is the standard of competition law intervention in relation to unilateral practices involving trade secrets – which is considered abusive only in very specific circumstances – is still open, since the existing decisions dealing with competition law issues involving trade secrets have not sufficiently

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27 Ibid., p. 17 et seq.

28 Article 7 of the Law on protection of competition, Official Gazette of RM 145/2010.

29 In the Republic of Macedonia there is no such decision passed by the Commission for Protection of the Competition, as seen on the official web page of the Commission, www.kzk.gov.mk/eng/zapis_decision.asp?id=20 (1/12/2015).

clarified this aspect.[30] In this way, the legal certainty is harmed by this lack of clarity, since different tests may be applied to similar cases.

D. Intellectual Property and Trade Secrets

Intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those goods. Those rights do not apply to the physical object in which the creation may be embodied, but instead to the intellectual creation as such.[31]

The main question that arises is why the trade secrets are closer to the IPRs than to the other above explained legal concepts?

In theory, there are two main similarities of trade secrets and IPRs: The incentive to invent and the incentive to disclose.[32] The first one gives the developer new and valuable information and the right to restrict others from using it, and therefore the prospect of deriving supra competitive profits from the information. This basically means that the trade secret law gives additional incentive (not provided by any other IPRs) to innovate.[33] The second similarity is the incentive to disclose. Some authors even refer this as the primary goal of all IPRs, including trade secrets. The incentive to disclose is often viewed as the benefit that the society will gain from making a certain invention available to the public.[34]

At a first glance, it seems that the trade secrets law is not aimed at disseminating, but at maintaining a secret. However, it is our position

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30 Study, (fn. 20) p. 10.

31 *Анастасовска/Пепељугоски*, Право на интелектуална сопственост, Академик, 2012, p. 19.

32 *Lemley*, (fn. 3), p. 25.

33 In U.S. Supreme Court *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) the Court refused to hold that patent law preempted trade secret law, reasoning in part that "the patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention. In this respect the two systems are not and never would be in conflict [...]. Trade secret law will encourage invention in areas where patent law does not reach [...]".

34 *Lemley*, (fn. 3), pp. 26-29.

that without legal protection, companies in certain industries would invest too much in keeping secrets in the physical sense. Namely, without the proper intellectual property protection, physical investments must be made for each secret, while legal investments need to be made only if there is misappropriation. That means that even if a physical investment in secrecy is individually cheap, in the aggregate the cost of having to make that investment for every secret may outweigh the cost of resort to law, which will be necessary only in those few cases in which the secret is actually misappropriated. Trade secret law develops as a substitute for the physical and contractual restrictions those companies would otherwise impose in an effort to prevent a competitor from acquiring their information. In so doing, it encourages disclosure of information that companies might otherwise be reluctant to share for fear of losing the competitive advantage it provides.[35]

Unfortunately, trade secrets are not included in the intellectual property legal framework, meaning that only several EU Member States have provisions regulating the trade secrets in their intellectual property legal acts. Also the Republic of Macedonia does not provide for trade secrets explicit intellectual property protection, neither protection under the Law on industrial property,[36] nor under the Law on copyright and related rights.[37] The main reason for this is the fact that trade secrets were often considered as a corporate matter and not intellectual property matter. Saying this we refer the attention to the Company Law[38] and Labor Law[39] which provide the obligation of the employees, among which also the General Manager and the Advisory Board of the company, to maintain business secrets.

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35 Ibid., p. 36.

36 Law on Industrial Property, Official Gazette of RM 21/2009, 24/2011, 12/2014, 41/2014, 152/2015.

37 Law on Copyright and related Rights, Official Gazette of RM 115/2010, 140/2010, 51/2011, 147/2013, 154/2015.

38 Company Law, Official Gazette of RM 28/2004, 84/2005, 71/2006, 25/2007, 87/2008, 17/2009, 23/2009, 42/2010, 48/2010, 8/2011, 21/2011, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014, 41/2014, 138/2014, 88/2015, 192/2015, Articles 241, 361.

39 Labor Law, Official Gazette of RM 167/15, Article 35.

However, in practice trade secrets are "sold" and licensed to other parties by agreements. Usually these agreements involve confidentiality provisions, provisions on disclosure, non-use provisions, what to do if third party rights are infringed, improvements to trade secrets etc.[40]

E. Conclusion

Significant number of scholars suggests that conceiving of trade secrets as property rights or rights deriving out of contractual relations will lead to stronger protection for trade secrets. Our position is closer to those who treated the trade secrets as intellectual property rights. Trade secrets serve the same purposes as patent and copyright law – to encourage innovation and the disclosure and dissemination of that innovation. However, the intellectual property view of trade secret rights requires us to give thought to striking the right balance in order to encourage innovation without unduly limiting disclosure, a question that might not arise at all under a different conception of trade secrecy. Ensuring this different concept in the scope of intellectual property rights is necessary on the European continent.

This applies especially, if we take into account that the value of the intellectual property rights in practice depends on whether the owner of the rights is capable of undertaking necessary measures to prevent others from infringing its rights. It is evident that, up to now, inside the EU (common law countries such as USA are moving forward, by providing the adequate legal regulations and protection of trade secrets) there is no harmonized system for the protection of trade secrets, but there is certain inception to regulate the trade secrets by passing the new Trade Secrets Directive. The New Directive seems to be a good starting point in providing adequate and efficient protection of trade secrets in Europe, as a valuable property right.

The law on trade secrets in the Republic of Macedonia does not differ from the European national laws. The civil law protection is

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[40] In light of this the case law practice of the Court of Appeal Amsterdam, judgment *Lastang*, BIE 1999 no. 48 of 20/2/1964, p. 151, shows that trade secrets containing non-disclosure clause may continue to use the secret after termination of the agreement in absence of a non-use clause.

rather complicated and closely connected with the tort, breach of contract and competition concept. The provisions, which regulate different aspects of trade secrets, are spread in several legal texts, they are not consistent and harmonized, which provokes difficulties in the enforcements process. This might discourage holders of trade secrets to protect their rights and creates a lack of court praxis. Harmonizing the national legislation of the Member States with the Trade Secrets Directive, and the law of the Republic of Macedonia as a Candidate State with the EU *acquis communautaire*, provides a basis for improvement of the existing situation.

Consumer Protection in Enforcement Proceedings in Light of the Recent CJEU Case Law

Paula Poretti[*]

Abstract

CJEU's recent case law regarding interpretation of Directive 93/13 concerning a question whether national procedural law affords effective judicial review of unfair terms in consumer contracts have affected the procedural autonomy of Member States to a considerable degree. In the paper decisions of the CJEU will be used in order to illustrate the development of the interpretation of Directive 93/13 as an instrument which affects not only national substantive law matters related to unfair contract terms but also the adjustment of the national procedural law matters by imposing an obligation of "consumer-oriented interpretation" of procedural standards. In this sense, the central part of this paper will discuss the judgment of the CJEU in Erste Bank case as well as the opinion of the Advocate General (AG) Szpunar in Finanmadrid case. Having in mind the limit set by the national procedural autonomy in the field of enforcement proceedings, the paper analyzes if and to what extent the CJEU's case law on Directive 93/13 contributes to enhancing procedural guarantees to consumers in enforcement proceedings which is also laid down in Article 47 of the Charter of Fundamental Rights.

A. Introduction

It is certainly noteworthy that in its recent case law the Court of Justice (CJEU) focuses on procedural guarantees of consumer rights in the enforcement proceedings. Although the *Aziz* case[1] is considered to be a leading case regarding interpretation of the Council Directive

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[1] CJEU, case C-415/11, *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164.

93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[2] (Directive 93/13), also a certain number of cases that preceded and followed *Aziz* have affected the procedural autonomy of Member States (MS) regarding effective judicial review of unfair terms in consumer contracts to a considerable degree.[3] Thereby, while the first judgments concerned the possibility of the court to review unfair contract terms *ex officio* in the course of ordinary judicial proceedings, more recent references seem to shift towards challenging provisions of national procedural law which preclude or restrict judicial review of unfair contract terms in enforcement proceedings.

In this paper these judgments of the CJEU will be analysed in order to illustrate a development of the interpretation of Directive 93/13 as an instrument which affects not only national substantive law matters related to unfair contract terms but also provokes the adjustment of the national procedural law matters to higher standards by imposing an obligation of "consumer-oriented interpretation" of procedural standards. In this sense, the main part of this paper will discuss the judgment of the CJEU in *Erste Bank* case[4] as well as the opinion of the AG *Szpunar* in *Finanmadrid* case.[5] It is interesting to see if and to what extent, having in mind the limit set by the national procedural autonomy in the field of enforcement proceedings, the CJEU's case law on Directive 93/13 contributes to enhancing procedural guarantees to consumers in enforcement proceedings by invoking guarantees set in Articles 38 and 47 of the Charter of Fundamental Rights (CFR). Namely, already in its former judgments the CJEU took fundamental rights guaranteed in the CFR under consideration concerning the interpretation of the standards of procedural legal protection of consumers in Directive 93/13. In the most recent *Finanmadrid* case, it will be interesting to observe if the opinion of AG *Szpunar* who examines the rela-

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2 Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 95 of 21/4/1993, p. 29.

3 See *Della Negra*, The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sánchez Morcillo and Kušionová, CMLR 2015, p. 1009 et seqq.

4 CJEU, case C-32/14, *ERSTE Bank Hungary Zrt. V Atilla Sugár*, ECLI:EU:C:2015:637.

5 Opinion of AG *Szpunar* to CJEU, case 49/14, *Finanmadrid E.F.C, S.A. v Jesús Vicente Albán Zambrano and others*, ECLI:EU:C:2015:746.

tionship between the principle of effectiveness and the CFR reflects any changes in that regard.

B. CJEU's Case Law on Consumer Loan Contracts

The purpose of Directive 93/13 is to harmonize national substantive law by adopting uniform rules of law in the matter of unfair contract terms in consumer contracts because the laws of MS relating to unfair terms in consumer contracts show marked divergences, which result in differences amongst national markets for the sale of goods and services to consumers from each other and distortions of competition amongst the sellers and suppliers, notably when they sell and supply in other MS.[6] However, at first it did not seem as if Directive 93/13 would achieve the expected results especially if a negligible number of references for preliminary ruling concerning the interpretation of Directive 93/13 in the period between 1994 and 2007 were taken into account.[7] But in the last several years it seems that the role of Directive 93/13 in consumer protection has been affirmed and even transformed and it has become an instrument which affords consumers a higher level of both substantive and procedural legal protection. In the legal literature judgments of the CJEU in *Aziz* case and series of cases on unfair contract terms which followed are considered to be the basis for developing a *genuine* European law on the control of unfair contract terms and at the same time laying down the foundations of a *genuine* European consumer procedural law.[8] But in fact this development builds on a gradual process which has been initiated by CJEU's interpretation of Directive 93/13 as an instrument which establishes a requirement of judicial review of unfair contract terms *ex officio* and a possibility of a national court to provide interim

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6 See recital 6-7 of the Directive 93/13 (fn. 2).

7 There were only 6 references for preliminary ruling to the CJEU in that period. *Micklitz/Reich*, The Court and Sleeping Beauty: The revival of the Unfair contract terms directive (UCTD), CMLR 2014, p. 771 et seqq.

8 *Micklitz*, Mohamed Aziz – sympathetic and activist, but did the Court get it wrong?, 2013, http://www.ecln.net/tl_files/ECLN/Florence%202013/Micklitz%20-%20The%20ECJ%20gets%20it%20wrong%20Aziz-30-11-14.pdf (1/12/2015), p. 1; *Micklitz/Reich*, (fn. 7), p. 771.

relief and stay enforcement proceedings until review of unfair contract terms is provided in declaratory proceedings which will be presented in greater detail later.

Regarding a reference of the Spanish national court concerning the scope of the consumer protection provided by Directive 93/13 in *Océano* case[9] the CJEU took the view that the national court may determine of its own motion if a term of a contract is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the ordinary courts but concluded that the Directive 93/13 does not impose a direct obligation on a national court to review unfair contract terms *ex officio*. However, the CJEU's reference in *Océano* to a position of a consumer as a weak party in comparison to a seller or supplier who because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair, which highlights the need to provide for effective protection of the consumer in a way that the national court acknowledges that it has power to evaluate terms of this kind of its own motion, seems to suggest that such obligation should be imposed. Further confirmation of that view can be found in decision of the CJEU in *Cofodis*[10] as well as *Pannon*,[11] *Asturcom*,[12] *Penzügyi*,[13] *Photovost*,[14] *Invitel*,[15] *Banco Español de Crédito*,[16] *Banif Plus Bank*[17] and *Asbeek Brusse* case.[18] For exam-

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9 CJEU, joined cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346.

10 CJEU, case C-473/00, *Cofidis SA protiv Jean-Louis Fredout*, ECLI:EU:C:2002:705.

11 CJEU, case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi*, ECLI:EU:C:2009:350.

12 CJEU, case C-40/08, *Asturcom Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, ECLI:EU:C:2009:615.

13 CJEU, case C-137/08, V*B Pénzügyi Lízing Zrt. v Ferenc Schneider*, ECLI:EU:C:2010:659.

14 CJEU, case C-76/10, *Pohotovosť s.r.o. v Iveta Korčkovská*, ECLI:EU:C:2010:685.

15 CJEU, case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242.

16 CJEU, case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, ECLI:EU:C:2012:349.

17 CJEU, case C-472/11, *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, ECLI:EU:C:2013:88.

ple, in *Cofodis* case CJEU relied on the opinion from *Océano* that it is therefore apparent that, in proceedings aimed at the enforcement of unfair terms brought by sellers or suppliers against consumers, the fixing of a time-limit on the court's power to set aside such terms, of its own motion or following a plea raised by the consumer, is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the Directive 93/13. To deprive consumers of the benefit of that protection, sellers or suppliers would merely have to wait until the expiry of the time-limit fixed by the national legislature before seeking enforcement of the unfair terms they would continue to use in contracts.[19] In *Banco Español de Crédito* CJEU confirmed that judicial review of unfair contract terms *ex officio* should also be provided in simplified proceedings, such as that at issue in the main proceedings where an application for an order for payment has been brought. In *Banif Plus Bank* case *the* CJEU followed standards of consumer protection introduced in earlier cases and states that Articles 6(1) and 7(1) of the Directive 93/13 must be interpreted as meaning that the national court, which has found of its own motion that a contractual term is unfair, is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. It is obvious that in delivering this opinion the CJEU relied on the standards of protection based on the idea of a position of a consumer as a weaker party which are provided by Directive 93/13 and reaffirmed in the case law of CJEU (see *Pénzügyi, Banco Español de Crédito*).

Nevertheless, the *Aziz* case takes a step further in providing adequate consumer protection not only in ordinary civil proceedings but also in enforcement proceedings. According to Spanish national law it is not possible to claim that terms of the loan agreement are unfair in mortgage enforcement proceedings. Therefore after the conclusion of the enforcement proceedings, Mr *Aziz* complained in separate proceedings that a term of the loan agreement was unlawful. A com-

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[18] CJEU, case C-488/11, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, ECLI:EU:C:2013:341.

[19] CJEU, joined cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, para. 27.

plaint was made in separate declaratory proceedings. However, the complaint brought in those proceedings cannot influence enforcement. In the reference for preliminary ruling the CJEU was asked whether the national procedural rules, which preclude the ground of objection that terms are unlawful, were compatible with Directive 93/13. The national court also asked whether individual terms of loan agreements are unlawful.[20]

In the *Aziz* case special attention should be given to the opinion of AG *Kokott* who clearly distinguishes the level of consumer protection which should be provided in ordinary civil proceedings in comparison to the level of protection which should be guaranteed to consumers in enforcement proceedings. Namely, in *Banco Español de Crédito* the CJEU concluded in relation to a judicial order for payment procedure, that in order to safeguard the principle of effectiveness in connection with Directive 93/13 a national court is even required, before the adoption of the order for payment against which the consumer could then lodge an objection, to assess of its own motion whether terms contained in a contract are unfair, provided that the court has all the legal and factual elements necessary for that task available to it. There is a significant risk that the consumer will not lodge the objection required. But as AG *Kokott* emphasizes the main difference between *Banco Español de Crédito* and *Aziz* is the nature of the proceedings. On the one hand, in *Banco Español de Crédito the* national court delivered a decision in a simplified order for payment procedure which by its nature is an adversarial ordinary judicial proceeding. On the other hand, in *Aziz* the limitation of grounds of objection were questioned although enforcement proceedings are aimed at simplified realization of the creditors claim. Also, the possibility of the court to examine facts and evidence in enforcement proceedings is restricted. Having that in mind AG *Kokott* points out that in the *Aziz* case an enforcement order already exists in the form of the notarial instrument and it must be recognised that the creditor has an interest in seeking enforcement quickly. Through the procedural organization of the enforcement proceedings themselves and a comprehensive exclusion of grounds of objection in those proceedings, the legislature pursues the

[20] Opinion of AG *Kokott* to CJEU, case C-415/11, *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona and Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164. para. 3.

aim of being able to execute enforceable claims quickly. Accordingly AG *Kokott* concludes that it would not seem absolutely necessary to regard it a priori as an excessive impediment to the legal protection of the consumer if, by initiating proceedings, the consumer must first establish the conditions so that the court hearing the case can assess terms of the agreement.

Regardless of the fact that there was no need in the *Aziz* case to answer the question whether the consumer must have the possibility explicitly in the enforcement proceedings to claim that a term of the loan agreement is unfair. Nor was it necessary to clarify whether it can be inferred from *Banco Español de Crédito* that the court hearing the enforcement proceedings must also assess of its own motion the effectiveness of individual contractual terms, which may have effects on enforcement. In my opinion, the opinion of the AG *Kokott* in *Aziz* case is crucial. It not only establishes a link between rights granted under Directive 93/13 and procedural protection under national law but it may also be regarded as a starting point for the analysis and understanding of the recent decision of the CJEU in *Erste Bank* case and the opinion of the AG *Szpunar* in *Finanmadrid* case, which will be discussed further later.

After *Aziz*, in subsequent cases, by introducing a more elastic interpretation the CJEU strengthened the proceduralization of the Directive 93/13 and also enabled application of the CFR to the Directive 93/13.[21] So, it is necessary to review the judgments in *Sánchez Morcillo*[22] and *Kušionová* case[23] since in these cases CJEU introduced a new element by examining if adequate protection of fundamental (human) consumer rights was provided in terms of a right to effective remedy, to a fair trial and to equality of arms according to Article 47 as well as respect for private and family life according to Article 7 CFR. The *Sánchez Morcillo* case was also the one in which, by reference for preliminary ruling, which was made regarding a question if the fact that in enforcement proceedings the debtor was able to appeal against

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21 *Della Negra*, (fn. 3), p. 1019.

22 CJEU, case C-169/14, *Juan Carlos Sánchez Morcillo i María del Carmen Abril García protiv Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099.

23 CJEU, case C-34/13, *Monika Kušionová v SMART Capital, a.s.*, ECLI:EU:C:2014:2189.

the order upholding the debtor's objection against the mortgage proceedings, but was not provided with a right of appeal against an order dismissing his objection, the CJEU was in a position to examine the level of procedural protection guaranteed to consumers in enforcement proceedings. Since, according to the position of the CJEU earlier case law regarding interpretation of Directive 93/13 on protection of consumers as a weaker party (*Aziz*) also refers to national enforcement proceedings, CJEU concluded that Article 7(1) of the Directive 93/13, read in conjunction with Article 47 CFR, should be interpreted as precluding a system of enforcement, such as that at issue in the main proceedings, which provides that mortgage enforcement proceedings may not be stayed by the court of first instance, which, in its final decision, may at most award compensation in respect of the damage suffered by the consumer, inasmuch as the latter, the debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the seller or supplier, the creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disapplied. It is important to notice, that in the case at hand the CJEU disregarded the opinion of the AG *Wahl* according to whom neither the principle of effectiveness, envisaged for the purpose of protection pursued by Directive 93/13, nor the right to effective judicial protection precludes a national procedural provision under which, in mortgage enforcement proceedings, the right to lodge an appeal is restricted to an appeal against an order discontinuing enforcement or disapplying an unfair term. The opinion of AG *Wahl* was modelled on a comparison to the situation on which the CJEU had to rule in the *Aziz* case. AG *Wahl* pointed out that to go by the conclusions to be drawn from the case law, and in particular those in *Aziz* case, it appears that the rights consumers derive from Directive 93/13 are effectively protected, for, on the one hand, consumers are able to rely on the existence of unfair terms before the court hearing the objection to mortgage enforcement and, on the other hand, the court is able to raise of its own motion the existence of such terms and, where appropriate, stay enforcement of the mortgage.

In contrast to the *Sánchez Morcillo* case, the CJEU examined in the *Kušionová* case whether in the light of Articles 38 and 47 CFR, Directive 93/13 should be interpreted as precluding the legislation of a MS, such as the one at issue in the main proceedings, which enables a

creditor to recover sums on the basis of unfair contract terms by enforcing a charge against a consumer's immovable property without any assessment of the contract terms by a court and despite there being a dispute as to whether the contract term at issue is unfair. There are several aspects which distinguish *Kušionová* case from previously analysed cases. Firstly, in the case at hand CJEU examined if extra-judicial enforcement of the charge on immovable property provided adequate consumer protection in accordance with the Directive 93/13. However, in *Kušionová* case CJEU took the view without waiting for the opinion of the AG. Still, the reasoning of CJEU was influenced by the opinion of AG Wahl in *Macinský*,[24] who considered the four-month period to contest the public auction as sufficient for the consumer to take the first step and defend his or her rights before the courts. In the case at hand CJEU thus considered the Directive 93/13 not to be contrary to national legislation such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extra-judicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine. However, it should be noted that in the case at issue CJEU did not regard consumers as weaker parties (as in the *Aziz* case) but instead based its decision on a model of a consumer who is reasonably well informed, observant and circumspect. The CJEU takes the view that the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the *total inertia* on the part of the consumer concerned.[25]

Finally, in the light of the presented case law it should be examined whether CJEU in the *Erste Bank* case and AG *Szpunar* in his opinion in the *Finanmadrid* case follow the case law established through earlier judgments including *Aziz* as the landmark case or whether the recent

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[24] CJEU, case C-482/12, *Macinskýi v Macinská,* ECLI:EU:C:2014:182, In *Macinský* case a judgment was not delivered because the national court withdrew the reference for preliminary ruling after the opinion of AG *Wahl* (Opinion of AG *Wahl* to CJEU, case C-482/12, *Macinskýi v Macinská*, ECLI:EU:C:2013:76).

[25] *Della Negra*, (fn. 3), p. 1022 et seq.

developments in *Macinský* and *Kušionová* case indicate a change in the position of CJEU regarding the level of procedural protection which should be guaranteed to consumers in enforcement proceedings according to Directive 93/13.

C. Recent Developments in CJEU's Case Law – "Erste Bank" and "Finanmadrid" Case

In the *Erste Bank* case a reference for preliminary ruling was made to CJEU challenging national legislation which in the event of a breach by a consumer of an obligation contained in a document in due form drawn up by a notary, enables the other party to the contract to avoid *inter partes* proceedings before a court and assert its claim to the amount it indicates by issuing what is known as an enforcement clause, without any examination being possible of the unfairness of a term of the underlying contract. Namely, in the case at issue Mr *Sugár* signed an acknowledgment of debt drawn up as a notarised document in favour of *Erste Bank* which upon failure of Mr *Sugár* to fulfil his contractual obligations terminated the loan agreement and requested the affixation of the enforcement clause on the acknowledgement of debt. Although Mr *Sugár* requested the notary to cancel the enforcement clause affixed to the acknowledgement of debt, arguing that the agreement with *Erste Bank* contained unfair contract terms, the notary rejected the application of Mr *Sugár* on the ground that it was not vitiated by any irregularity. Namely, according to Hungarian national regulation the notary is only allowed to verify if the instrument complies with the formal and substantive requirements without being able to examine the possible unfairness of the contract terms in the loan agreements. CJEU concluded that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as meaning that they do not preclude national legislation, such as the one at issue in the main proceedings, which allows a notary who drew up, in due form, an authentic instrument concerning a contract concluded between a seller or supplier and a consumer, to affix the enforcement clause to that instrument or to cancel it when no review of the unfairness of the contractual terms has been performed at any stage. There are several aspects crucial for the understanding of the opinion of the CJEU in the case at hand.

Significantly, the *Aziz* case which concerned the link between declaratory proceedings and enforcement proceedings stressed that review on unfair contract terms *ex officio* should preferably be conducted in the course of the declaratory proceedings and only in exceptional cases in enforcement proceedings. Upon closer examination of the CJEU case law concerning *ex officio* judicial review of unfair contract terms it appears that the obligation of the judicial review is generally imposed on national courts and not on other entities entitled to conduct proceedings and usually concerns ordinary judicial proceedings or declaratory proceedings in which the validity of the agreement is challenged although in some cases enforcement proceedings have been initiated. In that context the CJEU has pointed out that in *Banco Español de Crédito* and *Banif Plus Bank* it has been determined that the possibility for a notary to initiate the enforcement of a contract, without examining during the procedure for affixing the enforcement clause that for its cancellation, the unfairness of the various clauses, may infringe Directive 93/13 even though it already has the legal and factual elements necessary for that task available to it.[26] However, CJEU held that different nature and function of a non-contentious notarial extra-judicial enforcement proceedings in comparison to ordinary judicial proceedings in the case at issue provided for justification of its view.[27] It seems that the CJEU took into account the opinion of AG *Cruz Villalón* who explained that the Directive 93/13 cannot be interpreted as containing any provision concerning the role which may or must be devolved to notaries concerning the review of unfair contract terms, especially if it would concern the change in national legislation of MS which would impose an obligation on a notary to conduct contentious proceedings in order to determine the unfairness of the contract terms.[28] Therefore, the CJEU concluded that the Directive 93/13 does not regulate the issue of whether, in circumstances in which national legislation attributes notaries with the power to affix the enforcement clause to an authentic instrument concerning a contract, and subsequently to cancel it when it has

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[26] CJEU, case C-32/14, *ERSTE Bank Hungary Zrt. V Atilla Sugár*, ECLI:EU:C:2015:637, para. 46.

[27] Ibid., para. 29.

[28] Opinion of AG *Cruz Villalón* to CJEU, C-32/14, *ERSTE Bank Hungary Zrt. V Atilla Sugár*, ECLI:EU:C:2015:424, paras. 67-72.

expired, the authority should be extended to notaries to exercise powers which fall directly within the scope of judicial function.[29]

A parallel can be drawn between *Kušionová* and the case at hand beyond the mere assessment of the CJEU that the Directive 93/13 does not preclude national legislation which does not provide for a possibility of review of unfair contract terms *ex officio* in extra-judicial enforcement proceedings. Namely, instead of regarding consumer as a weaker party the CJEU based on the approach in *Kušionová* concluded that the need to comply with the principle of effectiveness cannot be stretched so far as to make up fully for the *total inertia* on the part of the consumer concerned.[30] But unlike in *Kušionová,* the CJEU failed to consider the procedural protection provided to consumers in extra-judicial enforcement proceedings in the light of Articles 7, 38 and 47 CFR in the case at hand.

In the *Finanmadrid* case a reference for preliminary ruling was made regarding the question whether the Directive 93/13 and Article 47 CFR must be interpreted as precluding national legislation such as that currently governing the Spanish order for payment procedure, which does not mandatorily provide either for the examination of unfair terms or the intervention of the court, except when the *Secretario Judicial* considers it expedient or the debtors lodge an objection, because that legislation hinders or prevents examination of their own motion by the courts of contracts which may contain unfair terms. The referring court also wanted to know if Directive 93/13 must be interpreted as precluding national legislation, such as the Spanish law, that does not permit a court to consider, of its own motion and *in limine litis*, during subsequent enforcement proceedings relating to an enforceable instrument (a reasoned decision issued by the *Secretario Judicial* bringing the order for payment procedure to a close) whether the contract giving rise to the reasoned decision whose enforcement is sought contained unfair terms, because under national law the matter is *res judicata*.

The CJEU has not delivered a judgment yet, but the opinion of the AG *Szpunar* provides certain guidelines. AG *Szpunar* pointed out that

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[29] CJEU, case C-32/14, *ERSTE Bank Hungary Zrt. V Atilla Sugár*, ECLI:EU:C:2015:637, para. 48.

[30] Ibid., para. 62.

the *Finanmadrid* case differs from *Erste Bank* because it concerns the possibility of a *Secretario Judicial* in an order for payment procedure or a court during subsequent enforcement proceedings to review unfair contract terms *ex officio.* Although AG *Szpunar* took the view, that such review should be provided in enforcement proceedings but only if it was not provided in the stage of examination of an application for an order for payment in the simplified procedure conducted by *Secretario Judicial*, he explained that it could not be considered to be a preferrable solution and it would be more desirable to oblige the *Secretario Judicial* (as an employee of the justice system) to conduct the review of unfair contract terms *ex officio*. Apart from the fact that such review in enforcement proceeding would be contrary to *res judicata*, it would also be difficult to provide for adequate examination of facts and evidence in enforcement proceeding since it is not adapted to the examination of the merits of the case. AG *Szpunar* even recalls that unified European procedures in civil and commercial matters[31] also do not provide for review as to the substance in enforcement proceedings. Another important part of his opinion is the view on compatibility of the Spanish law with fundamental right on effective legal remedy laid down in Article 47 CFR. AG *Szpunar* pointed out that the level of procedural consumer protection under Directive 93/13 is higher than the level of protection guaranteed in Article 47 CFR and that in this sense Article 47 CFR does not preclude national legislation such as the one at issue in the main proceedings. It remains to be seen, if the CJEU will follow the delivered opinion. AG *Szpunar* himself has expressed certain doubts in that respect.

D. Conclusion

Undoubtedly, interpretation of the Directive 93/13 in the case law of the CJEU has affected procedural autonomy of MS regarding regulation of ordinary judicial proceedings, by developing the requirement of review of unfair contract terms *ex officio* providing for interim relief

[31] This refers to the European Payment Order (Regulation (EC) No. 1896/2006 creating a European order for payment procedure, OJ L 399 of 30/12/2006, p. 1) and European Enforcement order (Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims, OJ L 143 of 30/4/2004, p. 1).

until review of unfair contract terms is provided in declaratory proceedings, regardless whether in the case at issue ordinary or simplified proceedings were conducted by the national court. However, *Erste Bank* raised the question whether the same level of consumer protection could be expected in proceedings conducted by a notary, especially if they include extra-judicial mortgage enforcement proceedings. In *Finanmadrid* the question, whether the court should be able to test the unfairness of the contract terms, on which the order for payment was based, even if the consumers did not raise this issue and the *Secretario Judicial* did not analyse contract terms, before rendering the final order for payment, was raised in enforcement proceedings against a consumer who defaulted on his credit payments but in this case, for a movable property (motor vehicle) instead of immovable property.

The analysis of the CJEU's case law reveals several key points regarding the development of procedural consumer protection at EU level which should be taken into consideration:

– Should *ex officio* review of unfair contract terms be limited to ordinary civil proceedings (including declaratory proceedings and summary proceedings) or should it be provided in enforcement proceedings as well, if the question of unfairness was not raised at an earlier stage?

– Should *ex officio* review be conducted only by courts? Would a potential obligation of a notary to conduct the unfairness test be contrary to the position of notary as an entity which does not exercise powers which fall directly within the scope of judicial function?

– If the development of standards of procedural consumer protection in the CJEU's case law are attributed to the processes of "hidden" and more recently even "open" constitutionalization of European Private Law to which according to the legal literature the CJEU resorted in order to provide over-indebted consumers with legal protection in cases in which inadequate protection can cause eviction from their family homes, how is the opinion of AG *Szpunar* in *Finanmadrid* to be understood? Is the possibility of *ex officio* review in enforcement proceedings concerning movable property a sign of the further reach of Directive 93/13 in comparison to Article 47 CFR?

– Finally, is it possible to restrict the reasoning of the CJEU to the case at issue at the national court, which raised the reference for preliminary ruling, given that it might also influence national courts of other MS in both delivering their judgments as well as raising similar references to the CJEU? Or is the CJEU prepared to additionally affect procedural autonomy of MS in order to provide for harmonized standards of consumer protection in ordinary civil proceedings as well as in enforcement proceedings?

The judgment of the CJEU in *Erste Bank* is based on a distinction between the function of a notary and of the national court. In its interpretation the CJEU points out that the Directive 93/13 does not regulate the issue whether a notary should exercise powers which fall directly within the scope of judicial function. Although the CJEU did not adopt a favourable view to the evaluation of unfair contract terms by a notary, at the same time, in his opinion in *Finanmadrid* case AG *Szpunar* emphasized that although the *Secretario Judicial* acts as an "employee of the judicial system" (not a judge of the national court) he should be able to review unfair contract terms in a simplified order for payment procedure. In light of the opinion of AG *Szpunar*, it is unclear whether the position of a notary could be understood as a position of a commissioner or assistant of the court because in some national legal systems of MS notaries (at least indirectly) participate in conducting extra-judicial enforcement proceedings. In his opinion AG *Szpunar* takes one crucial step further from the established case law in concluding that if review of unfair contract terms has not been provided in the course of ordinary proceedings (in this case summary proceedings) it should be available in the course of enforcement proceedings, although he points out that it perhaps would not be the best possible solution. Still, the doors are now open to the possibility and it remains to be seen how the CJEU will respond. Another important point of discussion was raised by the AG *Szpunar* by his estimation that the level of consumer protection guaranteed in Directive 93/13 is higher than the one provided for in CFR. Since it concerns the interplay between procedural consumer protection and protection of fundamental rights of consumers it will most likely not pass unnoticed within academia.

Some Aspects on the Legal Treatment of the ECHR in Albanian Legislation

Nadia Rusi[*]

Abstract

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a multilateral treaty that regulates the European public order. Signed in 1995 by the Albanian state, the ratification of the ECHR was part of the obligations assumed by Albania in the framework of accession to the Council of Europe. The new Constitution of Albania (1998) confers a completely new approach to the report of international law with national law in comparison with the previous constitutional provisions. Within the framework of monistic systems, the Albanian Constitution recognizes the supremacy of international law in relation to domestic law. In particular, the Albanian Constitution recognizes a constitutional status to the ECHR. Therefore, this article, through an analytical approach, aims to study the place the ECHR has within the national legal order on the basis of the review of legal and doctrinal resources in this area as well as the jurisprudence of the Constitutional Court.

A. Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is a multilateral treaty, signed in Rome on 4 November 1950 and entered into force three years later (3 September 1953) after its ratification by ten states. It is the result of cooperation between the member states of the Council of Europe (CoE) to create a joint document, with the power to guarantee fundamental rights for all individuals within the jurisdictional area of these states. In this regard, the ECHR has mainly regional character. However, in

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many cases, the European Court of Human Rights (ECtHR) goes beyond that when it states:

"Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'".[1]

At the moment the ECHR is ratified by a CoE member state, it is applicable, through the incorporation in the domestic law of that State, within the catalogue of rights that it contains. As noted by *Stone*:

"The ECHR is no longer a self-contained regime (if it ever was), operating in its own separate sphere. Instead, the Convention has been steadily incorporated into domestic law."[2]

The legal status that the ECHR occupies in the hierarchy of applicable legal norms in a state is different from country to country. Constitutions in force in these states contain various provisions regarding the relationship between the ECHR and national law. Various authors, analysing the content of the constitutional provisions in different countries have concluded that the status of the ECHR in the domestic legal order can be summarized as follows:[3]

a) There are some constitutions characterized by the acknowledgment of a constitutional rank given to the ECHR in the domestic legal order; e.g. Austria, Netherlands (essentially monist status).[4]

b) Some states are characterized by the acknowledgment of a super-legislative ranking in the domestic legal order; e.g. France, Belgium, Spain and Portugal.

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1 ECtHR, no. 5310/71, *Ireland v. The United Kingdom*, judgment of 18/1/1978, para. 239.

2 *Stone Sweet*, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court, Faculty Scholarship Series, Paper 71, 2009, p. 8.

3 *Montanari*, 2002 cited from *Martinico*, National Judges and Supranational Laws: Goals and Structure of the Research in: Martinico/Pollicino (eds.), The National Judicial Treatment of the ECHR and EU Laws, 2010, p. 12 et seq.

4 In this group of countries is part even Albania. See below the status of ECHR on the Constitution of the Republic of Albania.

c) Other states are characterized by the acknowledgment of a legislative ranking in the domestic legal order; e.g. Scandinavian countries, United Kingdom.

The place of the ECHR in the hierarchy of the legal system of a country is important as concerning the obligation of the State to implement the ECHR and the decisions issued by the ECtHR against the state, also under obligation to their respective states to take measures in order to adapt domestic legislation in accordance with the provisions of the Convention. It also takes value in terms of international conflict with national norms in a country. For example, for those states that give the ECHR an on-legal status, it applies the principle that "internal laws contrary to the ECHR are inapplicable". Moreover, this whole process is important in the context of the possibility of the direct application of the ECHR by national courts to protect the rights of vulnerable citizens.

The rights contained in the text of the ECHR become part of the national internal system through the incorporation of the Convention into domestic law. As *Polakiewicz* has emphasized, the ECHR does not require any specific mode of incorporation and, for many decades, some States refused to incorporate it.[5] Until the 80's, for example, the French position was that the Convention had virtually no legal status in the internal order.[6] This attitude would lead states into a situation where in case of a violation of rights under the Convention, countries can be discharged from liability only by compensating the applicant. According to *Keller & Stone*, when the legal status of the ECHR is denied in the internal order, a state would not see the judgments of the ECtHR as binding and would not necessarily amend its domestic legislation in order to align it with the text of the Convention, even though the ECHR had decided in the specific case that the domestic law was in violation of the Convention.[7] This was the former French stance. However, the study of the status of the ECHR into domestic law of states shows a departure from this former French approach towards

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5 *Polakiewicz*, 2001 cited from *Stone Sweet/Keller*, Assessing the Impact of the ECHR on National Legal Systems, Faculty Scholarship Series, Paper 88, 2008, p. 682.

6 Ibid.

7 Ibid., p. 683.

a mechanism of incorporating the ECHR into domestic law. Thus, the difference between countries lies only in the way and the methods selected for the incorporation of the ECHR into domestic law. Therefore, it is worth noting that despite the different status that the ECHR has in the domestic legal order, through incorporation into domestic law, it becomes an important instrument of protection of human rights in all Contracting States.

B. Historical Aspects of the Ratification of the ECHR by Albania

The obligation of the Albanian state to ratify the ECHR is a result of the membership of Albania in the CoE. On 4 May 1992, Albania applied to join the CoE. By Resolution (92)9 of 21 May 1992, the Committee of Ministers asked the Parliamentary Assembly to give an opinion, in accordance with Statutory Resolution (51)30A. Starting from May 1992 the reporters of the Monitoring Committee of the Assembly held several successive visits to the country.[8] The Assembly evaluated that Albania, in accordance with Article 4 of the Statute, was capable and willing to fulfil the conditions for membership to the CoE, as defined in Article 3 which states that:

"Any member of the Council of Europe must accept the principles of the rule of law and the principle that any person within its jurisdiction enjoy the same human rights and fundamental freedoms, and collaborate sincerely and effectively to the fulfilment of its goals."

Also, the Parliamentary Assembly of the CoE trusted that Albania shall interpret the commitments taken fully in line with those defined in paragraphs 13 and 16 of its Statute, so it expressed a favourable Opinion (Opinion no. 189, 1995[9]), by accepting the request for membership forwarded by the Albanian authorities. In the same opinion, the Parliamentary Assembly set as a liability to the Albanian government that:[10]

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8 Parliamentary Assembly, Opinion no. 189 (1995) on the Application by Albania for membership of the Council of Europe, www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13928&lang=en (1/12/2015).

9 Ibid.

10 Ibid., para. 17.

"to sign the European Convention on Human Rights at the moment of accession; to ratify the Convention and Protocols Nos. 1, 2, 4, 7 and 11 within a year; to recognise, pending the entry into force of Protocol No. 11, the right of individual application to the European Commission of Human Rights and the compulsory jurisdiction of the European Court of Human Rights (Articles 25 and 46 of the Convention)".

Pursuing this undertaking, the Republic of Albania signed the ECHR and its Protocols 1, 2, 4, 7, and 11 on 13 July 1995, the same date as it acceded to the CoE. In a separate document signed on the same date, the Republic of Albania undertook to ratify the Convention and its additional protocols within one year from the date of the signature.[11] In complying with these undertakings, the Republic of Albania ratified the ECHR by Law No. 8137 of 31 July 1996[12] and deposited the instruments of ratification with the Secretary General of the CoE on 2 October 1996. On the same date, the Republic of Albania deposited the declaration recognising the competence of the European Commission of Human Rights (on the basis of former Article 25) and that of the ECtHR under the condition of reciprocity (on the basis of the former Article 46(2) of the Convention.[13]

[11] Council of Europe, Ministry of Justice in Albania, Report on the Compatibility study of the Albanian Legislation with the requirements of the European Convention on Human Rights, 2001, p. 25.

[12] Official Journal of the Republic of Albania, 1996, No. 20, p. 724.

[13] Albania, Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms, Article number: Ex-25.

C. The Legal Status of the ECHR in the Albanian Legal System

I. The Status of the ECHR between the Law for Main Constitutional Provisions (1991) and the Constitution of the Republic of Albania (1998)

The ECHR was ratified[14] by the National Assembly of the Republic of Albania on the proposal of the Council of Ministers, in support to Article 16 of Law No. 7491, dated 29 April 1991 "[o]n the main constitutional provisions".[15] If we analyse all the provisions contained in this law, it has to be noted that a provision regarding the incorporation of international agreements into domestic law as well a provision about the status to recognize international law within the Albanian legal system is missing. Article 23 of Law No. 7491, dated 29 April 1991 "[o]n the main constitutional provisions" stipulates only that "[l]aws are promulgated not later than 15 days after approval and enter into force 15 days after their publication in the Official Gazette, except the cases when otherwise provided by the laws and cases of organic laws".

However, with the entry into force of the Constitution of the Republic of Albania,[16] the ECHR became part of the Albanian legal system. This is because Article 180(1) of the Constitution of the Republic of Albania provides that "International agreements ratified by the Republic of Albania before the entry into force of this Constitution are considered ratified according to this Constitution". Based on this prediction, given that the ECHR is ratified before the entry into force of the Constitution (1998), then the forecast set in the aforementioned article applies to the ECHR.

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[14] Article 1 of Law No. 8137, dated 31/7/1996, Official Journal 4/1991 of 17/7/1991, p. 145: "On the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms" decides that is ratified "Convention for the protection of human rights and fundamental freedoms".

[15] Law No. 7491, dated 29/4/1991: "For major constitutional provisions", Official Journal 4/1991 of 17/7/1991, p. 145 et seq.

[16] The Albanian Constitution was approved through a referendum and by the Parliament by Law No. 8417, dated 21/10/1998, Official Journal 28/1998 of 7/12/1998, p. 1073.

Let us go on to see what the constitution provides about the status of international law in domestic law.[17] In the Albanian constitution, the ratio between national and international law is defined by Articles 5, 116, 122. Thus, Article 5 of the Constitution stipulates that "[t]he Republic of Albania applies international law that is binding upon it."

In a first analysis, it is worth mentioning the fact that the Albanian Constitution regulates expressively only the status of (i) the international agreements that are ratified by the Assembly (hereafter referred as the Parliament, as well as those that do not require a ratification by Parliament (Articles 116, 121,122); (ii) the norms adopted by international organization enacted by organisation where Albania is a contracting party (Articles 122(3) and 123) and, (iii) the special status of the ECHR (Article 17).[18]

Article 116 of the Constitution determines the hierarchy of legal norms that are effective in the entire territory of the Republic of Albania. This hierarchy of normative acts in the Republic of Albania contains:

a) the Constitution;

b) ratified international agreements;

c) the laws;

d) normative acts of the Council of Ministers.

As we see, the Constitution of the Republic of Albania belongs to that category of constitutions that recognize to ratified international agreements an on-legal status. It is explicitly defined in Article 122(2) according to which "[a]n international agreement ratified by law has priority over national laws that do not agree with" it. Thus, in a situation of conflict between international agreements and domestic law, the Government is obliged to implement the provisions of the international agreement regulating the issue in question, regardless of what domestic law provides. In the same regard, Article 122(3) of the Constitution provides that "the norms issued by an international organization have priority in case of conflict upon the right of the coun-

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[17] The Albanian Constitution provides for a monist system of the relationship between international law and national one.

[18] *Alimehmeti/Caka*, The Relationship between international and domestic law in the Albanian legal system, in: Luca (ed.), International Constitutional Law, 2014, p. 2.

try when in the agreement ratified by the Republic of Albania over the participation in the organization, is expressly predicted for direct application of the norms issued by it."

II. Publication of Ratified International Treaties in the Official Journal

The interpretation of Article 122(1) of the Constitution is important, which defines the conditions that must be met for an international agreement to become part of the internal system. In an expressive way Article 122(1) provides that "[a]ny international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Gazette of the Republic of Albania. It is implemented directly, except when it is not self-applicable and its implementation requires issuance of a law." As we see, the Constitution of the Republic of Albania accepts the possibility of direct application of international agreements. However, it sets as an important procedural requirement for the incorporation of international law into the national legal system "the obligation to publish the agreement in the Official Gazette". In addition to this provision and Article 117 of the Constitution stipulates that "[l]aws, regulations of the Council of Ministers, ministers, other central institutions become effective only after they are published in the Official Journal",[19] and that "[i]nternational agreements ratified by law promulgated and published according to the procedures provided for by law. The promulgation and publication of other international agreements is done according to law."[20] For this reason, non-disclosure of a ratified international agreement, in the Official Journal constitutes a violation of the forecast held in Section 122(1) of the Constitution, as well as in Article 117(1) and (3) thereof. This obligation takes even more importance in the case of international agreements that has the nature of self-applicability (such as the ECHR).

So, if we return the ECHR, it is worth to note that in accordance with the Constitution of the Republic of Albania, special requirements for

[19] Article 117(1) of the Constitution of the Republic of Albania.

[20] Article 117(3) of the Constitution of the Republic of Albania.

publication of international agreements in the Official Gazette, has not been met for a relatively long time, in the case of the ECHR. ECHR has not been published in the Official Journal since 1996 when it was ratified in July 2010.[21] So for a period of 14 years ECHR is not published in the Official Journal. As it is accepted by some authors,[22] it is true that this procedure was not a condition under the previous Principal Constitutional Provisions-Law. No. 7491 of 29 April 1991. But, by the same authors is noted that, it is also true that under the provisions of that constitutional setting, international agreements as such could not become part of the Albanian domestic legal system. So, according to them, if we accept that they were applicable within the domestic legal system of the Republic of Albania, they could only have been so via transformation of the international agreement by a domestic legal act (law, degree, decision of the Council of Ministers) as part of the domestic system. In these conditions, we can say that there was an objective lack on the correct application of the ECHR within the Albanian legal system. And if we accept that in such a case (not publication of international agreements in the Official Journal) solution can take place either through the application procedure *renvoi* or through the procedure of transformation (typical of dualist systems, not monistic), we may conclude that Albanian authorities have tended towards the former option.

III. The Special Status of the ECHR in the National Legal System

European Convention of Human Rights, unlike all other conventions and agreements with international character occupies a special position in the Albanian legal framework. The special status of the Convention is recognized by the Constitution of the Republic of Albania, which in its Article 17(2) expressly refers to the ECHR in its text.

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21 Official Journal, no. extra, July 2010, www.qbz.gov.al/botime/permbledhese/Konventa%20Europiane%20per%20te%20Drejtat%20e%20Njeriut.pdf (1/12/2015).

22 See *Bianku*, Human Rights Background and evolution in Albania and compatibility of the Albanian Legislation with Articles 1, 14, 15, 16, 17, 18 of the Convention, Article 3, protocol 1, Articles 2, 3 & 4 Protocol 4 and Article 1 Protocol 7 to the European Convention on Human Rights, in: Council of Europe, Ministry of Justice in Albania, Report on the Compatibility study of the Albanian Legislation with the requirements of the European Convention on Human Rights, 2001, p. 25.

Article 17(1) of the Constitution provides the possibility of imposing restrictions of rights and freedoms provided in the Constitution, only by law for a public interest or for the protection of the rights of others. Restrictions in any case must be proportionate to the situation that has dictated it. However, according to Article 17(2) of the Constitution "[t]hese limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights". This means that the ECHR will serve as a minimum standard with regard to the limitation of rights and freedoms provided for in the Constitution of the Republic of Albania. As we see, unlike any other international agreement, which under Article 116 of the Constitution has the status on-legal but under-constitutional, the ECHR takes a special status equivalent to the constitution only for "the rights and freedoms set forth in the Constitution". In this regard, the ECHR is not only directly applicable in Albanian legislation, but also enjoys constitutional status. Albanian judges can use the ECHR as a source of conflict resolution in respect of fundamental rights and freedoms equally and with the same value as the Constitution. As noted by several authors,[23] it is interesting to note that in some cases the United Chambers of the Supreme Court, when quoting the applicable law in matters of restricting human rights refer first ECHR and then the Constitution. Thus, the ranking they make to the applicable law is: ECHR, the Constitution, a special law regulating specifically the matter at issue and a general law of reference.[24] According to these authors, there are no arguments by the courts related with the doctrine of the supremacy of the European Convention of Human Rights to the Constitution. However, it is worth to further follow the practice of the Court to see if this placement of so-called "casual" may be followed by legal arguments in favour of supporting the supremacy of the ECHR.

The special status that has the ECHR is well accepted by the Albanian Constitutional Court on some issues. The Constitutional Court in the reasoning of its decisions has appreciated that adherence to the ECHR is not only its obligation but also of the courts of ordinary juris-

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[23] *Alimehmeti/Caka*, (fn. 18), p. 9.

[24] Unifying Criminal Decision of the High Court No. 3, dated 27/9/2002, p. 265; Joint College Decision of the High Court No. 368, dated 10/11/2009, p. 9 et seq.

diction, especially of the Supreme Court, due to the special power as it can revise judgements and unify the judicial practice.

According to the Albanian Constitutional Court, when it comes to the treatment of fundamental human rights "the ECHR has exclusive competence in our national system. This competence is recognized by our domestic legal system, for purposes of the application of Article 122 of the Constitution, but also of its Article 17(2), bringing an obligation that the decisions of the ECHR apply directly. Upon ratification of the ECHR, the Assembly of the Republic of Albania, as a representative of popular sovereignty, has taken over duties that are applicable to all state bodies of the Republic of Albania, including the courts of all levels, regardless of their type".[25] Moreover, the Constitutional Court notes that "if [there] are cases of legislative vacuum, or when legal provisions are contrary to the provisions of the Convention, the judges at each level directly implement decisions of the ECHR in accordance with Article 122 of the Constitution and Articles 19 and 46 of the ECHR."[26]

With regard to the above, we can conclude that, given the special status that Article 17(2) of the Constitution grants the ECHR regarding the restriction of fundamental rights and freedoms, we can say that the issues that raise this problem, the right of the last word belongs to the Strasbourg Court and not to the Supreme Court or the Constitutional Court of Albania. Moreover, the decision rendered by the court of Strasbourg in a specific case could potentially entail the need of jurisprudential changes, even legal ones, in Albania.[27]

D. Conclusions

With regard to the status of international law in relation to domestic law, Albania is part of a monistic system. The Albanian Constitution grants an important position to ratified international treaties in the application of international law within the jurisdiction of Albania. In

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[25] Constitutional Court Decision, No. 20, dated 1/6/2011.

[26] Ibid.

[27] *Zaganjori*, E drejta nderkombetare ne gjykimet dhe vendimet e gjykatave kombetare, Jeta Juridike No. 2, 2005, p. 12.

the pyramid of legal norms of the Albanian legal framework, ratified international treaties rank immediately after the Constitution. This means that they have supremacy over domestic law in case of conflict between national and international law. Unlike all international agreements ratified by the Republic of Albania, the ECHR occupies a special position. Article 17(2) of the Constitution provides that the Convention, concerning the limitation of fundamental rights, is at the same level as the Constitution.

In this context it is important to stress that the ECHR provides for a minimum standard of protection. Article 122(1) of the Constitution stipulates that "[a]ny international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Gazette of the Republic of Albania. It is implemented directly, except when it is not self-applicable and its implementation requires issuance of a law."

The Constitution of the Republic of Albania accepts the possibility of the direct application of international agreements, but set a procedural condition as important to the incorporation of international law into the national legal system, "the obligation to publish the agreement in the Official Gazette". In the case of the ECHR, the Albanian legislator did not implement the Convention requirement of publication in the Official Journal for almost 14 years. This calls into question whether the ECHR was actually part of the Albanian domestic system according to constitutional provisions or if the ECHR is implemented in Albania under the procedure *renvoi* without actually being part of it.

The Importance of Comparative Studies for the Process of the Approximation of Legislation to the EU Law

Altin Shegani[*]

Abstract

The approximation of law is a unique condition of membership in the European Union for countries aspiring to join the European family, as in the Albanian case. This means that the Albanian state must align its national laws, rules and procedures in order to give effect to the entire body of EU law contained in the acquis communautaire. To realize the transposition process in adopting or changing national laws, rules and procedures with the requirements of the relevant EU law, there are some steps to follow, and the comparative studies help to create a bridge for facilitating the communication between different legal orders. Basically, the paper analyses how the comparison is a necessary method of legal reflection: first, to create a holistic legal framework based on shared values and experiences; second, to enhance the opportunities for approximation processes of national legislation with regional or international legal instruments; and third, to facilitate the application of the already established juridical order to specific social relationships.

A. Introduction

The changes in the legal universe that have been taking place in the last few decades have increased the potential value of different kinds of comparative studies and thereby projected new objectives in the model of social organization and control.[1] *Friedrich Carl von Savigny*[2]

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[1] See *Mousourakis*, Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective, Osaka University Law Review No. 57 (February 2010), pp. 87-106.

conceived the law and the legal studies[3] as an outcome of a process and not merely the product of an act.[4] The process of the law-making constitutes a reflection of the model of the particular social order[5] to which it tends to apply. The various models of social order have resulted in a legal cultural diversity, which is deemed to be the direct consequence of the differences between civilizations. In order to overcome the discrepancies between the normative system, the science and practice of law has progressively elaborated new interpretative methods, including *inter alia* the comparative studies. Comparative studies on the micro and macro level focus on the development of legal norms and institutes, the impact of various circumstances[6] that directly influence the establishment of the legislative framework.[7] The legislative framework and the sources are described as the key elements of the landscape of a legal model.

Lawyers are inclined to compare the legal framework based on the respective manner of its creation and evolution. Based on this point of view, the comparison is a necessary method of legal reflection. Comparative law is not only important *per se*, but it certainly serves society as a whole and its interest for legal progress. Pragmatism pertaining to the causes and objectives performed by the function of social development, gives to the comparative studies in juridical matters a clear utilitarian touch.

The evolution of the interpretative method of legal norms has favoured the affirmation of comparative law as a distinct legal discipline.[8]

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2 *Friedrich Carl von Savigny*, one of the most distinguished lawyers of all times, remarkable for the publication in 1814 of the criminal "*De la Vocation de notre époque pour la legislation et la science du droit*".

3 For further details see *Shegani*, Comparative Criminal Law, 2013, pp. 7-23.

4 Quoted in *Saccco*, Lingua e Diritto, www.arsinterpretandi.it/upload/95/att_sacco.pdf (1/12/2015), p. 117.

5 *Motulsky*, Mission pratique de la Philosophie du droit, Arch. Philo. Droit 1952, pp. 175-180.

6 Such as socio-political elements.

7 These enable the distinction of the concepts and classification of offenses (crimes and misdemeanors), their elements, subjects and the respective criminal consequences.

8 See *Bozheku*, Il diritto comparato: Aspetti Generali (prima parte), 2006.

In the quest for understanding more about comparative law, *Montesquieu's* lessons become particularly useful,[9] in the sense that "in their broader sense, laws are stemming from the nature of things".[10] Each civilization establishes its own legal culture, its normative system of positive law, and its legislative standards.[11] The measure in which they change, are inter alia, a result of the analytical process of legal comparison. Nowadays, comparative legal reasoning is increasingly present in all dimensions of practice and study of law. Comparative law being integrated more and more to the right itself, as a supporting mechanism and as a fundamental technique.

Comparative studies also show how peculiar the field of legal research is. As such, this process requires a thorough understanding and knowledge of the rules applicable in different systems and legal orders, as well as the socio-political context in which they apply.[12] The comparative analysis is certainly of better quality if the ideas of the comparative lawyer are well-structured.

B. The Scope of Comparison and the Object of Comparative Studies

Comparative studies constitute in themselves a cognitive operation based on the evaluation of objects, phenomena, processes which helps to create the image of qualitative and quantitative characteristics.[13] A necessary precondition for the process of comparison is the scope of comparison,[14] also known as the areas of comparison.[15] The

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9 See *Trigeaud*, La liberte du legislateur civil selon Montesquieu, Cahiers de Philisophie Politique et Juridique de l'Université de Caen, No. 7, 1985, pp. 30-46.

10 See Esprit des Lois, l., 1.1.

11 See *Agostini*, Droit Compare, 1988, p. 9.

12 *Raig*, Preface, in: Stirn/Fairgrieve/Guyomar, Droits et en France et au Freedoms Royame-Uni, 2006, p. 7.

13 See *Udilova*, Notion de Comparaison et des moyens de son expression en francais, 2011, http://oaji.net/articles/2014/941-1404303957.pdf (1/12/2015), p. 2.

14 *Pavišić*, La Comparazione dei Principali Sistemi Europei, Corso integrativo di Diritto e Procedura Penale Comparati, Università degli Studi di Macerata, www.progettoinnocenti.it/dati/168SISTEMI%20PENALI%20COMPARATI.rtf (1/12/2015).

15 *Shegani*, (fn. 3), p. 70.

particular examination of the comparison areas helps us understand that the reference to institutional normative models is a common practice in comparative law. The different models of juridical orders are the starting point of analysis and they represent a fundamental basis for legal interpretation.[16] With regard to the object of comparison, it should be mentioned that it is directed towards what is comparable. As regards to comparability, it is necessary and crucial that there should be a common variable for each case and that they have the same meaning in every case.[17] This means that there should be at least two samples, a comparative one and another to which it is compared. The history of the creation and development of law has shown that the comparative studies are gaining significant ground. Comparative studies are oriented towards two or more important legal objects[18] whose similarities[19] and differences[20] are to be highlighted. The lawyer may use instinctively, without saying and without taking into account, the genotype to develop a conceptual reflection and produce an argument on the positive law.[21] *Vanderlinden*, proposes a solution by suggesting the dissolution of the legal concepts, to highlight from all components, the elements that do not correspond to the right one or the other, and to process in a way of continuous expression with diagrams, to which the semantic unit has all the characteristics features to distinguish one from another notion.[22] It seems that *Vanderlinden's* proposal, could serve as a starting point for all the future efforts which aim to create a way of expression of the uniform law and, possibly, a way to express the law in itself. One of the major aims of the comparative studies is the legal analysis of the cultural diversity. At

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16 They distinguish between them based on the sources of criminal norms, which constitutes a significant criterion for comparative analysis.

17 See *Örücü*, Methodology of Comparative Law, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, 2012, p. 442.

18 See *Pavišić*, (fn. 14), pp. 2-7.

19 Comparative law aims to group legal phenomena and to orient their comparability based on the similar elements.

20 Nowadays, models of legal culture today clearly prove that no legal rule can remain faithful to just one model.

21 See *Saccco*, (fn. 4), p. 117.

22 Ibid.

this point, the main operation that starts with the ascertainment of the situation and the major characteristics of the materials, object of a comparative review begins.

C. Comparative Studies Characteristics

The comparison understanding is complex, as a philosophical, logical and cognitive category that plays a crucial role in the perception of the world.[23] Well-known comparatist[24] lawyers emphasize its value as a tool for the dissemination of knowledge and for a better understanding of the domestic law. Comparative studies' development today appears in the form of a reaction against or towards the nationalization of the law which was observed in the nineteenth century, at the time of the codification.[25] Considering the normative nationalist' legal theory for the aforementioned period, comparative studies became a necessary tool for the recognition of law beyond the national political borders.[26] From the general principles upon which the comparative studies logically rely, we can acknowledge that the norms and institutions functioning in a certain legal environment in itself represents two important aspects, one being organic and the other being functional.[27] The organic and functional aspects should be considered by the general characteristics of the law under consideration. For example, in the case of the Common Law Regulation, we need to understand that the key element for the continuity of the legal life of this family is the faithfulness of the existence of the doctrines related to the judicial precedent.[28]

The comparison does not work and does not apply only and simply for the cognitive and informative disposition. If it was organized only

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23 See *Udilova*, (fn. 13), p. 1.

24 *Understand*, *Konstantinesco*, *David* etc.

25 See Droit pénal comparé, www.lexeek.com/document/22755-caracteristiques-droit-penal/ (1/12/2015).

26 See *Glenn*, Aims of Comparative Law, in: Smits, (fn. 17), p. 58 et seq.

27 For more information see *Rasat*, La justice en France, Collection Encyclopedique Que sais-je?, 1991, p. 9.

28 For more see ibid.

by these limits, its coefficient of efficiency and its legal and social usefulness will be decreased. The comparative method does not exclude the realistically recognition but intends the positive expectations of the comparatists lawyers. The comparison as a research method, is deeper structured in the mechanism of action, than to provide just recognition. In this context, the comparative method should be understood as a method oriented to be implemented in the legal models. The comparative attempts remind us that the comparative studies combine the various exchanges between legal orders.[29] The law intends to benefit from the comparative studies to achieve a general model of construction, moving from the normative data to reach other general abstractions.

D. Comparative Studies as References to the Legal Traditions

The comparative studies can be considered as the starting point of reflection in the early legal traditions. The roots of comparative studies in legal sciences are found in legal multiculturalism. Even today, comparative lawyers study these traditions in order to find a way to combine interpretation and views of different legal traditions.[30] The universe of legal culture demonstrates a rich diversity of doctrinal, normative and institutional views. This diversity easily justifies the legal transformations which happened in different societies at different times. The interest and not simply a legal curiosity have led lawyers to orient the analysis process by comparison, as a natural process of reflection on legal multiculturalism. The comparison of the rules of law is the comparison that goes through the historical models of the organizations in different times. The history of comparative studies constitutes, after the birth and creation of the history of law, an important event realized through a solid ally, such as language. Language has developed and modernized the law, and therefore its history is also an important part of the history of law.[31]

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29 See Droit pénal comparé, (fn. 25).

30 See *Zartner Falstrom*, The Role of Legal Tradition in the Development of International Law: Conflict or Compromise, Paper presented at the annual meeting of the Southern Political Science Association, New Orleans, Jan 09, 2008.

31 See The Encyclopedia of Language and Linguistic IV, 1994, p. 2080 et seqq.

The different positions in terms of comparison of the laws and goals have been evident throughout legal history. Greek lawyers referred to the law of another Greek city-state to judge the cases, and the process of comparison has no difference between the same processes of comparison among two different internal norms in the decision-making process. In the same way, the Romans sent a delegation to Greece before the drafting of the Twelve Tables, however, in practice, a more formal comparison of laws inevitably has happened among the Roman provinces.[32] The Medieval era is identified as the "the time of increment of the laws" in the same territory. The comparative studies have played a crucial role in the "reunification" in specific instances.[33] European states construction's process used many sources of law and in the 16th century major doctrinal efforts to coax from the resources of the Roman law, the canons and the customary law were observed.

E. The Role and Use of Comparative Studies in the Development of Juridical Sciences

Law theorists aim at explaining law based on its social and public purposes and usefulness as a guardian of the social legal order.[34] As a useful means to social interests, the comparison works based on a "legitimacy" of its own. From its legal usefulness dimension, results, solutions and normative efficiency are gained. Comparative studies based on views from different authors aid the legal normative technique by combining – or better say harmonizing – three basic functions:

First, to create a holistic legal framework based on shared values and experiences;

Second, to enhance the opportunities for the approximation processes of national legislation with regional or international legal instruments;

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[32] See *Glenn*, (fn. 26), p. 57 et seq.

[33] See ibid., p. 58.

[34] See *Shegani*, The Criminal Law of Public Order as a Guardian of Public Interest in Terrorist Acts Scenario, Sociology Study ISSN 2159-5526, March 2013, Volume 3, Number 3, pp. 172-177.

Third, to facilitate the application of the already established juridical order to specific social relationships.

Comparative legal studies may be a valuable contribution to the ongoing process of legal integration within the European Union. The practical interest is to allow or enable a better and more useful application of the foreign law for the purposes of improving the domestic legal order.

Actually, comparative studies provide us with a practical tool for comparing different European systems and receive the appropriate solution for similar legal issues of concern. Experts of the field agree that comparative law is a contribution to the systematic unification and harmonization of law. In this respect, an example of the utility of comparative studies in harmonization processes is that of a comparative law study undertaken for the unification or harmonization of legislation that restricts the legal systems it investigates to the international organization (i.e. European Union, Benelux) within which the legislation would have to function.[35] Comparative studies, in addition to their use as an evolving instrument, practically serve as the laws' classification system.[36] This operation consists in setting the worlds legal orders in a classification system as per different notions of legal traditions and ideal patterns of legal systems.[37] The comparative lawyer must gather and explain data based on carefully established classifying schemes, find out and describe similarities and differences based on such data, and lay down reciprocal reports between constituent elements of the comparative process.[38]

Comparative studies in the juridical field contribute to a better understanding of the domestic law from the perspective of contrasts and the vast information they provide. Therefore, in the domestic aspect they constitute an important element that can be useful to

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35 See *Kamerling*, The International Guide to Tax Auditing, 2011, p. 15.

36 See *Glenn*, (fn. 26), p. 59 et seq.

37 This purpose of the comparative law was influenced by the birth, in the nineteenth century, of various comparative and classifying disciplines (comparative anatomy, comparative literature etc.) and the concept of ideal models which was given importance in social sciences by *Max Weber*.

38 See *Örücü*, (fn. 17), p. 447.

both legal and institutional reforms. The systematic study of the legal patterns leads to the crystallization of the investigation and trial processes' pattern. One of the most important pragmatic purposes of comparative law is the regional and international legal harmonization, which is of paramount importance nowadays on the European continent, but also in the widespread process of transnational and international law.

In the European context specifically, comparative studies are an irreplaceable method of the work of European courts which rely on the domestic law of each member state and the European Union law, as well as on the application of the European Convention on Human Rights.[39] The regional harmonizing forms or those based on a specific topic can be viewed today as the maximum limits of the harmonization comparative process. It is now clear to all that legal universalization is a utopia. The internationalization of crime brought an internationalization of anti-crime reaction. The United Nations Organization and other regional organizations such as the Council of Europe have different institutions and develop various policies in the field of comparative studies.[40]

F. Approximation Tools in Comparative Studies

The approximation of law is a unique obligation (condition) of membership in the European Union, which means that countries aspiring to join the European Union (as in the Albanian case), must align their national laws, rules and procedures in order to give effect to the entire body of EU law contained in the *acquis communautaire*. To realize the transposition process in adopting or changing national laws, rules and procedures with the requirements of the relevant EU law, there are some steps to follow, and the comparative studies help to create a bridge for facilitating the communication between different legal orders. Historical analyses of law utilizing the comparative method are considered essential for the further development of law today. In this respect, knowledge derived from historical-comparative

[39] See *Jeanclos*, Droit Pénal Européen, Dimension historique, Economica 2009, pp. 9-24.

[40] Ibid.

studies seems to have an indispensable role in understanding contemporary legal institutions, as these are to a considerable extent the product of historical conditions and mutual influences of legal systems in the past.[41]

An important step in the process of approximation is the analysis and comparison of EU and national specific legislations. The comparative studies assist in the effort for determining the existing state of conformity and the appropriate national response to the EU legislation. A holistic and inclusive approach to the EU integration agenda is crucial to its success. That is why EU has constantly emphasised the need for constructive dialogue on the EU integration agenda among all sectors of society.[42] The comparative studies can give answers to questions such as whether national legislation is covering the specific subject matter. The conclusions from the comparative approach or perspective give at least three answers:

– If the national legislation respond entirely to EU obligations (in which case the evaluation is more a check of conformity);

– If the national legislation correspond in part to EU obligations (in which case the evaluation will need to consider gaps which may remain and the possible ways of dealing with them);

– If the national legislation appear to be in conflict with EU legislation, in which case the evaluation should include a review of options for the modifications of relevant national legislation (whether to adapt existing laws or to replace them, for example).

In particular, there is room for a great deal of work on the question of transferability of legal models across different cultures, especially in so far as legal integration and harmonization require reasonably transferable models. The point here is that law is more than simply a body of rules or institutions; it is also a social practice within a legal community.[43] The comparative approach needs the involvement of

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41 See *Mousourakis*, (fn. 1), pp. 87-106.

42 Speech of *Clive Rumbold* (EU Delegation to Albania's Charge d'Affaires, International conference), Approximation of Albanian Legislation with the EU's Acquis: Prospects and Challenges, Tirana on 30/5/2014.

43 See *Mousourakis*, (fn. 1), pp. 87-106.

different actors, especially Faculties of Laws and research centres devoted to comparative studies.

After all, comparison seems to be a basic method in the framework of other alternative methods that help and facilitate the process of legislation approximation. Comparison tools serve as a contributive method in this process, on the basis of preliminary evaluation made on certain performance criteria related to the operation of legal norms and institutions. The borrowed application of special elements of a convergent model is a benefit of "legal multiculturalism". Through the identification of differences and similarities, comparison helps to reveal the vacuum and lack of consistency of legal norms and institutions that operate in a given legal order.[44] By identifying differences as changes, is influenced the commitment of the comparison process as a method for adjusting legal concepts and institutions from other legal orders. In this way, a solution is stimulated, which, through its implementation in the context of another legal order, has shown to be positive and effective. Therefore, comparison aims to enhance the opportunities for a better operation of the normative-institutional model, in terms of both its form and substance. Through the comparison process, it is possible to facilitate the borrowing of the most appropriate legal institutions and norms in relation to the requirements of the *acquis communautaire*. On the other hand, the approximation process benefits from comparison tools the product of a model selected by a simulated perspective.

G. Conclusion

Comparative Law, like many other legal disciplines, cannot avoid the explanation of reasons about its existence. In the efforts to explain its existence, Comparative Law completes an important cycle of its internationality. The dynamic nature of the comparison techniques is influenced by the dynamicity of processes affecting the legal culture in a given social context. Through these mechanisms of revealing yet comparing nature, comparative studies form and unveil the contours of a legal cultural identity. In the field of models for enforcement of

[44] For a more detailed view see La Qualite de la Legislation: L'Expérience Canadienne, http://ec.europa.eu/dgs/legal_service/seminars/ca_labelle_expose.pdf (1/12/2015).

normative factors, comparative studies in themselves represent a mechanism of legal techniques. Today, Comparative Law can be considered not only as the language and the communication code for the community of jurists, but also as a drive of significant impact on the improvement of social relations, considering that it creates a qualitative reflective product resulting from the confrontation of different legal orders. Due to the communication with different legal cultures, it targets the necessary normative and institutional improvements, as well.

Based on this argument, we can conclude that Comparative Studies puts methods[45] into action that influence the legal technique of creating, elaboration, and enforcement of the law.[46] In this context, comparative studies rightfully can be considered as the model of integrated research. Comparative studies promote important and dynamic movements and produce significant legal consequences in the national systems. The analytical sceptre orients and realizes mainly the comparative model with institutional and normative aspects as it object.

Without a doubt, analytic products explain the legal transformations that the national legislations have been through in different fields, starting from the doctrinal diversity. Transformations in themselves testify for the enrichment of the universe of national legal cultures. For these and other reasons mentioned above, I think that lawyers, who are part of the comparative research category, have rightfully understood that the "International Life of Law" tents towards harmonization. In this context, comparison is used not only first and foremost with the goal of approximation and integration in a common Law in the context of its modernization.[47] In the context of the European Union, for example, where the right to compare is a driving force and plays a crucial role in the process of harmonization,

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45 See *Shegani*, (fn. 3), pp. 63-70.

46 See *Pollozhani*, Krijimi i se drejtes dhe roli i teknikes juridike – aspekte komparative, Logos SA, 2003, p. 13.

47 See *Malltezi*, L'influence francaise et les rapports commerciaux entre la France et l'Albanie dans une perspective historique, Revue Internationale de Droit Compare 3/2014, pp. 817-843.

functional comparative analysis diverts attention from the "vertical" to the "horizontal" and provides the opportunity for convergence, for the legal systems as well as legal methods of member states, leading to a gradual and eventually legal integration.[48] In an optimistic point of view, comparative studies in the field of juridical studies have the value of the legal language, which the new century must use, which is the law of the digital era.

[48] See *Örücü*, (fn. 17), p. 444.

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