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Preface

This publication is the forth volume of the series of papers published within 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, together with the law faculties of the Universities of Belgrade (Serbia), 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 sets to 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 in the development of common structures and strategies. The Cluster of Excellence seeks to explore new avenues in the transfer of knowledge, as we firmly believe that sharing expertise and experiences will strengthen the profile of each partner and the network as a whole. To this end, the Cluster implements 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 is purported to 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, best practices in legal reform, and ap-

proximation of legislation in the region of South Eastern Europe and the EU. The series is 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 2018 encompasses six papers from academic staff and junior researchers from the law faculties in Rijeka, Saarbrücken, Skopje and Tirana. This issue covers a broad variety of topics and illustrates the wide range of subjects connected to European and International Law. Particular topics in this volume discuss various civil, criminal and human rights law issues from a European perspective, including harmonisation of anti-money laundering legislation, implementation of data protection law and challenges to fundamental rights in multireligious societies, to name a few.

We thank the German Academic Exchange Service (DAAD) and the German Federal Ministry for Education and Research for their financial support. We owe a special thanks to all authors for their contributions as well as to Ass. iur. Mareike Fröhlich LL.M., and Corina Vodă 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 provoke greater interest in European and International Law and contribute to the achievement of the goals of the SEE | EU Cluster of Excellence in European and International Law.

Saarbrücken, December 2018

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Challenges Arising for Schools from Claims to Freedom and Equality in a Pluralistic Society

Thomas Giegerich[*]

Abstract

Today`s societies in Germany and other European States are pluralistic. They are characterized by a great diversity of political ideas, sexual identities, individual life plans, religions and beliefs and so on. This article aims at putting the challenges for schools arising from claims to freedom and equality in a legal context by using the example of their religious and ideological diversity.

It is difficult to integrate minorities in the living conditions determined by the majority in a way which reconciles conflicting interests: the minorities' legitimate claims to the preservation of their particularities, the implementation of the fundamental values of the free constitutional State, the majority's democratic right of regulating social coexistence and avoiding excessive difficulties in the everyday functioning of public schools. That requires a considerable amount of good will and openness to compromise on all sides.

While courts in Europe have usually found acceptable compromises, the rights of Muslims, who constitute small minorities in most European countries, are taken more seriously at the UN level than at the European level. This impression should be actively counteracted in order to maintain the global credibility of European human rights standards that are equal for all. For Europe as a continent of diversity and with a history of religious wars and genocide, the maintenance of religious and ideological peace is of particular importance. This objective can only be achieved on the basis of mutual respect between all religious and philosophical creeds without any discrimination.

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A. Protection of Freedom and Equality Regarding Religions and Beliefs

Today's societies in Germany and the other European States are pluralistic. They are characterised by a great diversity of political ideas, sexual identities, individual life plans, religions, beliefs and so on. This article aims at putting the challenges for schools arising from claims to freedom and equality in a legal context by using the example of their religious and ideological diversity.

The freedom of religion and belief is specifically protected in the German Constitution (Basic Law – BL),[1] in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[2] which binds all the 47 Member States of the Council of Europe and in the Charter of Fundamental Rights of the European Union.[3] However, the freedom to manifest one's religion and beliefs can be limited by laws for the protection of overriding public interests.[4] At the same time, discrimination on the grounds of religion or belief is prohibited, and equality before the law is guaranteed.[5] In school cases, only the guarantees of the German Basic Law and the European Convention on Human Rights have been of practical importance, but not those of EU law. The reason is that the responsibility for the content of teaching and the organisation of education systems has remained with the Member States so that EU law hardly plays any role

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1 Article 4 (1), (2) of the Basic Law for the Federal Republic of Germany, Federal Law Gazette Part III, classification number 100-1.

2 Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4/11/1950.

3 Article 10 (1) of the Charter of Fundamental Rights of the European Union, OJ C 326 of 26/10/2012.

4 Article 9 (2) ECHR; Article 52 (1) CFR. In Germany, according to the settled case law of the Federal Constitutional Court, the fundamental right in Art 4 (1), 2 BL is subject only to limitations deriving conflicting constitutional law, such as conflicting fundamental rights of other persons and community values of constitutional rank - see BVerfGE 52, 223 (246 f.); 93, 1 (21); 108, 282 (297). The counter-concept prevailing in the legal literature, on the other hand, deduces from Art 140 BL in conjunction with Art 136 of the Weimar Constitution of 1919 that freedom of religion was subject to limitations imposed by statutes in the public interest (see the references in the *Jarass/Pieroth*, Basic Law [14th edition 2016], Art 4 BL margin note 32).

5 Article 3 (3) BL; Article 14 ECHR; Article 21 (1) CFR.

in these areas.[6] When applying the ECHR, it must be taken into account that the religious traditions and the current position of religion in the legal system of the 47 Convention States are very different. There accordingly is no uniform "European" solution to cases concerning religious freedom and equality.[7]

B. Exceptions to General Laws May Be Compatible with the Principle of Equality

The prohibition on discriminating against individuals because of their religion (for example because they wear a headscarf for religious reasons) serves to protect religious freedom. On the other hand, claims derived from the freedom of religion to be exempted from general legal obligations, such as the obligation to participate in coeducational swimming lessons, apparently entitles claimants to more favourable treatment than all the others. How can religious liberty and equality be harmonised? In a State governed by the rule of law, the freedom of religion must be the same for everyone and privilege no one. However, at closer inspection equality as an imperative of justice does not require that everyone is treated alike, but only that those who are essentially in the same condition are treated alike while those in a different condition are treated differently, *i.e.* in accordance with their differences.[8]

In a society that is religiously and ideologically pluralistic, the diversity also increases the challenges of adequately accommodating diversity, if binding rules are formulated for all. Every legal system is inevitably shaped by its religious and ideological traditions and the ideas presently shared by the great majority of the people. If, as in Germany, Christianity is dominant, then rules of law automatically take Christian ideas into consideration. This applies, for example, to the public holiday calendar, eating habits and usual clothing. Thus, as

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6 Article 165 (1) of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 of 26/10/2012.

7 *Nußberger*, The European Court of Human Rights and Freedom of Religion, in: Uerpmann-Wittzack/Lagrange/Oeter (eds.), Religion and International Law, 2018, p. 130 ff.

8 BVerfGE 130, 240 (252 f.); ECtHR, no. 2346/02, *Pretty v. UK*, judgement of 29/4/2002, para. 88.

a matter of course, there is no school on Easter and Christmas, but there is on the Islamic Festival of Sacrifice or the Jewish Day of Atonement. If Muslim or Jewish students want to celebrate these days in accordance with practising their religious commands, they must ask for an exemption from compulsory school attendance. But are they truly privileged if such an exemption is granted? Or is it not just a matter of treating them equally to Christian students who can easily celebrate their religious holidays because they are automatically included in the school holidays?

C. Balancing the Individual with the Collective Interests

In recent years, the courts in Germany and Europe have had to decide on conflicts that occurred in schools between members of religious minorities and majority views that were incorporated in general law. It should be noted that only a small number of "pathological" cases end up in courts, cases which could not be settled otherwise. When I explain some of these cases, one should not get the wrong impression that everyday school life throughout Germany and Europe is characterised by such "pathologies".

On the other hand, nowadays more cases of that kind become public in comparison to the time when I went to school, mainly for two reasons: Today there are more members of religious minorities, and they invoke their rights to freedom and equality more resolutely – quite in accordance with the spirit of a liberal democratic system that depends on the determination of people to actively exercise their fundamental rights. Another reason is the growing distance between social majorities in Europe and Islam and their fear of parallel Muslim societies. However, as we shall see, the pertinent cases by no means only concern Muslims, but conflicts between the religious, cultural and moral notions of social majorities and minorities in a much more general sense. The basic question always is: how can the special interests of individuals be adequately balanced with the overall interest of the community in which they live? Let us consider three school-related examples.

D. Three Examples from the Case Law in Germany, Europe and at UN Level

1. Example: The Cross or Crucifix in the Classroom

As early as 1995, the German Federal Constitutional Court (FCC) ruled that the display of crosses in the classrooms of State schools violated the negative aspect of religious freedom of the students and the fundamental duty of religious neutrality of the State. It was not acceptable that the students were compelled to "learn under the cross".[9] More than twenty years earlier, the FCC had decided that conducting a court hearing in a courtroom with a crucifix on the wall violated the religious freedom of a Jewish participant.[10] Does a State that displays crosses in government buildings not create the risk that its non-Christian citizens might feel marginalised?[11]

The European Court of Human Rights also had to decide on the permissibility of crosses in classrooms of State schools in the light of the European Convention on Human Rights. In the case Lautsi v. Italy, which the applicants brought to enforce their secularist concepts, a chamber of the ECtHR in 2009 considered the Italian practice of routinely hanging crucifixes in classrooms as a violation of the freedom of religion[12] read together with the right of education.[13] The decision led to outraged reactions not only in Italy but also in some other Catholic and Orthodox Convention States.

The Italian Government requested a referral to the Grand Chamber of the ECtHR[14] which in 2011 handed down a contrary decision: Concerning the installation of crucifixes in classrooms, there were very different traditions across Europe, and the Convention States,

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9 BVerfGE 93, 1 (18).

10 BVerfGE 35, 366.

11 The recent decision of the Bavarian cabinet to display a cross in the entrance area of all public buildings raises this question. But see *Friedrich*, Über Kreuz mit der Verfassung? Das Gebot religiöser Neutralität des Staates am Beispiel der neuen „Kreuzpflicht" für Dienstgebäude des Freistaats Bayern, NVwZ 2018, p. 1007 ff., who wrongly considers this decision to be compatible with the religious neutrality of the State.

12 Article 9 ECHR.

13 Article 2 Additional Protocol to the ECHR.

14 Article 43 ECHR.

therefore, had a wide margin of appreciation in that regard. Consequently, the Italian practice was not contrary to the ECHR, especially as there was no religious indoctrination due to the mere presence of a crucifix in the classroom.[15] This decision can, on the one hand, be applauded because it takes account of the diversity existing in Europe with regard to the constitutional status of religion. But on the other hand, one can also regret the impression that the Grand Chamber, succumbing to political pressure, abandoned the protection of the minority from the majority.

2. Example: Headscarves and Full-Face Veils at School

a) The Unsettled Dispute about the Rigour of the Islamic Dress Code

Headscarves and face veils at school draw attention to Muslim women. Starting with the headscarf, it should be remembered that there is no agreement within Islam as to what degree of covering is actually mandated. However, it is not for the free constitutional State to decide on the content of religious commands; it cannot settle the dispute about the content of the Islamic dress code. If therefore, a Muslim woman plausibly claims that she feels obliged for religious reasons to wear a headscarf in public, this must be accepted. Any form of State pressure to remove the headscarf amounts to interference in her freedom of religion and must, therefore, be justified by very weighty reasons.

b) Headscarf Ban for Female Teachers?

With regard to headscarf bans at school, the distinction between female students and female teachers comes into play. While female students are private persons, female teachers in public schools are representatives of the State and role models so the State can impose additional obligations on them. Nevertheless, their religious freedom must also be respected. For this reason, the German FCC considered a general headscarf ban for teachers in the German State of North Rhine-Westphalia to be disproportionate and thus incompatible with

[15] ECtHR (GC), no. 30814/06, *Lautsi v. Italy*, judgment of 18/3/2011.

the constitutional provision protecting the freedom of religion.[16] As the Court explained in an earlier judgment, in such cases there was a conflict between the positive freedom of religion of the teachers, the negative freedom of religion (*i.e.* the freedom from religion) of the students, as well as their parents, parental rights of education and the State function of providing public education. An adequate balance of these positions required the legislature to enact a headscarf ban only if there was a sufficiently specific risk for school peace or State neutrality.[17] Of course, a headscarf ban cannot be justified if students, parents or even members of the teaching staff actively create an Islamophobic mood in a certain school which poses the actual threat to school peace. It is important to emphasise the FCC's final remark in that judgment: If manifestations of religion or belief by teachers in State schools are forbidden in order to preserve school peace or State neutrality, then the prohibition must be extended to all religions and beliefs without discrimination. In other words, no headscarves also mean no Jewish kippahs and no necklaces with cross pendants.

With regard to headscarf bans on female teachers, the ECtHR also concedes the Convention States a wide margin of appreciation because there is no pertinent consensus across Europe. Accordingly, the Court accepted headscarf bans both for primary school teachers in Switzerland[18] and for professors in Turkey.[19]

As a matter of fact, the Human Rights Committee (HRC) at the United Nations level recently expressed the opposite view. The HRC was established by Art. 28 – Art. 45 of the International Covenant on Civil and Political Rights (ICCPR).[20] The ICCPR is the global equivalent of the ECHR, an international treaty for the protection of the classic freedoms at the world level, which now binds 172 States, including all the parties to the ECHR. According to the Optional Protocol (OP) to

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16 FCC, 1 BvR 471/10, 1 BvR 1181/10, Order of 27 January 2015.

17 BVerfGE 108, 282.

18 ECtHR, no. 42393/98, *Dahlab v. Switzerland*, decision of 15/2/2001.

19 ECtHR, no. 65500/01*, Kurtulmuş v. Turkey*, decision of 24/1/2006.

20 International Covenant on Civil and Political Rights, United Nations Treaty Series, vol. 999, 16/12/1966, p. 171.

the ICCPR,[21] the HRC can consider complaints ("communications") lodged by individuals who claim to be victims of a human rights violation committed by one of the 117 States that have also ratified the OP to the ICCPR, including France. Pursuant to Art. 5 para. 4 of the OP, the HRC shall forward its "views" on the merits of an individual complaint to the State party concerned. These views are, however, only politically and morally, but not legally binding on the State concerned.[22] In answer to such a communication, the HRC classified a headscarf ban court that had been imposed on a Muslim employee of a private childcare facility and upheld by the French courts as a violation of the employee's freedom of religion (Art. 18 ICCPR) and the prohibition of discrimination based on sex and religion (Art. 26 ICCPR).[23] Presumably, the HRC would come to the same conclusion concerning headscarf bans on female teachers in State schools.

Regarding headscarf bans for female teachers as well as crosses in classrooms, the FCC is friendlier towards religion than the ECtHR. This is permissible because the ECHR only sets minimum human rights standards which the Convention States are free to exceed, both by national rules and the adoption of stricter international obligations from other sources.[24] The case law of the FCC with regard to headscarf bans is in accordance with the practice of the HRC which has similarly interpreted the global human rights standards laid down in the ICCPR that are mandatory for all Convention States.

The views of the HRC on headscarf bans should give the ECtHR reason to rethink its jurisprudence which leaves the Convention States too much leeway to impose such bans. It is true that the ECtHR is not bound by the HRC's views and there is no "appeal" to the HRC

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21 Optional Protocol to the International Covenant on Civil and Procedure Rights, United Nations Treaty Series, UNTS vol. 999, 19/12/1966, p. 171.

22 *Nowak*, CCPR Commentary, 2005, Art 5 First OP, margin notes 39 ff.

23 Views adopted by the Committee under 5 (4) of the Optional Protocol, concerning communication No. 2662/2015 from 16.7.2018, *F.A. v. France*, CCPR/C/123/D/2662/2015 (24.9.2018), available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2FD%2F2662%2F2015&Lang=en (12/11/2018).

24 Article 53 ECHR.

against its judgments based on the OP-ICCPR.[25] Nor is there any international obligation to adapt the standards of a regional human rights treaty to the higher standards of its global counterpart. However, if the ECtHR wishes to maintain its pioneering role in international human rights protection and to prevent the Convention States from violating their obligations under the ICCPR, it should reconsider its previous practice. In particular, it should not hesitate to limit the Convention States' margin of appreciation when they restrict the Convention rights of discrete and insular minorities in order to take account of human rights developments at UN level. There is nothing to prevent the ECtHR from interpreting the guarantees of the ECHR more extensively and implementing them more strictly, in the light of ICCPR guarantees and the pertinent practice of the HRC.

c) Headscarf Bans for Female Students?

So far, there seem to have been no attempts in Germany to prohibit female students from wearing headscarves in State schools. Such a prohibition would only be compatible with the constitutional freedom of religion if the school peace was demonstrably endangered and there was no other way to maintain it.[26] The ECtHR ruled in several cases from Turkey and France that headscarf bans for female students in public schools were justified for the protection of the

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[25] It is true that Article 5 (2) (a) OP excludes the review competence of the HRC only as long as the same case is pending before the ECtHR but not once that Court has completed its proceedings. However, the Convention States have all acceded to the OP subject to the reservation that the HRC's review competence does not extend to cases decided by the ECtHR (*Nowak* [note 21], Art 5 First OP, margin notes 15 ff.). The German reservation, for example, reads as follows: "The Federal Republic of Germany makes a reservation with regard to Article 5 (2) (a) that the competence of the Committee does not apply to communications: (a) which have already been examined in another international investigation or dispute settlement procedure …" (BGBl. 1994 II, p. 311).

[26] Cf. Wissenschaftliche Dienste des Bundestags, „Schule und Religionsfreiheit – Wäre ein Kopftuchverbot für Schülerinnen rechtlich zulässig?", WD 3-3000-277/16. *Jäschke*, Kopftuchverbote gegenüber Schülerinnen an öffentlichen und privaten Schulen, DÖV 2018, p. 279 ff.

rights of others and public order.[27] In these cases, too, the standards of the Basic Law are legitimately more protective of the freedom of religion than those of the ECHR.

d) Prohibition of Full-Face Veils in Schools?

When a female student insisted on wearing a full-face veil during lessons and was therefore expelled from school, the Bavarian Higher Administrative Court considered her expulsion to be justified. Her claim to freedom of religion conflicted with the State's educational mandate, as laid down in the constitution. The State was free to opt for the teaching method of open communication instead of teachers' monologues. Open communication was disrupted by full-face veils worn by female students because that kind of veiling suppressed the non-verbal communication by facial expression.[28] Is this justification really convincing, or did the school authorities and the court in fact want to set an example against Islamic clothing practices that are perceived as threatening and as an offensive propagation of the discrimination of women by political Islam? If that was their intention, would it be justified, provided that the female student participated in verbal exchanges with teachers and other students in the classroom?

Meanwhile, the wearing of full-face veils has been partially regulated by legislatures at both the federal[29] and the State level; State law being primarily relevant for the school sector. The State of Bavaria in 2017 enacted a full-face veil ban *inter alia* in the field of education which applies to teaching staff in schools and day-care centres.[30]

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27 ECtHR, no. 26625/02, *Köse and 93 others v. Turkey*, decision of 24/1/2006; ECtHR, no. 27058/05, *Dogru v. France,* judgment of 4/12/2008; ECtHR, no. 31645/04, *Kervanci v. France*, judgment of 4/12/2008.

28 BayVGH, 7 CS 13.2592, 7 C 13.2593, Order of 22/4/2014, margin note 21.

29 Gesetz zu bereichsspezifischen Regelungen der Gesichtsverhüllung und zur Änderung weiterer dienstrechtlicher Vorschriften (Law on sector-specific regulations of concealment of the faceand amending further employment law regulations) of 8/6/2017 (BGBl. I, p. 1570).

30 Gesetz über Verbote der Gesichtsverhüllung in Bayern (Law on prohibitions of concealment of the face in Bavaria) of 12/7/2017 (GVBl. 2017, p. 362). See the critique by *Edenharter*, Vollverschleierungsverbote im Bildungs- und Erziehungsbereich, DÖV 2018, p. 351 ff.

So far, the ECtHR has only had to deal with French and Belgian laws prohibiting concealment of the face in public which it considered as justified under Art. 9 (2) ECHR. Based on communications by Muslim women who had been fined for wearing full-face veils, the Court held that it was within the Convention States' margin of appreciation to determine that wearing full-face veils in public disrupted the concept of living together in society and consequently violated the rights of others, because persons concealing their faces in public demonstratively rejected any contact with their fellow human beings.[31] In view of this case law and the decisions permitting headscarf bans for female teachers and students at school, the ECtHR will *a fortiori* uphold bans on full-face veils at school as permissible interference with the freedom of religion of the women concerned.

Recently, the HRC also assessed the French ban on concealment of the face in public. Based on communications by Muslim women who had been fined for wearing full-face veils, the HRC took the view that such a ban violated the freedom of religion (Art. 18 ICCPR) as well as the prohibition of discrimination on grounds of sex and religion (Art 26 ICCPR). The Committee deviated from the ECtHR's assessment in that it considered the concept of living together in society to be too abstract to be linked to specific conflicting rights of others within the meaning of Art. 18 (3) of the ICCPR whose protection could justify the ban. It also held that the ban together with the threat of punishment for violations was a disproportionate interference with the freedom of Muslim women who did not benefit from any of the statutory exceptions so that a special burden was imposed on them for which there was no legitimate reason.[32]

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[31] ECtHR, no. 43835/11, *S.A.S. v. France*, judgment of 1/7/2014; ECtHR, no. 37798/13, *Belcacemi and Oussar v. Belgium*, judgment of 11/7/2017.

[32] Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016 of 17/7/2018, *Yaker v. France*, CCPR/C/123/D/2747/2016 (17/10/2018), available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2FD%2F2747%2F2016&Lang=en (12/11/2018); Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2807/2016 of 17/7/2018, *Hebadj v. France*, CCPR/C/123/D/2807/2016 (17/10/2018), available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/123/D/2807/2016&Lang=en (12/11/2018).

The views of the HRC also indicate in this context that the European hostility towards Muslim clothing practices is not always considered as convincingly justified at the UN level. It is by no means certain that the HRC would consider a ban on full-face veils in schools to be compatible with the ICCPR. This should be reason enough for us Europeans to reconsider our approach to the religious concepts and practices of our Muslim minorities.

3. Example: Exemption from Compulsory School Attendance for Religious Reasons

Conflicts over the compatibility of teaching content with the moral and religious ideas of students and their parents first arose in the 1960s. At that time there was a dispute over the introduction of sex education lessons which many parents rejected because of their conservative Christian beliefs. In 1977, the FCC ruled that the State, by virtue of its constitution-based educational mandate, was empowered to include sex education in the compulsory school curriculum.[33] Sex education in State schools, however, had to be open to the various moral concepts in this area and take into account the parents' right to educate their children in conformity with their religious or philosophical beliefs. In particular, the schools must refrain from trying to indoctrinate the adolescent students. The State was not obliged to grant exemptions from participation in sex education lessons meeting these standards.

The ECtHR decided in the same sense: Neither parents nor students had a right of veto with respect to certain teaching content or a right to be exempted from attending lessons, if they disagreed with the ideas disseminated in these lessons, no matter if for religious or other reasons. Even more, neither the BL nor the ECHR grants anyone a right to an exemption from compulsory school attendance altogether in favour of homeschooling by parents.[34]

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[33] BVerfGE 47, 46.

[34] OVG Bremen, NordÖR 2009, 158; ECtHR, no. 35504/03, *Konrad v. Germany*, decision of 11/12/2006.; ECtHR, no. 18925/15, *Wunderlich v. Germany*, judgment of 10/1/2019; *Richter*, Religious Freedom and Parental Rights in a Pluralist Society, in: Uerpmann-Wittzack (note 7), pp. 329, 338 ff.

In recent years, demands by Muslim students for exemptions from coeducational sports and swimming lessons have come into focus. The German Federal Administrative Court (FAC) now takes a much more negative approach to such claims than it did in the past. In 1993, the Court held that a Muslim female student was entitled to an exemption from sports lessons because of the Koranic clothing rules unless the lessons were conducted in single-sex form.[35] Twenty years later, the same Court decided that a Muslim female student could be required to attend coeducational swimming lessons in swimwear that complied with the Muslim dress code, *i.e.* in the so-called *Burkini*.[36] In its new judgment, the FAC emphasised the educational and integration function of schools with regard to all of their activities. Obviously, the apprehension that parallel societies might develop and jeopardise social cohesion has become much more pronounced in Germany. The constitutional complaint of the student concerned against that new FAC judgment was not accepted by the FCC because it was not sufficiently substantiated.[37]

The same question was raised in two Swiss cases brought before the ECtHR. Like the German FAC, the Swiss Federal Court did not grant Muslim female students a right of exemption from co-educational swimming lessons but referred them to the wearing of the *Burkini* as an acceptable compromise between their freedom of religion and the general public interest. The ECtHR found this decision to be compatible with the freedom of religion guaranteed by the ECHR.[38] The limitation on their freedom of religion was justified in the interests of integrating female students with different cultures and religions, the proper functioning of the public school system and gender equality. The Convention States had a considerable margin of appreciation in that regard.

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35 BVerwGE 94, 82.

36 BVerwG, NVwZ 2014, 81.

37 FCC, 1 BvR 3237/13, decision of 8/11/ 2016 , BeckRS 2016, 55410.

38 ECtHR, no. 29086/12, *Osmanoğlu und Kocabaş v. Switzerland*, judgment of 10/1/2017.

E. Conclusion: Openness to Compromise, Reciprocal Respect and European Credibility with regard to Human Rights Standards

It is not necessary to discuss further examples, such as the permissibility of Muslim prayers in school buildings[39] and the necessity of keeping the Muslim fasting month (Ramadan) free from examinations. It has already become clear enough how difficult it can be to integrate minorities in the living conditions determined by the majority because that must be done in a way which reconciles conflicting interests: the minorities' legitimate claims to the preservation of their particularities, the implementation of the fundamental values of the free constitutional State, the majority's democratic right of regulating social coexistence and avoiding excessive difficulties in the everyday functioning of public schools. That requires a considerable amount of goodwill and openness to compromise on all sides.

It has also become clear that the rights of Muslims, who constitute small minorities in most European countries and are sometimes harassed by Islamophobic groups, are taken more seriously at the UN level than at the Council of Europe level. The ECtHR should actively counteract this impression because otherwise there is a risk that Muslims will no longer have confidence in its readiness to protect their fundamental rights and turn to the HRC. That would damage the global credibility of European human rights standards. For Europe as a continent of diversity and with a history of religious wars and genocide, the maintenance of religious and ideological peace is of particular importance. This objective can only be achieved on the basis of mutual respect between all religious and philosophical creeds without any discrimination.

[39] BVerwG, LKV 2012, 27.

Paid annual leave: The Croatian use-it-or-lose-it approach is incompatible with EU law

Igor Materljan[*] *and Gordana Materljan*[**]

Abstract

In its latest three Grand Chamber judgments, the Court of Justice of the European Union (CJEU) restated that paid annual leave is a fundamental social right without any derogation. It went even further and, for the first time in its jurisprudence concerning that right, it recognised its horizontal direct effect. This paper addresses such recent case law of the CJEU, in particular, the conditions for availing of that right as well as concerning compensations in lieu of leave not taken. Furthermore, it analyses the Croatian legislation and decisions delivered by Croatian courts in comparable situations. The finding, so far, is that Croatia is erroneously implementing the right to paid annual leave. The paper tries to find out the most appropriate way to redress the violation in question. It explores whether it is possible for Croatian courts to interpret the national law provisions in accordance with EU law.

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A. Introduction

There is no unified definition of "employee" or "worker" in European Union law. The two notions are often used interchangeably[1], usually as the opposite of the term "employer". The Court of Justice (CJEU) has stated that an employee performs services for and under the direction of another person in return for which he receives remuneration.[2] It construes the notion "worker" as a concept within EU employment law. Therefore, it may not be defined by reference to national laws; however, it should be interpreted in the light of the principles of the EU legal order, in particular, the fundamental freedom guaranteed by the Treaty. Since the application of the Treaty depends on the definition of that notion, it may not be interpreted restrictively.[3]

This is why the notion may include casual and temporary staff, freelancers, subcontractors and teleworkers provided that they have agreed to perform personally any work or services for the employer. The key element is the subordination requirement. If that requirement is not satisfied, the work provided is classified as an activity perused in a self-employed capacity.[4]

The same goes for the Working Time Directive[5], which has to be interpreted as an autonomous notion of EU law.[6]

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1 For example, the Treaty on the Functioning of the European Union (OJ C 326 of 26/10/2012, p. 47) and the Regulation (EU) No 492/2011 on freedom of movement for workers within the Union, (OJ L 141 of 27/5/2011, p. 1) use the term "workers", while the CJEU prefers the term "employees".

2 CJEU, case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284, para. 17. For more about the notion see *Verhulp*, The Notion of 'Employee' in EU-Law and National Laws, European Commission, Directorate-General for Employment, Social Affairs and Inclusion, European Centre of Expertise (ECE), 2017, https://www.my.stibbe.com/mystibbe/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAXlLxld8g770AoTWPQB5Bqg&fromContentView=1&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQuf6KjHLHOBw%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAe4lAh7Yab60s%3D (19/12/2018).

3 CJEU, case 53/81, *Levin v Staatssecretaris van Justitie*, ECLI:EU:C:1982:105, para. 13.

4 CJEU, case C-268/99, *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, para. 34.

5 Directive 2003/88/EC concerning certain aspects of the organisation of working time, OJ L 299 of 18/11/2003, p. 9.

Only personnel who fall under the notion of "worker" established by the CJEU are entitled to paid annual leave. In that respect, Article 7 of the Working Time Directive prescribes:

"1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

The CJEU recognises the right to paid annual leave as a fundamental social right of particular importance. The right is also expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union[7], to which Article 6(1) Treaty on European Union[8] has conferred the same legal value as the Treaties. The right is characterised as that from which there may be no derogations.[9] Although Article 7(1) of the Working Time Directive allows implementation of this right "in accordance with the conditions for entitlement to, and granting of, such leave", conditions negating the very existence of the right are not permitted.

The Croatian legislator and consequently its courts do not follow the same path. In fact, they are quite frugal when it comes to paid annual leave. The conditions for the recognition of that right are very strict and often lead to the loss of such a right. Although there have not been any

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6 Even though it is addressed to Member States, the Working Time Directive is relevant for resolving cases concerning staff of EU institutions. See *Tracol*, The new rules of procedure on the review procedure and the application of general principles in EU civil service law and litigation: *Strack*, Common Market Law Review 51(3), 2014, pp. 993-1014.

7 Charter of Fundamental Rights of the European Union, OJ C 326 of 26/10/2012, p. 391.

8 Consolidated version of the Treaty on European Union, OJ C 326 of 26/10/2012, p. 13.

9 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, paras. 7, 38 and 59; CJEU, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, ECLI:EU:C:2018:874, para 54; CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 28; CJEU, case C-118/13, *Gülay Bollacke v K + K Klaas & Kock BV & Co. KG,* EU:C:2014:1755, para. 15.

Croatian cases concerning this right before the CJEU, it is not certain that this issue will never appear on the agenda of the Luxembourg court.

Croatia transposed Article 7 of the Working Time Directive in its Labour Act[10] which includes relevant dispositions provided for paid annual leave (Article 76), its duration (Article 77), remuneration during annual leave (Article 81), determination of annual leave (Article 79), allowance in lieu of annual leave (Article 82) and the carrying-over of annual leave to the next calendar year (Article 84). Although aside from the Labour Act, other sources regulate the right to paid annual leave, they are not examined in this paper, as they are special provisions that concern the State.[11] They may provide for longer annual leave, but they do not affect the general mechanism of paid entitlement and the carry-over period established by the Labour Act.

The focus of this paper is the recent case law of the CJEU on the right to paid annual leave in both the private and public sectors.[12] In particular, it examines the conditions (and preconditions) for enjoying that right as well as that to compensation in lieu of leave not taken which must be paid in the event of the termination of the employment.

Furthermore, the paper analyses the Croatian legislation and court judgments in comparable situations, i.e. decisions of the First and Second Instance and Supreme Courts. The rationale behind this comparison is based on these questions: the overlap of the right to paid annual leave and long-term sick leave, the carry-over and accumulation of untaken leave and the loss of untaken leave because the worker failed to seek his or her right. The analysis of this divergent case law shows that Croatia is erroneously implementing the right to paid annual leave.

Finally, the paper tries to find the most appropriate way to redress the violation in question. It explores whether Article 7 of the Working Time Directive has direct effects and whether it is possible for Croatian

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[10] Labour Act (consolidated version), Official Gazette of the Republic of Croatia, no. 93/14 and 127/17.

[11] Civil Service Act, Official Gazette of the Republic of Croatia, n. 92/05, 140/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 01/15, 138/15, 61/17.

[12] For an overview of the CJEU's case law delivered until 2012, see *Blanpain*, European Labour Law, 2013, pp. 759-767.

courts to interpret its relevant national law in accordance with the case law of the CJEU when they face horizontal disputes.

B. The Case Law of the CJEU

In the European Union, social rights are constitutionalised.[13] As the final arbiter of constitutional claims, the CJEU is often faced with politically controversial issues and thus represents a major political actor.[14] The right to paid annual leave contained in the Charter constitutes a fundamental right granted to every worker. Article 31 (2) of the Charter[15] is drafted in precise terms and clearly shows that it is to be understood as a right and not as a principle.[16] The CJEU recognises that right as partly justiciable.

In most Member States, the entitlements to paid annual leave resulting from the Working Time Directive had a big impact on the caseload of first-instance jurisdictions and led to a change of working practices.[17] In fact, most EU states had to change their legislation in order to comply with the case law of the CJEU.[18] The European Commission monitors the

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[13] *Albi*, Il patrimonio costituzionale europeo e il diritto alle ferie come diritto fondamentale, Rivista Italiana di diritto del lavoro 2008, pp. 115-123.

[14] *Kumm*, Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights, International Journal of Constitutional Law 2004, p. 574.

[15] Article 31 (2) of the Charter reads as follows: "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave".

[16] Article 52 (5) does not clarify which articles in the Charter belong to the rights group and which belong to the principles group, respectively. This question is left to the courts to determine. *Lindfelt*, Fundamental Rights in the European Union – Towards Higher Law of the Land? A Study of the Status of Fundamental Rights in a Broader Constitutional Setting, 2007, p. 172.

[17] In the UK, the impact considered mostly doctors employed in the National Health Service. *Rogowski*, Implementation of the EU Working Time Directive in the United Kingdom, in: Barbier et al., The Sustainability of the European Social Model, EU Governance, Social Protection and Employment Policies in Europe, 2017, pp. 231-252; *White*, Editorial: Earning your holidays, European Law Review 2001, pp. 329-330.

[18] This was the case with German, UK, Danish, Spanish, Greek, Irish, Luxemburgish, Portuguese, Czech, Dutch, Latvian, Hungarian, Italian, French and Belgian legislation that laid down conditions for entitlement to paid annual leave. *Laurent-Merle*, L'article 22 de la loi

correct implementation of the Working Time Directive and in cases of its incorrect or non-implementation initiates infringement procedures.[19]

The right to paid annual leave as interpreted by the CJEU will be examined in the following chapters.

I. Accruing Paid Annual Leave while on Long-term Sick Leave

In 2006, German and English cases were brought before the CJEU. The first case concerned Mr Schultz-Hoff and his former employer, Deutsche Rentenversicherung Bund.[20] Mr Schultz-Hoff was on continuous sick leave for two years, and his employment terminated when the pensions authority granted him a permanent pension. Since he did not take his paid annual leave and his employer refused to grant him pecuniary compensation for that leave, he brought a court action against his former employer seeking payment for untaken paid annual leave.

The second case was brought by Mrs Stringer and her colleagues against Her Majesty's Revenue and Customs, their employer.[21] Mrs Stringer was absent from work for several months due to indefinite sick leave, during which time she wanted to take some days of paid annual leave. The other workers were on long-term sick leave and, since they had not taken their paid annual leave, they claimed payment in lieu of annual leave.

The CJEU joined the two cases and answered the questions in one judgment.[22] The judgment revealed that the EU law does not govern the

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du 20 août 2008 portant réforme des conditions d'ouverture du droit à des congés payés: un texte au goût inachevé, Recueil Dalloz 2009, pp. 893-895.

19 The Commission issued a reasoned opinion against Belgium for the incorrect transposition of Article 7 of the Working Time Directive. *Morsa*, Le régime des vacances annuelles des employés dans le secteur privé, Droits national, international et européen 2014, pp. 74-110.

20 CJEU, case C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:18.

21 *Ibid.*

22 *Ibid.;* for a commentary see: *Riesenhuber*, Joined Cases C-350/06 and C-520/06, Gerhard Schultz-Hoff v. Deutsche Rentenversicherung Bund and Mrs C. Stringer and Others v. Her Majesty's Revenue and Customs, Judgment of the Court (Grand Chamber) of 20 January 2009, Common Market Law Review 2009, pp. 2107–2115.

right to sick leave and the conditions for the exercise of that right.[23] The Working Time Directive governs only paid annual leave. Accordingly, it is for the Member States to lay down conditions for the exercise and implementation of that right. However, they cannot make the very existence of that right subject to any preconditions whatsoever.[24]

The Working Time Directive is neutral concerning the right of a worker on sick leave to take paid annual leave. According to the CJEU, if national legislation or practices do not allow a worker on sick leave to take paid annual leave during that sick leave, the worker in question must have the opportunity to exercise that right during another period.[25] On the other hand, the Directive does not preclude national legislation or practices, which allow a worker on sick leave to take paid annual leave during sick leave.[26]

The CJEU considered the question of the right to paid annual leave in the event of long-term sick leave where the incapacity for work persisted beyond the end of that year and/or of a carry-over period laid down by national law. It stated that the Working Time Directive grants that right to every worker notwithstanding his/her state of health and that it cannot be made subject to a condition concerning the obligation to actually having worked during the leave year.[27] Member States can lay down conditions for the exercise of that right, including even the loss of the right at the end of a leave year or of a carry-over period, provided that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise it.[28] The last condition is crucial. Since Article 7(1) of the Working Time Directive directly confers the social right to workers, Member States are not entitled to exclude the very existence of

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23 CJEU, joined cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:18, para. 27.

24 *Ibid.*, para. 28; CJEU, case C-173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, ECLI:EU:C:2001:356, para. 53.

25 CJEU, joined cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:18, para. 29.

26 *Ibid.*, para. 31.

27 *Ibid.*, para. 41.

28 *Ibid.*, para. 43.

that right.[29] The CJEU clarified that the said article precludes national legislation or practices which provide for the extinction of the right to paid annual leave at the end of the leave year and/or of a carry-over period where the workers have been on sick leave for the whole leave year and where their incapacity for work persisted until the end of their employment, which was the reason why they could not exercise their right to paid annual leave.[30]

Considering that the right to paid annual leave is not extinguished and that on termination of their employment the workers can no longer enjoy that right, they are entitled to an allowance instead.[31]

The CJEU stated that the entitlement to annual leave and payment on that account are two aspects of a single right.[32] Even though the Working Time Directive does not contain any disposition on how to calculate the allowance in lieu, the CJEU found a solution; workers must receive their normal remuneration for that period of rest.[33] It stated that for workers who have not been able, for reasons beyond their control, to exercise their right to paid annual leave before the termination of their employment, the allowance in lieu to which they are entitled must be calculated in such a way that workers are put in a position comparable to that they would have been in had they exercised that right during their employment.[34]

The analysis suggests that workers taking sick leave are entitled to accrue paid annual leave, provided that they could not enjoy their right

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29 *Ibid.*, paras. 45 to 47.

30 *Ibid.*, para. 49; this position has been repeated in several occasions, e.g. CJEU, case C-337/10, *Georg Neidel v Stadt Frankfurt am Main*, ECLI:EU:C:2012:263, para 32.; CJEU, case C-341/15, *Hans Maschek v Magistratsdirektion der Stadt Wien – Personalstelle Wiener Stadtwerke*, EU:C:2016:576, para. 32; for a commentary of the CJEU's case law see: *Caiola*, À la recherche d'une pondération équitable: la portée du droit au congé annuel payé au-delà du départ à la retraite, Revue des affaires européenne 2016, pp. 503-509.

31 CJEU, joint cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:18, para. 56.

32 *Ibid.*, para. 60.

33 *Ibid.*, para. 58.

34 *Ibid*., para. 61.; CJEU, joint cases C-131/04 and C-257/04, *C. D. Robinson-Steele v R. D. Retail Services Ltd and Michael Jason Clarke v Frank Staddon Ltd and J. C. Caulfield and Others v Hanson Clay Products Ltd*, ECLI:EU:C:2006:177, para. 58.

to paid annual leave for reasons beyond their control. The worker's health condition is one of those reasons. In addition, it seems that the right to carry over annual leave is not unlimited. The CJEU developed the criteria in its later case law, which is analysed in the next chapter.

II. Sick Leave and the Limits to Accumulation of Untaken Leave

In 2011, in *KHS v Schulte* the CJEU[35] was confronted with a similar question as the one analysed in the previous chapter. Mr Schulte was on long-term sick leave before his employment ended. He brought an action against his former employer KHS seeking allowances in lieu for the last three calendar years of his employment. The difference between this case and *Schultz-Hoff and Others* was that a collective agreement, providing for a 15-month carry-over period (instead of six months) was applied to Mr Schulte's contract of employment.

The question raised in this case concerned the limits of the carry-over period for annual leave not taken by the end of the reference period. In *KHS v Schulte* the CJEU maintained that a national rule laying down a carry-over period could not guarantee that a worker's right to paid annual leave will lapse without him actually having had the opportunity to exercise that right. However, this conclusion depended on the specific circumstances of a concrete case.[36]

The CJEU examined the purpose of the right to paid annual leave, i.e. enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure. It found that unlimited accumulation of entitlements to paid annual leave, acquired during a period of unfitness for work, would no longer reflect the actual purpose of that right.[37] The accumulated right to paid annual leave in these circumstances can reflect both aspects of its purpose only insofar as the carry-over does not exceed a certain temporal limit.[38]

The CJEU defined the limits of the carry-over period by balancing the workers' and employers' interests. It stated that the carry-over period

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35 CJEU, case C-214/10, *KHS AG v Winfried Schulte*, ECLI:EU:C:2011:761.

36 *Ibid.*, para. 28.

37 *Ibid.*, para. 30.

38 *Ibid.*, para. 31.

must take into account the specific circumstances of a worker who is unfit for work for several consecutive reference periods. Thus, the carry-over period must *inter alia* ensure that the worker can have, if needs be, rest periods that may be staggered, planned in advance and available in the longer term. It concluded that the carry-over period must be substantially longer than the reference period in respect of which it is granted.[39] On the other hand, the carry-over period must also protect the employer from the risk that a worker might accumulate periods of absence of too great a length, and from the difficulties for the organisation of work, which such periods might entail.[40]

Applying the established elements, the CJEU concluded that in a concrete case, a carry-over period of 15 months[41] is not contrary to the purpose of that right; i.e. it ensures that the latter retains its positive effect for the worker as a rest period.[42]

III. Accumulation and Loss of Untaken Leave Because the Worker Failed to Seek His or Her Right for Reasons beyond His or Her Control

The case *King v The Sash Window Workshop*[43], an English case in 2011, raised several questions. Mr King worked for Sash WW as a 'self-employed commission-only contract' employee for more than 13 years. Because of his specific situation (he was wrongly classified as a self-employed contractor), when he took annual leave, it was unpaid. This is why he did not take all annual leave he was entitled to. Upon termination of his employment, Mr King sought to recover payment for his an-

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39 *Ibid.*, para. 38.

40 *Ibid.*, para. 39.

41 Convention concerning Annual Holidays with Pay (Revised) of the International Labour Organisation in its Article 9 (1) also provides for the carry-over period by stating: "The uninterrupted part of the annual holiday with pay referred to in Article 8 (2) of this Convention shall be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than eighteen months, from the end of the year in respect of which the holiday entitlement has arisen."

42 CJEU, joined cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:188, para. 43.

43 CJEU, case C-214/16, *Conley King v The Sash Window Workshop Ltd and Richard Dollar*, ECLI:EU:C:2017:914.

nual leave — taken and not paid as well as not taken — for the entire period of his employment.

According to the national court that referred the question to the CJEU notwithstanding the type of contract, Mr King was considered a worker in the sense of the Working Time Directive. As such, he was entitled to paid annual leave. The central question was whether the Working Time Directive gave Mr King the right to carry over and accumulate until the termination of his employment paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

In that particular case, it was for reasons beyond his control that Mr King did not exercise his right to paid annual leave before his retirement. In fact, the CJEU concluded that as Mr King could have taken only unpaid annual leave that deterred him from taking his annual leave, which is equally incompatible with the purpose of the right to paid annual leave.

As it was stated in *Schultz-Hoff and Others*, the Working Time Directive does not allow Member States either to exclude the existence of the right to paid annual leave or to provide for the right to paid annual leave of a worker, who was prevented from exercising that right, to be lost at the end of the reference period and/or of a carry-over period fixed by national law.[44] A worker who has not been able, for reasons beyond his control, to exercise his/her right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu.[45]

It is true that the CJEU allows exceptions from the non-extinction rule, e.g. in the *KHS* case.[46] In that case, it was necessary to determine whether circumstances of the worker's extended absence are 'specific',

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[44] *Ibid.*, para. 51; CJEU, joined cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:18, paras. 47 and 48 and the case law cited.

[45] CJEU, case C-214/16, *Conley King v The Sash Window Workshop Ltd and Richard Dollar*, ECLI:EU:C:2017:914, para. 52; CJEU, joined cases C-350/06 and C-520/06, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, ECLI:EU:C:2009:18, para. 61.

[46] CJEU, case C-214/10, *KHS AG v Winfried Schulte*, ECLI:EU:C:2011:761.

such as to justify an exception to the said rule.[47] Any derogation from the non-extinction rule must be interpreted in such a way that limits its scope to what is strictly necessary in order to safeguard the interests that the derogation protects.[48] The CJEU discussed the employer's interests.

However, in that case, it stated that the protection of the employer's interests does not seem strictly necessary and, accordingly, does not seem to justify derogation from a worker's entitlement to paid annual leave.[49] The employer was faced with periods of the worker's absence, which, as with long-term sickness absence, would have led to difficulties in the organisation of work. On the other hand, the employer was able to benefit, until Mr King retired, from the fact that he did not interrupt his professional activity in its service in order to take paid annual leave.[50] Hence, in the circumstances of that specific case, the interest and fundamental right of the employee overrode the interest of the employer.

Here the CJEU made a clear distinction between the non-enjoyment of paid annual leave because of health conditions, on the one hand, and the employer's refusal to grant paid annual leave to the worker, on the other hand. It is clear from this judgment that in order for workers to enjoy their rights, it is irrelevant whether, over the years, they made requests for paid annual leave.[51] An employer that does not allow workers to exercise their right to paid annual leave must bear the consequences that stem from such behaviour.[52]

In this case, where the worker was wrongly classified as a self-employed contractor, and the employer benefitted from the presence of the worker in their service, the CJEU ruled without difficulty that the worker has the right to an indefinite accumulation of unused paid annual leave, and thus the employer has to grant him compensation for it at the end of their contractual relationship. In its further decisions, the CJEU ameliorated the criteria for the accumulation of the rights to paid

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47 CJEU, case C-214/16, *Conley King v The Sash Window Workshop Ltd and Richard Dolla*, ECLI:EU:C:2017:914, para. 56.

48 *Ibid.*, para. 58.

49 *Ibid.*, para. 59.

50 *Ibid.*, para. 60.

51 *Ibid.*, para. 62.

52 *Ibid.*, para. 63.

annual leave, particularly in cases when the worker failed to ask for its statutory holiday entitlements. These questions are addressed in the next chapter.

IV. Loss of Paid Annual Leave Because the Worker Failed to Seek His or Her Right

A German case brought before the CJEU in 2016, *Kreuziger v Land Berlin,*[53] concerned a legal trainee who did not ask for paid annual leave even though he could have done so. According to German legislation applicable to that case, the right to paid annual leave lapsed not as a consequence of the termination of the employment as such, but as a result of the fact that the worker did not apply to take it in the course of the employment period. Mr Kreuziger could not argue that he had not been able, for reasons beyond his control, to exercise his right before the employment contract was terminated. In fact, he could have taken the annual leave, but he willingly did not take it and instead asked for an allowance in lieu.

In this regard, the CJEU clarified that the burden of ensuring that the right to paid annual leave is actually exercised should not rest fully on the worker.[54] The employer must fulfil its own obligations. Of course, they are not required to force their workers to actually exercise their right to paid annual leave. However, they must ensure that workers are given the opportunity to exercise such a right.[55] The CJEU clarified the employer's obligation, i.e. they must encourage their workers, formally if need be, to do so, and inform them that, if they do not take it, it will be lost at the end of the reference period or authorised carry-over period, or upon termination of their employment.[56]

The CJEU also clarified the question of the burden of proof. It is clear that the employers bear that burden since they must be able to show that they have exercised all due diligence in order to enable their workers actually to take paid annual leave.[57] If not, it must be held that the

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53 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872.

54 *Ibid.*, para. 50.

55 *Ibid.*, para. 51.; CJEU, case C-214/16, *King*, ECLI:EU:C:2017:914, para. 63.

56 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 52.

57 *Ibid*., para. 53.

loss of the right to such leave and, in the event of the termination of their employment, the corresponding absence of payment of an allowance in lieu of annual leave not taken constitutes a failure to respect, respectively, Articles 7(1) and 7(2) of the Working Time Directive.[58] If it is proven that the worker deliberately and in full knowledge of the ensuing consequences refrained from taking the paid annual leave, Article 7(1) and (2) of the Working Time Directive does not preclude the loss of that right or, in the event of the termination of employment, the corresponding absence of an allowance in lieu of the paid annual leave not taken.[59]

In *Kreuziger v Land Berlin,* the CJEU defended the worker as the weaker party in the employment relationship. In order to benefit from his right to paid annual leave, the worker is not obliged to have an active role. It is entirely the employer's responsibility to organise the work in a way to secure the worker's right to paid annual leave. This obligation is particularly accented by passing the burden of proof on to the employer.

From a practical perspective, the burden of proof is crucial for the exercise of the right to paid annual leave and for granting the allowance in lieu before national courts. The burden of proof is also much disputed before Croatian courts. This and other questions will be addressed in the second part of the paper.

C. Croatian Regulation and the Case Law of the Croatian Courts

The right to paid annual leave is enshrined in the Croatian Constitution.[60] However, the most important dispositions are contained in Heading VII (Rests and Leaves) of the Labour Act[61], which applies, as a general act, to all sectors of economic activity. The general rule is contained in Article 77(1) of the Labour Act, according to which every worker has the right to paid annual leave of at least four weeks in each calendar year.

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58 *Ibid.*, para. 53.

59 *Ibid.*, para. 54.

60 Article 56 (3) of the Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14; for a general overview of the Croatian system see *Grgurev*, Labour Law in Croatia, Alphen aan den Rijn, 2013.

61 Labour Act (consolidated version), Official Gazette of the Republic of Croatia, 28/12/2017, No. 93/14 and 127/17.

This statutory minimum can be increased by way of collective agreement, working regulations or employment contract.[62]

Since annual leave is paid, workers have to be given compensation which cannot be lower than the amount of the average salary that has been paid to them within the three months prior to the leave.[63] Here again, higher compensation can be provided in a collective agreement, working regulations or employment contract.

Another very important source of information is also the case law of Croatian courts. Even though courts' decisions are not formally binding, they show the position of higher courts that are in principle followed by First Instance Courts. In this respect, it should be stated that decisions addressing the right to paid annual leave and the payment of an allowance in lieu are not numerous. The reason for this is that Croatian courts have always been very stingy concerning that right, and they interpret the conditions for the entitlement to paid annual leave and allowance in lieu strictly.

The allowance in lieu was introduced in the Labour Act in 2009[64]. Before that, the previous Labour Act[65] in its Article 52(2) provided only for the employer's obligation at the end of the employment relationship to issue a certificate concerning the non-exercise of the right to annual leave to be delivered to the new employer in order for it to be carried over.[66] Another possibility was to claim compensation for damages re-

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62 Article 77 (3) of the Labour Act; according to the CJEU's ruling in *Maschek*, Member States are free to decide whether to grant workers additional paid leave in addition to the minimum annual paid leave of four weeks provided for in Article 7 of the Working Time Directive. In that case, the Member States may grant to a worker who, because of illness, could not use up all of his additional paid annual leave before the end of his employment relationship, an entitlement to an allowance in lieu of that additional period. CJEU, case C-341/15, *Hans Maschek v Magistratsdirektion der Stadt Wien - Personalstelle Wiener Stadtwerke*, EU:C:2016:576, para. 32.

63 Article 81 of the Labour Act.

64 Labour Act, Official Gazette of the Republic of Croatia, No. 149/09, 61/11, 82/12 and 73/13.

65 Labour Act, Official Gazette of the Republic of Croatia, No. 38/95, 54/95, 65/95, 102/98, 17/01, 82/01, 114/03, 123/03, 142/03, 30/04 and 68/05.

66 Split County Court, judgment no. Gžri-101/13 of 28 August 2014.

sulting from the non-exercise of the worker's right to annual leave according to the general dispositions on the responsibility for damages.[67]

Even though Croatia has implemented the Working Time Directive through its new Labour Act which now clearly provides for the right to compensation in lieu of the untaken annual leave at the end of the employment relationship, the Croatian legislator and its courts have in most cases nonetheless established a use-it-or-lose-it mechanism, which does not allow for annual leave to be carried over for more than one calendar year and requires a very active role of the worker for the enjoyment of that right.[68]

I. The Right to Paid Annual Leave and Other Types of Leave

The Croatian Labour Act clearly distinguishes paid annual leave, on the one hand, and other types of leave, on the other. Other types of leave comprise sick, maternity, parental, adoption and special leave - i.e. to take care of a child with serious developmental disabilities. Different types of leave cannot be taken simultaneously.

Workers do not lose the right to paid annual leave when they use another type of leave. Article 84(4) and (5) of the Labour Act states that the workers are entitled to take annual leave or a portion thereof, which is either interrupted or unused in the year when it was acquired because they used another type of leave, after returning to work. In the case of long-term leave or a combination of two or more types of leave that occurred in two calendar years, the Labour Act distinguishes two situations. First, when the workers go on leave in one calendar year and return to work by the 30th of June of the next calendar year, and the second when the workers returned to work in the next calendar year, but after the 30th of June. In the first situation, workers are obliged to

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67 Supreme Court of the Republic of Croatia, judgment no. Rev-1740/1997 of 4 October 2000.

68 This mechanism is particularly problematic having in mind *KHS AG v Winfried Schulte*, where the CJEU ruled that the carry-over period must be substantially longer than the reference period in respect of which it is granted.

use the carried-over annual leave by the 30th of June; otherwise, it is lost.[69] In the second, they must use it by the end of the year.

The Labour Act allows workers to interrupt sick or another type of leave and use annual leave instead. The exception concerns only maternity leave, which a pregnant woman must take 28 days before the expected arrival and 70 days after the birth of the baby.[70] The interrupted leave can be continued after the use of annual leave.

Thus, it is clear from the dispositions of the Croatian Labour Act that the provisions concerning the carry-over period are not in conformity with the Working Time Directive as interpreted by the CJEU in its abovementioned case law.

II. Accumulation and Carry-Over of Paid Annual Leave

In principle, annual leave should be used in the calendar year in which it is acquired. Exceptionally, it can be carried over to the next calendar year. In that case, it has to be used by the 30th of June of the next year; otherwise, the right is lost.[71]

As we saw in *Schultz-Hoff and Others*, the carry-over period of six months is evidently too short because its duration is contrary to the purpose of the right to paid annual leave. The length of the carry-over period has to be determined after balancing workers' and employers' interests, as the CJEU explained in *KHS v Schulte*. There, the CJEU did not limit itself to considering only the employer's interest and their ability to organise the work. Its main concern was that the worker must be put in a situation to benefit effectively from the annual leave.

The Croatian legislator does not apply the same approach. It does not provide for the possibility to balance workers' and employers' interests but instead prescribes an automatic loss of the right to annual leave if it is not used by the end of the fixed carry-over period.

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69 Supreme Court of the Republic of Croatia, judgment no. Rev-315/1998-2 of 25 November 1998. In that respect the applicable legislation did not change, and the same corresponding provisions apply.

70 Article 12 (2) of the Law on Maternity and Parental Benefits, Official Gazette of the Republic of Croatia, No. 85/08, 110/08, 34/11, 54/13, 152/14, 59/17.

71 Article 84 (1) of the Labour Act.

According to Article 82 of the Labour Act, the right to an allowance in lieu is possible only after the termination of the employment relationship, provided that the right to paid annual leave has not extinguished in the meantime. According to the case law of the Croatian courts prior to its entry in the European Union, workers had to demonstrate the existence of a fault on the part of the employer in order to be granted compensation for annual leave not taken after the termination of their employment relationship. In fact, the Croatian courts denied workers the right to compensation for untaken annual leave when the worker did not exercise that right because he was put in invalidity pension[72] or because he retired,[73] and ruled that those circumstances did not constitute fault on the part of the employer.

The jurisprudence dating from after Croatia became a member of the European Union confirms the above-mentioned approach. To date, the Croatian Supreme Court considers that it is for workers to prove that the employer did not allow them to take annual leave and that in the case of termination of the employment contract they lose the right to compensation in lieu of annual leave only for that reason.[74] The court went even further and in its judgment of 13 July 2016[75] reiterated the case law contained in judgment No. ´ Rev-2437/95 of 8 April 1999, where it had followed the same reasoning. This demonstrates that the Supreme Court was completely unaware of the settled case law of the CJEU and that it is still interpreting the provisions of the Labour Act in accordance with its own case law based on the ancient provisions of that Act. It must, however, be stated that while it is true that the provisions of the new Labour Act concerning the carry-over period and the burden of proof have not been substantially changed compared to the previous Labour Act, the new Labour Act provides for the right to an allowance in lieu of untaken annual leave in case of termination of the employment relationship. Moreover, the new Labour Act clearly states that it trans-

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72 Supreme Court of the Republic of Croatia, judgment no. Rev-1308/1998-2 of 15 September 1998.

73 Supreme Court of the Republic of Croatia, judgment no. Rev-713/00-2 of 27 September 2000.

74 Supreme Court of the Republic of Croatia, judgment no. Rev-346/14-2 of 13 July 2016; Supreme Court of the Republic of Croatia, judgment no. Revr-774/14-2 of 14 February 2017.

75 Supreme Court of the Republic of Croatia, judgment no. Rev-346/14-2 of 13 July 2016.

poses the Working Time Directive and thus the Croatian courts are obliged not only to interpret its provisions in line with the case law of the CJEU but also to consider the national provisions in the light of the Charter.[76]

In an even more recent judgment[77], the Pula Municipal Court held that the applicant lost her right to paid annual leave after termination of her employment relationship when she did not take annual leave acquired during the year preceding her maternity leave until the 30th of June because she did not prove that the employer did not allow her to exercise this right. That recent judgment is under appeal before the County Court, and it will be interesting to see whether the superior Croatian courts will take the recent CJEU's case law into consideration. Taking the foregoing considerations into account, we can move forward on to the next question which concerns the accumulation of paid annual leave rights.

III. Accumulation of Paid Annual Leave and the Possibility of Taking Annual Leave

Article 84(3) of the Labour Act provides that workers may not carry over to the next calendar year a portion of annual leave if they are allowed to use that leave. What does "allowed to use annual leave" mean? Does this refer to workers who failed to seek annual leave by the end of the carry-over period?

Cases before the Croatian courts are often about the allowances in lieu of the annual leave not taken prior to the end of the employment relationships. Croatian courts are more likely to interpret this disposition in favour of the employers.

Since the former Labour Act did not provide for the allowance in lieu of untaken annual leave at the end of the employment relationship, Croatian courts ruled that workers had the right to claim compensation according to the general principles of responsibility for damages. However, those courts also held the view that employers had the obligation to compensate the worker for untaken annual leave only when they did not allow the workers to actually take such leave. According to Croatian

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[76] Article 51 (1) of the Charter of Fundamental Rights of the European Union.

[77] Pula Municipal Court, judgment no. Pr-14/17-24 of 26 July 2018.

courts, that means the employers must have denied the workers the right to exercise their right to annual leave. Only then could workers claim compensation for untaken annual leave[78], which meant that it was for the employees to demonstrate the fault[79] on the part of the employers who denied them the possibility to take annual leave.

Although the Labour Act in force does not contain similar wording and does not require workers to provide the proof of fault on the part of the employer, the fact remains that Croatian courts interpret that disposition very strictly.

In the case mentioned above, in light of the recent case law of the Pula Municipal Court[80], the accumulation of leave rights and hence paid annual leave rights are not possible if the annual leave or the remaining portion thereof has not been taken by the 30th of June of the year following the year of the acquisition of those rights. Moreover, according to Croatian case law, in order to prevail themselves of the exception provided for in the above-mentioned article 84(5) the workers have to prove that they were actually not given the opportunity by their employer to exercise their right to paid annual leave.[81]

In other words, workers lose the right to paid annual leave, without the possibility of carrying it over to the following year, if they fail to ask for it. This is not in line with the CJEU's case law. According to the CJEU, the burden of proof in that respect is on the employers who must show that they have exercised all due diligence in order to enable workers to take the paid annual leave to which they are entitled.[82]

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78 Supreme Court of the Republic of Croatia, judgments no. Rev-69/1996-2 of 9 February 2000; no. Rev-1740/1997-2 of 4 October 2000; no. Gzz-110/02-2 of 17 December 2002; no. Rev-713/00-2 of 27 September 2000.

79 Supreme Court of the Republic of Croatia, judgments no. Rev-1308/1998-2 of 15 September 1998; no. Rev-893/1998-2 of 1 October 1998; no. Rev-2637/1992-2 of 14 January 1993; no. Rev-2116/1995-2 of 25 October 1995; no. Gzz-107/02-2 of 5 September 2002.

80 Pula Municipal Court, judgment no. Pr-14/17-24 of 26 July 2018.

81 Supreme Court of the Republic of Croatia, judgment no. Revr-774/14-2 of 14 February 2017. It is clear from the motivation contained in this judgment that the Supreme Court shares the position of the lower courts concerning the burden of proof that he was actually given the opportunity by his employer to exercise his right to paid annual leave, which in case of untaken annual leave is on the employee.

82 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 53.

One recent case of the Bjelovar County Court shows that some judges in Croatia are willing to interpret the provisions of the Labour Act broadly. In its recent judgment,[83] this court decided that the applicant's non-exercise of her right to paid annual leave willingly was not proven, i.e. the defendant offered her to take such leave and she refused. In those circumstances, that court accepted the applicant's claim for payment of an allowance in lieu of annual leave not taken after the termination of her employment relationship. This judgment, even though it seems an isolated one, shows that some judges in Croatia have taken the same approach as the CJEU that all due diligence must be exercised on the part of the employers in order to enable the workers to take paid annual leave to which they are entitled. By doing so, they depart from the text of the Labour Act and respect the provisions of Article 7(1) and Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter, even though they do not mention them as the bases of their judgment.

D. Possibility of Interpreting the Labour Act in Conformity with the CJEU Case Law

Concerning the entitlement to paid annual leave and the carry-over period, the wording of Article 84 of the Labour Act is clear and unconditional. It establishes temporal limits in which the paid annual leave must be taken. If the annual leave is not taken under the fixed conditions and periods, the right is lost.

Is it possible for Croatian judges to interpret said provision in light of Article 7 of the Working Time Directive, as interpreted by the CJEU? The answer is no. The opposite is true; they prefer to apply legal provisions as they are written. Accordingly, allowing the accumulation of unused annual leave would be an interpretation *contra legem*.

Since Article 84 (paragraphs 4 and 5) of the Labour Act is not in conformity with Article 7 of the Working Time Directive, as interpreted by the CJEU, Croatian judges are in fact obliged to discard the said provision and exclude its application. The question that arises is whether they could apply Article 7 of the Working Time Directive directly.[84]

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[83] Bjelovar County Court, judgment no Gž-2538/2013 of 5 June 2014.

[84] The direct horizontal and vertical application of EU law opens many constitutional questions. For an in-depth analysis see *Pech*, Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer

The CJEU considered the horizontal and vertical effects of Article 7 of the Working Time Directive in its most recent cases *Kreuziger v Land Berlin* and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*[85].

As regards the vertical effect of the Working Time Directive, whenever the provisions of a directive appear to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State *inter alia* where the latter has failed to implement the directive correctly.[86] Moreover, where a person involved in legal proceedings is able to rely on a directive against a State, she/he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case, it is necessary to prevent the State from taking advantage of its own failure to comply with the EU law.[87]

Specifically, Article 7 (2) of the Working Time Directive does not lay down any condition for the entitlement to an allowance in lieu other than that relating to the circumstance; first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he was entitled to on the date the relationship ended. Such a right is conferred directly by the directive and does not depend on conditions other than those which are explicitly provided for therein.[88] According to the CJEU, that provision fulfils the criteria of un-

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and Dominguez, Common Market Law Review, 2012, pp. 1841-1880; *Eeckhout*, The EU Charter of fundamental rights and the federal question, Common Market Law Review 2002, pp. 945-994; *Moeschel*, Race discrimination and access to the European Court of Justice: Belov, Common Market Law Review 2013, pp. 1433-1450. For an alternative approach to deciding Charter cases see *Guðmundsdóttir*, A renewed emphasis on the Charter's distinction between rights and principles: Is a doctrine of judicial restraint more appropriate? Common Market Law Review 52, 2015, pp. 685-719.

85 CJEU, case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*, ECLI:EU:C:2018:874.

86 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 20; CJEU, case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ECLI:EU:C:2012:33, para. 33.

87 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 20; CJEU, case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ECLI:EU:C:2012:33, para. 38.

88 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 22; CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and*

conditionality and sufficient precision, and thus meets the conditions required for it to have direct [vertical] effect.[89]

On the other hand, when a horizontal direct effect is concerned, a directive cannot impose obligations on an individual and therefore cannot be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has the competence to do so only where it is empowered to adopt regulations.[90] Thus, the CJEU has judged that even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot be applied in a dispute exclusively between private persons.[91] That conclusion is also applicable to Article 7 of the Working Time Directive which cannot, therefore, be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of the national law.[92]

In short, Article 7 of the Working Time Directive can be applied only in disputes between individuals and the State or other institutions with public authority.

Volker Willmeroth v Martina Broßonn, ECLI:EU:C:2018:871, paras. 44 and 73. See, to that effect, CJEU, C-118/13, *Gülay Bollacke v K + K Klaas & Kock BV & Co. KG*, ECLI:EU:C:2014:1755, paras. 23 and 28; CJEU, case C-341/15, *Hans Maschek v Magistratsdirektion der Stadt Wien – Personalstelle Wiener Stadtwerke*, ECLI:EU:C:2016:576, para. 27.

89 CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berlin*, ECLI:EU:C:2018:872, para. 22.

90 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 76; see also: CJEU, case C-122/17, *David Smith v Patrick Meade and Others*, EU:C:2018:631, para. 42.

91 CJEU, joined cases C-569/16 and C-570/16; *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 77; CJEU, case C122/17, *David Smith v Patrick Meade and Others*, EU:C:2018:631, para. 43.

92 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 78; see also: CJEU, case C-316/13, *Gérard Fenoll v Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, ECLI:EU:C:2015:200, para. 48.

However, that did not prevent the Court from examining, in its most recent case law, the right to paid annual leave in the light of Article 31(2) of the Charter. By analysing its scope and different international instruments[93] that contribute to its recognition as the fundamental social right, the Court stated: "the right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter."[94]

The Court clearly states that Article 31(2) of the Charter entails, as regards the situations falling within the scope of the Charter, that the national court must disapply national legislation pursuant to which a worker is deprived of his entitlement to paid annual leave, and that employers cannot rely on national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.[95] The question of whether that provision applies also in horizontal disputes between individuals was also addressed by the Court. It stated that although certain provisions of primary law are addressed principally to the Member

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93 Community Charter of the Fundamental Social Rights of Workers, the European Social Charter, Convention No. 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised), The Universal Declaration of Human Rights, United Nations Charter of 1966 on economic, social and cultural rights. For an overview, see *Birk*, Chapter 3. The Rights Guaranteed by the Social Charter, in: *Mangarelli* (ed.), International Encyclopaedia for Labour Law and Industrial Relations, National Monographs, 2016, pp. 50–71.

94 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 85; see also: CJEU, case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257, para. 76; see also: *Leczykiewicz*, Horizontal application of the Charter of Fundamental Rights, European Law Review 2013, pp. 479-497.

95 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 86.

States,[96] this does not preclude their application to relations between individuals.[97] The Court compares Article 31(2) of the Charter to the prohibition contained in its Article 21(1) which is sufficient in itself to confer on individuals a right which they may rely on, such as in a dispute with another individual.[98]

The final conclusion of the Court with regard to paid annual leave in horizontal disputes thus militates in favour of a consistent interpretation of the provisions of Article 31(2) of the Charter. Namely, when a national court is unable to interpret national legislation in a manner ensuring its compliance with Article 31(2) of the Charter, it is required to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying, if need be, that national legislation.[99]

Considering the mentioned case law of the CJEU, in disputes between individuals, Croatian courts should directly apply the Charter and provide the required protection of the right to paid annual leave, especially when they have to extend the carry-over period and, consequently, award the accumulation of untaken annual leave and the corresponding allowance in lieu in case of termination of an employment relationship.

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96 Article 51 (1) of the Charter of Fundamental Rights of the European Union.

97 Opinion of AG *Bot* to CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, paras. 78 and 88; see to that effect: CJEU, case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, para. 77; Advocate General Trstenjak has argued the opposite; see: Opinion of AG *Trstenjak* to CJEU, case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, ECLI:EU:C:2011:559, paras. 80-83.

98 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para 89; CJEU, case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257, para. 76.

99 CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 91; See by analogy: CJEU, case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, para. 79; for a commentary on the application of fundamental rights see: *Lazzerini*, (Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS, Common Market Law Review 2014, p. 907–933.

The analysis of Croatian case law revealed that one Croatian court, i.e. the Bjelovar County Court, actually did disapply certain provisions of the Labour Act and granted an allowance in lieu of annual leave to the applicant by disregarding the provisions concerning the carry-over period. This is an appropriate approach which has been confirmed by the most recent case law of the CJEU. In order to assure that it will be practised by higher courts in Croatia, such as the Constitutional and Supreme Courts, it would be advisable for them to rely upon the jurisprudence of the CJEU and the relevant dispositions of EU law.

When it comes to the loss of the right to paid annual leave where the worker has failed to seek his right and the burden of proof in that regard, the situation in Croatian law is also problematic. There have been decisions of the Supreme Court that denied the entitlement of the right due to the passive role of the worker.[100] Moreover, according to Article 135(1) of the Labour Act, in cases where the allowance in lieu of annual leave is sought, the burden of proof is on the employee.

The decision of the Bjelovar County Court[101] is an ideal example since it reversed the burden of proof on the employer.[102] Given the fact the employer did not prove that he encouraged the worker to take annual leave and the latter did not exercise that right willingly, it concluded that the worker was entitled to that right; as well as, after the termination of the employment contract, the allowance in lieu.

Taking all the above-mentioned factors into account, the rest of the Croatian judges will have to conform to the case law of the CJEU.

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[100] Supreme Court of the Republic of Croatia, decisions no. Revr 1461/11-2 of 27 September 2016; and no. Revr 774/14-2 of 14 February 2017; judgments no. Rev-1308/1998-2 of 15 September 1998; no. Rev-893/1998-2 of 1 October 1998; no. Rev-2637/1992-2 of 14 January 1993; no. Rev-2116/1995-2 of 25 October 1995; no. Gzz-107/02-2 of 5 September 2002.

[101] Bjelovar County Court, judgment n. Gž-2538/2013-2 of 5 June 2014.

[102] According to Article 135 (1) of the Labour Act the burden of proof is on the person that considers that one of its rights deriving from the employment relationship has been violated, i.e. the person who has initiated proceedings, if not otherwise prescribed by law.

E. Conclusion

Annual leave accrued during sick leave must either: a) be taken by the employees at the same time as their sick leave; or b) be taken by the employees on their return to work; or c) where the employees do not return to work at the end of a period of sickness absence and terminate their employment, be paid to the employees in lieu of annual leave.

With regard to the carry-over period for paid annual leave rights, the time fixed by the national law cannot be limited to six months, as it is currently the case with Croatian legislation. Even though that period must be respected in light of the circumstances of each particular case, it is apparent from the CJEU's case law that the current Croatian legislation is not in line with the Working Time Directive and the Charter.

Moreover, the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.[103] The burden of proof whether the workers are given the opportunity by their employers to exercise their right to paid annual leave lies with the employers. Employers must be able to show that they have exercised all due diligence in order to enable the workers to take the paid annual leave to which they are entitled. Otherwise, the loss of the right to annual leave, in the event of the termination of the employment relationship and absence of a payment of an allowance in lieu of annual leave not taken, constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Working Time Directive and of Article 31(1) of the Charter, which can be applied in disputes between individuals and thus having also a direct horizontal effect.

The Croatian legislature did not take into consideration the jurisprudence of the CJEU when modifying its Labour Act. The Croatian Courts also seem to be unaware of the CJEU's case law when it comes to the right to paid annual leave. Available cases demonstrate that the burden of proof in cases when this right is sought is still on the employees and that the carry-over period prescribed by Croatian law is strictly applied.

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[103] CJEU, case C-619/16, *Sebastian W. Kreuziger v Land Berl*in, ECLI:EU:C:2018:872, para. 22; CJEU, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para. 90.

Accordingly, it is evident that Croatia needs to change its national legislation and its courts must start disapplying regulations that are inconsistent with EU law, in particular, those that concern the fundamental social right to paid annual leave.

An Overview of the EU General Data Protection Regulation and its Implication in Albania as a Non-EU Member State

Megi Kurti [*]

Abstract

The entry into force on 25 May 2018 of the EU General Data Protection Regulation (GDPR)[1] has changed the application of "connecting factors" from the international private law perspective. The GDPR replaces the Data Protection Directive 95/46/EC[2]. The purpose of this Regulation is to unify the process of gathering and processing, as well as the equal treatment of personal data of EU citizens which are processed by a natural, legal person, public authority, agency or other bodies which, alone or jointly with others, process personal data.

Notwithstanding the aim of the GDPR to harmonize data privacy laws across Europe, the main innovation is the broader jurisdiction of its application, with regard to non-EU member states, such as Albania.

In this respect, this paper consists of a brief analysis of the current legislation in Albania regarding data protection and the challenges in harmonizing our legal framework with the GDPR provisions.

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[1] Regulation (EU) No. 2016/679 on the protection of natural persons with regard the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of 26/4/2016.

[2] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 24/10/1995.

A. Introduction

The latest debates among the European Union institutions relate especially to personal data handling and processing. With the new forms of technology which have come our way, new legal challenges are presented in every member state of the European Union (and not only within the EU, as will be elaborated in this paper) to revise their legal frameworks with respect to the protection of personal data.

In our everyday life, we use different types of technology to access a whole range of information that is presented to us through small screens. We use it to our benefit, for example, when different types of technology digitalize our everyday working processes, facilitating the communication of information and data. However, these developments and others such as "big data" present legal scholars with more and more challenges regarding the protection of such data. All the information we access is a transcript presented in a way that we, as human beings, are able to understand, but in reality, this information is written by software developers using different codes of different programming languages. As a result, Artificial Intelligence is, in fact, a way to show us the very complex methods and routes through which our data are registered, collected, processed and stored by these systems which actually managed by a group of Information Technology engineers and controlled by the company which employs them. These data may be used by companies which collect personal data as part of their business activities or as part of a contractual agreement, for many purposes, which may or may not be serving the aim and purpose for which they were primarily collected for. In this regard, Article 23 of the General Data Protection Regulation calls for controllers to hold and process only the data absolutely necessary for the completion of their duties (data minimization), as well as limiting the access to personal data to those needing to act out the processing. In that case, if these technological systems still store and have access to our information and personal data without any reason and purpose which we have agreed to, we are facing a concrete situation of a data protection breach and the whole burden lies within the company, which, according to the GDPR is liable for huge fines. This is just a simple way to show the great importance of personal data as well as the need to have a harmonized legal framework in every state where such data are transferred to.

As a new field of law, the more technology evolves the greater the need to protect personal data, as well as the greater the challenges which lie in every legal system. Regulation 2016/679 of 27 April 2016 (GDPR), as mentioned, replaces Directive 95/46/EC of 24 October 1995[3]. The GDPR entered into force on 25 May 2018 and the first court decisions based on its application and interpretation have just been released by some national courts such as a German court, Bochum Regional Court[4], which issued on August 2018 an interim injunction against a lawyer who provided an incomplete privacy policy on her website as well as an unencrypted contact form. The court considered both the missing privacy policy and the lack of encryption of the website to be violations of the GDPR. At this point, it is too early however to have an interpretation of the EU GDPR provisions by the European Union Court of Justice, although there are several debates in this regard at EU level.

As stated above, the GDPR applies to every EU member state and also to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related[5]. Any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union should be carried out in accordance with the GDPR, regardless of whether the processing itself takes place within the Union. This means that companies established in the EU – which have branches or collaborate in any kind of way with companies not based in an EU member state and which process personal data – have to comply with the provisions of the GDPR as well. From a private international law perspective, this is leading to a new interpretation of the concept of "connecting factors".

The growth of foreign business investments in Albania, as well as the establishment of trade relations between Albanian and foreign entities, require the implementation of legal easing measures in the framework of business and commercial transactions. This creates not only challenges in the process of updating the legislation but also a need for training legal practitioners in the area of legal protection of businesses

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3 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23/11/1995.

4 Landgericht Bochum, I-12 O 85/18, judgment of 7/8/2018.

5 Article 3 (2) of the General Data Protection Regulation, (fn. 2).

which, due to their relationship with foreign entities, are more or less subject to the application of new legal interpretations. Only in 2016 there were 5,637 foreign joint ventures operating on the territory of the Republic of Albania[6] and the number of foreign joint ventures that exercise economic activity in the country has increased by 11.6% in 2017 as compared to 2016.[7]

Thus, this paper aims to modestly contribute to the data protection discourse by giving a brief overview of the current Albanian legislation with respect to data protection. Trading entities from different parts of the EU want to be sure that the legislation in the countries where they invest in complies with the EU data protection rules as eventual fines are likely create a huge loss on their capital investment. This paper does not intend to outline the whole legal system, nor does it intend to exhaust every single legal element thereof. Instead, it sets off to offer an original approach to the current legal framework on personal data protection in Albania by comparing it to the GDPR provisions, as well as to increase legal scholars' attention (corporate lawyers, in particular) to the new rules on processing of personal data.

B. The Concept of Personal Data

Personal data means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.[8] This is exactly how the current EU Regulation defines personal data.

The first legal instrument that gave personal data a definition was actually the OECD Guidelines.[9] The terms "personal data" and "data sub-

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6 Albanian Statistical Institution, INSTAT "Foreign companies in Albania 2014-2016", December 2017, p. 6.

7 http://www.instat.gov.al (18/11/2018).

8 Article 4 of the General Data Protection Regulation, (fn. 2).

9 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 1980.

ject" serve to underscore that the Guidelines are concerned with physical persons. "The precise dividing line between personal data in the sense of information relating to identified or identifiable individuals and anonymous data may be difficult to draw and must be left to the regulation of each Member country. In principle, personal data convey information which by direct (e.g. a civil registration number) or indirect linkages (e.g. an address) may be connected to a particular physical person."[10] The same definition is given by Convention 108 "for the protection of individuals with regard to the processing of personal data"[11] which refers in Article 2 to "personal data" as meaning any information relating to an identified or identifiable individual, also designated as "data subject". Moreover, as per Article 2 of the Directive 95/46/EC[12] "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.[13]

In the *Amann* case[14], the the European Court of Human Rights (ECtHR) interpreted the term "personal data" as not being limited to matters of the private sphere of an individual. This meaning of the term "personal data" is also relevant for the GDPR. Also, under EU law as well as under Council of Europe law, information contains data about a person if: "an individual is identified or identifiable by this information; or an individual, while not identified, can be singled out by this information in a way which makes it possible to find out who the data subject is by conducting further research".[15] The GDPR stipulates that a natural per-

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10 *Ibid*, para. 41.

11 The Convention 108 opened for signature on 28 January 1981 and was the first legally binding international instrument in the data protection field. Under this Convention, the parties are required to take the necessary steps in their domestic legislation to apply the principles it lays down in order to ensure respect in their territory for the fundamental human rights of all individuals with regard to processing of personal data.

12 See fn. 3.

13 Article 2 of the Directive 95/46/EC.

14 ECtHR [GC], no. 27798/95, *Amann v. Switzerland*, judgment of 16/02/2000, para. 65.

15 Council of Europe, Convention 108+, the Modernized Convention for the Protection of Individuals with Regard to the Processing of Personal Data, 18 May 2018, ETS 108, Art. 2.

son is identifiable when he or she "can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person".[16] Furthermore, there are also sensitive data such as: personal data revealing racial or ethnic origin; personal data revealing political opinions, religious or other beliefs, including philosophical beliefs; personal data revealing trade union membership; genetic data and biometric data processed for the purpose of identifying a person; personal data concerning health, sexual life or sexual orientation.[17]

Given the above, it is evident that the definition of personal data in Europe has not been identical throughout the years and across different legal instruments: from the Convention 108, where personal data are considered as *ut supra* and all the information that has to do with an identified or identifiable individual to the definition provided by Directive 95/46 where personal data is seen to be more detailed and finally to the GDPR, where the concept of personal data is more specific and better adjusted to the rapid changes of telecommunication nowadays.

These differences not only in the definition of personal data, but also as regards the concept of collection and processing of data are living proof that legal instruments need to keep up with technological changes. The fact that these changes have taken place in the EU legal instruments have the logical result that the definition of personal data varies from the legislation of one Member State to the other. Is this convenient for the purposes of the Single Market? Since the GDPR provides a more modern and detailed definition of personal data, an analysis of its role (also in relation to the foregoing question) will follow.

I. The Importance of Regulations as EU Legal Instruments as opposed to Directives

At EU level, the protection of personal data is nowadays determined by a Regulation, which has replaced the relevant Directive. Why this

[16] Article 4 (1) of the General Data Protection Regulation, (fn. 2).

[17] Article 9 (1) of the General Data Protection Regulation, (fn. 2).

change? And will it be able to guarantee the same protection of personal data in every Member State?

For starters, directives refer to a state's authority in that the state itself can choose the legal instrument of implementation into its own domestic law, as well as the measures to assure and achieve the aim of the directive. A directive shall be binding as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.[18] For directives, the way in which an aim is accomplished is not important, rather the most important fact is that its purpose is accomplished. To this end, the aim of a directive is not the unification but rather the harmonization of laws, being tool for the harmonization of EU secondary law in a wide range of fields. The idea is to remove contradictions and conflicts between national laws and regulations or to resolve inconsistencies as far as possible, so that the same material conditions exist in all Member States. Directives are one of the primary tools positioned for building the Single Market. A directive is binding on Member States when it comes to the objective that should be achieved, but leaves the national authorities to decide on how to adopt the community goal and how it to incorporate it into their local systems. The *ratio* behind this form of legislation is that it allows intervention so that local economic and legal structures can adapt easier. Member States may consider specific local circumstances when implementing community rules. Directives do not replace the laws of the Member States under the obligation to implement them at the national level and they do not usually provide rights and do not charge citizens of the Union with obligations. They are only addressed to the Member States. Citizens' rights and obligations stem only from the measures adopted by the authorities of the Member States for implementing the directive. Implementation is often carried out through an exact transposition of the text of the directive into national law.

At the other end of the spectrum are regulations, which allow for a heavier interference of Union bodies in the domestic legal systems of the Member States. A regulation shall have general application. It shall

[18] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 of 26/10/2010, Art. 288 (3).

be binding in its entirety and directly applicable in all Member States.[19] Notably, regulations are distinguished by two uncommon features in international law. The first is their common nature, which means they define the same law throughout the Union, regardless of international borders, and have full implementation in all Member States. A Member State has no power to enforce a regulation in part or only to select those provisions which it approves. Nor can it require provisions or experiences of national law to prevent mandatory enforcement of the regulation. The second characteristic of regulations is direct applicability, which means that legal acts do not have to go through the process of implementation in national law although they transfer rights or charge the EU citizens with obligations just as national law does. The Member States, their governing institutions and the courts are directly bound by the Union law and they should respect Union law in the same way in which they should respect their relevant national domestic law. If regulations are ratified with the involvement of the European Parliament (according to the common decision-making procedure), they are described as "legislative acts". Parliament is not responsible for the rules that are only ratified by the Council or the European Commission, and so, at least from the procedural point of view, they lack the basic characteristics of a legislation of this type. All in all, regulations are binding in their entirety for the Member States, institutions, natural and legal persons. They shall have general application and are directly applied in all Member States from the date of entering into force. They have the same effect in all Member States, being used as a tool for the unification of law.

After contrasting these two tools, it can be concluded that the GDPR that has replaced the former directive is a stronger form of harmonization, which leads to the unification of the measures that should be taken and the procedures that should be followed while processing personal data in order to ensure the same level of protection. The question posed in the beginning of this section is actually answered by the effects that regulations have on states as opposed to directives. However, critical in this respect is to survey how the regulation is actually implemented.

[19] *Ibid*., Article 288 (2).

II. Personal Data and the Right to Respect for Private Life

Having reviewed the concept of personal data and its scope, we ask ourselves whether a breach of personal data protection could be linked with the right to respect for private life? In the EU legal order, data protection is recognized as a fundamental right, separate from the fundamental right to respect for private life.[20] This separation raises the question of the relationship and differences between these two rights.[21]

The right to respect for private life and the right to the protection of personal data are closely related, because in their *ratio* both aim to protect similar values, i.e. the autonomy and human dignity of individuals by granting them a personal sphere in which they can freely develop their personalities, think and shape their opinions.[22] And while these rights differ in their formulation and scope, they are actually an essential prerequisite for the exercise of other fundamental freedoms, such as the freedom of expression, freedom of peaceful assembly and association, and freedom of religion. What separates them is that the right to respect for private life consists of a general prohibition of interference, subject to some public interest criteria that can justify interference in certain cases[23], whereas the right to the protection of personal data does not.

Because of new developments in the area of technology, the protection of personal data is considered a modern and active right,[24] putting

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[20] The right to privacy in European law, referred to as the right to respect for private life was "launched" and inspired by the international human rights law such as the UDHR - the Universal Declaration of Human Rights which is adopted in 1948, prescribing the right to privacy under its Article 12 as one of the fundamental protected human rights. In 1950 the European Convention on Human Rights provided under its Article 8 that everyone has the right to respect for his or her private and family life, home and correspondence. On the other hand, the data protection right came in the European level with the Convention 108 of 1981.

[21] Council of Europe, European Union Agency for Fundamental Rights, Handbook on European data protection law, 2018, p. 19.

[22] *Ibid.,* p. 19.

[23] *Ibid.,* p. 19.

[24] Opinion of AG Sharpston to CJEU, joined cases C-92/09 and C-93/02, *Volker und Markus Schecke GbR v. Land Hessen*, ECLI:EU:C:2010:353, para. 71.

in place a system of checks and balances to protect individuals whenever their personal data are processed[25].

Article 8 of the EU Charter of Fundamental Rights (the Charter)[26] regulates the right to personal data protection and provides that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law[27]. These principles are also found in more detail in the GDPR. Data subjects have the right to access their data and to obtain from the controller without undue delay the rectification of inaccurate personal data relating to him or her.[28] Seemingly, the right to protection of personal data is implied whenever we have to process personal data and, in this context, it is a broader concept than the right to respect for private life.[29] The GDPR purports to ensure that any processing of personal data should be lawful and fair; it should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed.[30] Data protection applies to all kinds of personal data and data processing, irrespective of the relationship and impact on privacy[31] and the GDPR applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.[32]

While the right to privacy concerns situations where a private interest, or the "private life" of an individual, has been compromised, the processing of personal data may also infringe on the right to private life, making it not necessary to prove an infringement on private life for data

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25 Handbook on European data protection law, (fn. 20), p. 19.

26 European Union, Charter of Fundamental Rights of the European Union (2000/C 364/01), 26/10/2012, Art. 8.

27 Handbook on European data protection law, (fn. 20), p. 19.

28 Article 16 of the General Data Protection Regulation, (fn. 2).

29 Handbook on European data protection law, (fn. 20), p. 20.

30 Recital 39 of the General Data Protection Regulation, (fn. 2).

31 Handbook on European data protection law, (fn. 20), p. 20.

32 Article 2 of the General Data Protection Regulation, (fn. 2).

protection rules to be triggered.[33] The Court of Justice of the EU recalls in its case law that the concept of "private life" is a broad term not susceptible to exhaustive definition[34] considering under its meaning multiple aspects of the person's physical and social identity; information about the person's health which is also an important element of private life[35]; elements such as, for example, gender identification, name and sexual orientation and sexual life also fall within the personal sphere protected by Article 8; as well as Article 8 protects the right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[36] However, every case presents different facts and circumstances, therefore the assessment of whether or not there is, or has been, an interference with "private life" depends on each case.[37]

A contrario, regarding the application of data protection principles, any operation that involves the processing of personal data (with explicit exceptions laid down by paragraph 2 of Article 2 of the GDPR) is more likely to fall under the scope of data protection rules imposing the application of the right to personal data protection.[38] For example, where the employer records information relating to the names of and remuneration paid to employees, the mere recording of this information cannot be regarded as an interference with the private lives of the employees even though such an interference could, however, be argued if, for instance, the employer transferred the employees' personal information to third parties. Employers must in any case comply with data protection rules because recording employees' information constitutes data processing.[39]

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33 Handbook on European data protection law, (fn. 20), p. 20.

34 ECtHR, nos. 30562/04 and 30566/04, 2008, 4/12/2008, *S. and Marper v. the United Kingdom*, judgment of 4/12/2008, para. 66.

35 *Ibid.,* p. 20.

36 *Ibid.,* p. 20.

37 Handbook on European data protection law, (fn. 20), p. 20.

38 Article 2 of the General Data Protection Regulation, (fn. 2).

39 Handbook on European data protection law, (fn. 20), p. 20.

Also, in *Digital Rights Ireland*[40], the CJEU decided on the validity of Directive 2006/24/EC[41] in the context of personal data protection as a fundamental right and the respect for private life, provided by the EU Charter.[42] Directive 2006/24/EC provides that Member States shall ensure that the categories of data specified in Article 5 (such as available electronic communication services or public communication networks to retain citizens' telecommunication data) are retained for periods of not less than six months and not more than two years from the date of the communication[43] to ensure that data is available for the purposes of preventing, investigating and prosecuting serious crime.[44] The measure only concerns metadata, location data and data necessary to identify the subscriber or user and it does not apply to the content of electronic communications.[45] The CJEU deemed this Directive to be an interference with the fundamental right to personal data protection[46] "because it provides for the processing of personal data". In addition, it found that the Directive interfered with the right to respect for private life.[47]

Therefore, the right to personal data protection comes into play whenever personal data are processed.

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40 CJEU [GC], joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, judgement of 8/4/2014.

41 Directive 2006/24/EC on the retention of data generated or processed in connection with the provisions of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105/54 of 13/4/2006.

42 Charter of fundamental rights of the European Union, (fn. 24).

43 Article 6 of the Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (no longer in force), OJ L 105 of 13/4/2006, https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32006L0024 (18/11/2018).

44 *Ibid.,* Article 1.

45 European Commission, Guidelines on the right to "data portability", adopted on 13 December 2016, as last revised and adopted on 5 April 2017, Art. 29, p. 18.

46 *Ibid.,* Digital Rights Ireland, (fn. 38), para. 36.

47 *Ibid.,* paras. 32-35.

III. The Concept of Processor and Controller

Under the GDPR, "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.[48] The GDPR, as well as the earlier Directive, defines the actors processing data as data controllers and data processors. According to Article 4(7) of the GDPR, a controller is "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data". Moreover, Article 4(8) of the GDPR defines the "processor'" as "a natural person or legal person, public authority, agency or other body which processes personal data on behalf of the controller". In the private sector, the controller or the processor is generally either a natural or a legal person.[49] Article 2(2)(c) excludes from the scope of the GDPR the processing of personal data by a natural person in the course of a purely personal or household activity. Recital 18 further clarifies that in these situations there is no connection to a professional or commercial activity.

With respect to processing, the CJEU held in *Bodil Lindqvist*[50] that a situation where a private person publishes information about other persons on the internet falls within the scope of Directive 95/46/EC. In this case, an individual named Bodil Lindqvist had published information about herself and her 18 colleagues in the parish where she was working. The information was published on internet page that she had set up herself, and had requested to have a link between those pages and the Swedish Church's website. She had set up the internet pages in order to provide parishioners, preparing for their confirmation, with information they may need. On these pages, she referred to her colleagues by including either their full names or only their first names. She described their jobs and hobbies in a rather humorous manner. In many of the cases she even mentioned family circumstances and telephone

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48 *Ibid*., Article 4 (2) of the General Data Protection Regulation, (fn. 2).

49 Handbook on European data protection law, (fn. 20), p. 49.

50 CJEU, case C-101/01, *Lindqvist*, ECLI:EU:C:2003:596, para. 48.

numbers. Concerning one of the colleagues she wrote that this colleague was working part-time on medical grounds because she had injured her foot.[51] The Court ruled in this case that the processing of personal data was not excluded from the scope of Directive 95/46/EC since the provision in question (Article 3(2) of Directive 95/46/EC) must be interpreted "as relating only to activities which are carried out in the course of private life or family life of individuals, which is clearly not the case with processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people."[52]

This interpretation, in theory, should be equally applicable to the GDPR since in this part of the Directive 95/46/EC and the Regulation contain similar provisions.

Lastly, according to the GDPR, "controller" means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law; while a "processor" means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.[53]

[51] *Ibid*., paras. 12-13.

[52] *Ibid*., para. 47.

[53] *Ibid*., Art. 4 (7) – (8) of the General Data Protection Regulation, (fn. 2).

C. Innovations and the territorial Scope of the General Data Protection Regulation with regard to its Implication in Albania as a Non-EU Member State

I. Innovations of the Regulation

Some of the new aspects that the GDPR has brought about consist of:

- Broadening the territorial scope of its legal effects

Perhaps the biggest change in the regulatory landscape of data protection comes with the expanded jurisdiction of the GDPR's effects. Previously, the territorial application of the Directive was unclear. The GDPR makes its applicability very clear. The GDPR will be applicable to the processing of personal data by controllers and processors that are located in EU countries, regardless of whether or not the processing is carried out in these countries.

- Strengthening the criteria for granting consent

There is a new approach to the concept of "consent" according to the GDPR. In the new Regulation, concrete practical aspects of consent and other related aspects are dealt with, such as consent of minors or consent by electronic means.

- New Rights:

a) Right to be forgotten

This right means the subject of it has the right to require the controller to delete the personal data about him or her, without delay, and the controller has the obligation to delete personal data based on the reasons set out in the EU Regulation;

b) Data Transferability Right - Data Portability

The data subject has the right to obtain personal data that he or she has provided to the controller in a structured, widely used, and automatically readable format and those data are transferable to another unhindered controller.

- Strengthening accountability

The GDPR brings about a strengthening of accountability in relation to data processors. Controllers are required to show more attention to respecting the principles of protection of data and rights at each stage of data processing by creating a culture of monitoring, reviewing, and

evaluating processing procedures or increased sanctions against non-enforcers of the law on the protection of their data.

- Increasing transparency

The principle of transparency requires any information that is directed to the public or to the data subject to be concise, easily accessible and easy to understand in a plain and clear language.

- Protecting the Data of Children

Children deserve specific protection regarding their personal information as they can be less aware of the pertinent risks, consequences, warranties and rights with respect to the processing of their personal data.

- Strengthening the independence of the Authority for the Protection of Personal Data

The GDPR guarantees the full independence of the Personal Data Protection Authorities, suggesting increased human and financial resources.

- Creating a Data Protection Officers Network (DPO)

The GDPR introduces as an innovation the obligation to designate Data Protection Officers who should be assigned to the purpose of monitoring the compliance of the data controllers or data processors with the GDPR and other data protection laws

- Certification of data controllers - data processors

Pursuant to Article 43 of the GDPR, certification of controllers is a required protection of data at their request. In this sense, the supervisory authority must have created the necessary legal conditions for (i) drafting and approving legal or subordinated legal acts "on certification of information security management systems and their protection"; (ii) accreditation of the certification body; (iii) certification of controllers. The purpose of this objective is to harmonize the entire existing legal framework for the protection of personal data with the best EU practices in order to guarantee this right.

Infringements of GDPR provisions shall be subject to administrative fines up to EUR 20 million or, in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

As it can be seen, the novelties of the GDPR regulation are numerous. Although Albania is not part of the EU, as a country aspiring for integration, it is expected to harmonize its national legislation with the *acquis communitaire*.

II. The Territorial Scope Interpretation

"*This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behavior as far as their behavior takes place within the Union. 3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.*"[54] This is *expressis verbis* the territorial scope of the GDPR as prescribed in its Article 3. As I mentioned above, one of the innovations of the GDPR is the broader scope of its application. This means that even in states like Albania, which are not members of the EU, the Regulation will apply if processing and storage of personal data are taking place.

The *Google Spain and Google*[55] case presented such a situation where the dispute in the main proceedings concerned the personal data of a Spanish national resident, Mr. Costeja González, which appeared in the links to the daily newspaper La Vanguardia. Mr. González was mentioned in relation to a real estate auction which had a connection with attachment proceedings concerning the recovery of social security debts. He requested that his personal data be removed or that it no longer appear in the links to La Vanguardia. The CJEU was requested to give a preliminary ruling and one of the questions was regarding the territorial scope of Directive 95/46/EC, since this Directive also refers to

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54 Article 3 of the General Data Protection Regulation, (fn. 2).

55 CJEU, case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* , ECLI:EU:C:2014:317.

the same concept and the interpretation of Article 4(1)(a) of the same Directive was also requested.

The national court started by asking whether an entity is to be considered as an "establishment" when "the undertaking providing the search engine sets up in a Member State an office or subsidiary for the purpose of promoting and selling advertising space on the search engine, which orientates its activity towards the inhabitants of that State".[56] The Court noted that Article 4(1)(a) of the Directive should not be interpreted restrictively and that the provision prescribes a particularly broad territorial scope.[57] The Court's reasoning was mainly focused on determining the meaning of "in the context of the activities" of an establishment, instead of the notion of 'establishment'.

The Court stated that "carried out in the context of the activities" in Article 4(a) of the Directive cannot be given a restrictive interpretation, since the provision needs to be read in light of the objective of Directive 95/46/EC. Furthermore, the Court noted that the goal of this Directive was to ensure the effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data.

The objective of the GDPR is the same. In this regard, we can assume that if the same case were to be brought before the Court after the entry into force of the GDPR, the interpretation of the territorial scope would still have been the same, if not even more detailed. It is also important to note that the GDPR applies when the processing activities are *related to* either offering of goods or services to data subjects in the EU, or to the monitoring of their behavior. In this case, in my opinion, the term *related to* seems to be a vague notion that does not require any strong connection between the processing activities and the offering of goods or services or the monitoring of the behavior. However, this does not affect any problem with the notion of *related to* since it requires that there is a connection between the processing activities and the offering of goods or services or monitoring of the behavior. In this interpretation, if there is a connection between the processing activities with companies that operate in the territory of Albania, then the Regulation applies.

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[56] *Ibid*., para. 20.

[57] *Ibid.,* para. 54.

Another argument and *ratio* for this application is found in the *Recital 23* of the GDPR itself.[58]

III. The Albanian Legal Framework on Data Protection

What follows is an overview of some of the most important data protection laws that operate in Albania, in order to briefly compare these laws to the GDPR. Legislation on personal data protection in Albania is contemporary and aligns to the standards of the acts of the Council of Europe and the European Union. There is a dynamic reform taking place, with the adoption of the Additional Protocol for the Modernization of Convention 108 of the Council of Europe and the launch of the implementation of the GDPR and these require engagement from Albania in reforming its own rules on data protection. Some of the most important laws regulating the sphere of data protection are: (i) the Constitution of the Republic of Albania; (ii) Law No. 9887 on the Protection of Personal Data[59]; (iii) Law No. 120/2014 "on several amendments and addenda to the Law No. 9887 of 10/03/2008 "on the Protection of Personal Data", as amended; (iii) Law No. 119/2014 "on the right to infor-

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58 *"In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union should be subject to this Regulation where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment. In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union."* Recital 23, GDPR (fn. 1).

59 Law No. 9887 dated 10/03/2008 as amended by the Law No. 48/2012 dated 26/04/2012 on the Protection of Personal Data, Official Gazette of the Republic of Albania, 16/05/2012, No. 53.

mation"; (iv) Law No. 9288 of 7/10/2004 "on the ratification of the Convention on the Protection of Individuals from Automatic Data Processing"; (v) Law No. 9287of 7/10/2004 "on the ratification of the Additional Protocol to the Convention on the Protection of Individuals from the Automatic Processing of Personal Data, regarding the supervisory authorities and the cross-border transfer of personal data"; (vi) "Law No. 9918 of 19/05/2008 "on electronic communications in the Republic of Albania"; (vii) Law No. 8839 of 22/11/2001 "On management, collection and storage of information classified as state secret"; (viii) Law No. 8839 of 22/11/2001 "on the collection, administration and preservation of Classified Police Information"; (ix) Law No. 10 371 of 10/2/2011 on "Ratification of the Memorandum on the legal Guarantee and legal remedies against the illegal processing of personal data".

The Albanian Constitution in its Article 35 states *"1. No one can be obliged, except when required by the law, to disclose information relating to his or her person. 2. Any collection, use and disclosure of the data about the person is done with his consent, except in cases of provided by law. 3. Everyone has the right to be acquainted with the collected data about him, with the exception of cases provided for by law. 4. Everyone has the right to request the correction or deletion of untrue or incomplete data or collected in violation of the law".*

One of the most important laws on data protection is the Law of 2008, as amended, on Protection of Personal Data. In this text, most of the provisions are structured according to the EU data protection law. Even the definition is the same, where personal data is defined as *any information relating to an identified or identifiable natural person, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. "Sensitive data" shall mean any piece of information related to the natural person in referring to his racial or ethnic origin, political opinions, trade union membership, religious or philosophical beliefs, criminal prosecution, as well as with data concerning his health and sexual life.*

Expressis verbis, under Article 5 of the Law of 2008,[60] protection of personal data is based on: a) processing that is fair and lawful; b) collec-

[60] Article 5 of the Law No. 9887 "On protection of personal data", as amended, Official Gazette of the Republic of Albania, No.160, 17/10/2014.

tion for specific, clearly defined and legitimate purposes and shall be processed in a way that is compatible with these purposes; c) adequate data, which are relevant to the purpose of their processing and not excessive in relation to the purpose; d) accurate data, and where necessary, updated; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified; e) keeping data in a form that allows the identification of data subjects for no longer than it is necessary for the purpose for which they were collected or further processed.[61]

The reasons for data processing are also defined in an exhaustive list where personal data may be processed only if *personal data subject has given his consent; processing is necessary for the performance of a contract to which the data subject is one of the parties or in order to negotiate or amend a draft/contract at the request of the data subject; in order to protect the vital interests of the data subject; to comply with a legal obligation of the controller; for the performance of a legal task of public interest or in exercise of powers of the controller or of a third party to whom the data are disclosed; processing is necessary for the protection of the legitimate rights and interests of the controller, the recipient or any other interested party. However, in any case, processing of personal data cannot be in clear contradiction with the data subject right to protection of personal life and privacy.*[62]

The Law of 2008, as amended, also offers the right to request blocking, rectification and erasure of personal data. Every data subject, according to Article 13 of the Law, has the right to request blocking, rectification or erasure of his data, free of charge whenever he is informed that data relating to him are irregular, untrue, incomplete or have been processed and collected in contradiction with the provisions of this law. Within 30 days from receipt of the data subject request, the controller shall notify the data subject on the lawful processing of the data and whether the blocking, rectification or erasure has been carried out or not. Furthermore, Article 16 guarantees the right to complain for every person who claims that his rights, freedoms and legal interests concerning his personal data have been violated and shall have the right to complain or to notify the Commissioner and to request his intervention

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61 *Ibid.,* Article 5.

62 *Ibid.,* Article 6.

to remedy the infringed right. Following this complaint, in accordance with the Code of Civil Procedure, the data subject may file a complaint in court. Another important part of this Law is the institution of the Commissioner[63] for personal data protection, who is a public legal person and is the independent authority in charge of supervising and monitoring the protection of personal data by respecting and guaranteeing the fundamental human rights and freedoms in compliance with the law. *Inter alia* the Commissioner is in charge of: giving opinions on legal and secondary draft acts related to personal data, as well as projects required to be implemented by the controller alone or jointly with others; giving recommendations for the implementation of obligations deriving from the law on protection of personal data and assures publication thereof etc.[64]

The GDPR is currently one of the main topics among Albanian businesses because of its extraterritorial and has encouraged the business community to start taking the necessary measures in order to be in compliance with it. All Albanian organizations/businesses offering paid or unpaid goods and/or services to EU citizens fall under the scope of the GDPR. On 4 April 2018, the Albanian Parliament passed a resolution "on the Assessment of the Activity of the Albanian Commissioner on the Right to Information and Data Protection". The Resolution assessed the role of the Commissioner during the year 2017. The Commissioner is an independent institution and responsible authority that oversees and monitors the right to information and personal data protection in accordance with Law No. 119/2014 "on the Right to Information" and Law No. 9887 of 10/3/2008, "on Personal Data Protection", as amended. It also assessed the active role of the Office of the Commissioner in raising the awareness of public authorities on the obligations on the design and publication of transparency programs and the provision of public information.

Through this Resolution, Albania's Parliament requested that in 2018 the Office of the Commissioner engages in enriching transparency programs of public and non-public institutions with information related to the objectives for sustainable development in accordance with the 2017 "United Nations 2030 Agenda for Sustainable Development". In addition,

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63 http://www.idp.al/?lang=en (12/11/2018).

64 Article 31 of the Law "On protection of personal data", (fn. 55).

the Commissioner should engage in drafting normative draft acts that fully align national rules to the new EU legislation package in the field of personal data protection: Regulation (EU) 2016/679 of 27 April 2016, the GDPR and the Directive (EU) 2016/680 27 April 2016 (Directive on the Protection of Data of Natural Persons during the Criminal Procedure).

D. Conclusions

With new technologies being adopted in our everyday work and life, the legal framework should also accommodate new forms of information where personal data are stored, collected or processed through a mere "click". As analyzed in this paper, the GDPR provides for an extended territorial scope of application which makes it a relevant issue for Albania. The Albanian business community has already started reviewing their processes in order to comply with the GDPR rules (and avoid potential fines).

As a country aspiring for EU integration, the Office of the Commissioner on the Right to Information and Data Protection has developed a strategy to implement the GDPR according to the following steps: 1. Adopt modern legislation on the protection of personal data to comply with the GDPR and Directive 680/2016; 2. Increase the capacity of the staff of the Office of the Commissioner for harmonizing national legislation to the *acquis*. 3. Collaborate and partner with and other state institutions counterparts from the EU; 4. Prioritize data protection in the Information and Communication Technology sector; 5. Raise public awareness on the innovations of the new harmonized law; 6. Educate students on their rights and responsibilities when using personal data in the digital environment.

Aligning the Foreign Policies of Western Balkan Countries in Cases of EU's Use of Targeted Sanctions

Julija Brsakoska Bazerkoska[*]

Abstract

This paper analyses how the foreign policies of the Western Balkan countries – through the examples of the Republic of Macedonia and the Republic of Albania, which are part of the Stabilisation and Association Process (SAP) – need to align with the EU when targeted sanctions are imposed. The paper argues that the start of SAP did not mean instant cooperation in the sphere of imposition of targeted sanctions. In this respect, the practice of potential candidate countries was mainly to align their foreign policies with the UN. When the prospects of membership were emphasized at the European Council in Thessaloniki in 2003, the "Thessaloniki Agenda for the Western Balkans" provided for political dialogue and cooperation in the area of Common Foreign and Security Policy. Through this Agenda, the European Union enabled a closer collaboration with the Western Balkan region in the implementation of targeted sanctions.

Consequently, the paper focuses on the legal and institutional structure established within the two Western Balkan republics – Macedonia and Albania, which are candidate countries for European Union (EU) membership and how such structure enables them to cooperate effectively in the implementation of targeted sanctions. This is important because after an EU Council Decision on imposition of restrictive measures is enacted the candidate countries need to take all necessary measures to align their foreign policies in the respective area with the EU.

Finally, the paper concludes that the adoption of legislation for implementation of restrictive measures together with the establishment of a supporting institutional structure within the candidate countries sends a strong

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political signal to the European Union and to the international community in general that the Western Balkans are willing and ready to respect established regulations on targeted sanctions.

A. Introduction

The European Union (EU) has frequently imposed sanctions or restrictive measures towards governments of third countries or non-state entities and individuals in recent years. When using restrictive measures, the European Union has two objectives. Primarily, the EU acts to implement United Nations (UN) sanctions more effectively. Secondarily, the EU uses sanctions as an instrument of its own Common Foreign and Security Policy (CFSP). In each case, the European Union is committed to the effective use of sanctions as an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and its CFSP.

This paper analyses how the foreign policies of Western Balkan countries – through the examples of the Republic of Macedonia and the Republic of Albania, which are part of the Stabilisation and Association Process (SAP) – need to align with the EU when targeted sanctions are imposed. The paper argues that the start of SAP did not mean instant cooperation in the sphere of imposition of targeted sanctions. In this respect, the practice of potential candidate countries was mainly to align their foreign policies with the UN. When the prospects of membership were emphasized at the European Council in Thessaloniki in 2003, the "Thessaloniki Agenda for the Western Balkans" provided for political dialogue and cooperation in the area of CFSP. Through this Agenda, the European Union enabled a closer collaboration with the Western Balkan region in the implementation of targeted sanctions.

Consequently, the paper focuses on the legal and institutional structure established within the two Western Balkan republics – Macedonia and Albania, which are candidate countries for EU membership and how such structure enables them to cooperate effectively in the implementation of targeted sanctions. This is important because after an EU Council Decision on imposition of restrictive measures is enacted the candidate countries need to take all necessary measures to align their foreign policies in the respective area with the EU.

Finally, the paper concludes that the adoption of legislation for implementation of restrictive measures together with the establishment of a supporting institutional structure within the candidate countries sends a strong political signal to the European Union and to the international community in general that the Western Balkans are willing and ready to respect the established regulations on targeted sanctions.

B. Defining the Terminology – Sanctions, Restrictive Measures and Targeted Sanctions

Sanctions are one of the most widely used tools in EU foreign policy. There is no one commonly agreed definition for the term 'sanctions'. According to Portela, in international relations "sanctions are not limited to the interruption of economic relations but encompass as well measures devoid of economic significance, such as diplomatic sanctions"[1]. Koutrakos describes sanctions as measures that "connote the exercise of pressure by one state or coalition of states to produce a change in the political behaviour of another state or group of states"[2].

Within the United Nations framework, the Security Council (UNSC) adopts sanctions under Article 41 of the United Nations Charter: *"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures".* These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. As it can be seen from the wording of Article 41 of the United Nations Charter, the term 'sanctions' it is not explicitly referred to preferring instead 'measures not involving the use of armed force'.

In EU terminology, sanctions have traditionally been referred to as 'restrictive measures'. In official documents, the term 'sanctions' appears

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1 *Portela*, The EU's use of 'Targeted' Sanctions: Evaluating Effectiveness, CEPS Working Document No. 391, March 2014, p. 4.

2 *Koutrakos*, Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments, 2001, p. 49.

in brackets and it is attached to the term 'restrictive measures'.[3] The term 'restrictive measures' is used to refer to the EU tool of CFSP regulated by Article 215 of the Treaty on the Functioning of the European Union (TFEU). It is important to notice that according to Article 75 TFEU the so-called 'administrative measures' can be imposed as a part of the Area of Freedom, Security and Justice when they are directed to 'internal' terrorism. Article 215 TFEU, on the other hand, concentrates on sanctions against third states and individuals in the area of CFSP.

The sanctions landscape underwent a profound transformation in the mid-nineties because of the emergence of the concept of targeted or 'smart' sanctions. Targeted sanctions are designed to put pressure on leaders or specific elites who are deemed responsible for objectionable behaviour.[4] Targeted sanctions are used to raise the targeted regime's costs of noncompliance while avoiding general suffering. They mainly include measures such as targeted financial sanctions, arms embargoes, travel bans and diplomatic sanctions directed against named individuals and organizations.[5]

Officially the EU uses 'sanctions' only in connection to measures agreed to in the framework of the Common Foreign and Security Policy, routinely adopted in the form of a CFSP 'common position', or CFSP 'decision' after the Lisbon Treaty. In cases when it is necessary for the EU to act and impose sanctions, which are grounded on the CFSP decision, on the basis of Article 215 TFEU the Council can adopt restrictive measures against natural or legal persons and groups or non-State entities. These are known as targeted or smart sanctions because they are aimed at specific individuals or companies rather than, for example,

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3 More in *Portela*, The EU's use of 'Targeted' Sanctions: Evaluating Effectiveness, CEPS Working Document No. 391, March 2014, pp. 4-5.

4 *Ibid.,* p. 4.

5 For more on this issue see: *Drezner*, Sanctions sometimes smart: Targeted sanctions in theory and practice, International Studies Review, Vol. 13, No. 1, 2011, pp. 102-104; *Hufbauer/Oegg,* Targeted Sanctions: A Policy Alternative?, Paper for a symposium on "Sanctions Reform? Evaluating the Economic Weapon in Asia and the World", Peterson Institute for International Economics, February 2000, p. 2; *Friedman,* Smart Sanctions: A Short History, Foreign Policy, April 2012, p. 2; *Biersteker/Eckert/Tourinho,* Targeted Sanctions: The Impacts and Effectiveness of United Nations Action, 2016, p. 37.

putting an embargo on all trade with a particular country.[6] Since this paper focuses on the EU sanctions practice under the CFSP aimed at individuals or companies, the term 'targeted sanctions' as used in academic literature will be used interchangeably with the EU term of 'restrictive measures'.

C. The EU and Targeted Sanctions

Alongside the continuing expansion of Union membership, in the years after 1958 the scope of the Union's policy competences has expanded considerably as well. The traditional subject matter of international relations that is foreign security policy and defence was excluded from the formal policy agenda of the European Community. This remained so for decades to come until the CFSP became one of the pillars of the European Union in Maastricht.[7] Therefore, at first, the imposition of sanctions by the European Community and afterwards by the European Union was strongly connected with UN action. For that reason, a short overview of the UN practice in this area will follow.

I. Why do UN Sanctions Matter?

Under Chapter VII of the UN Charter, the Security Council can implement measures that range from economic and other sanctions not involving the use of armed force to international military action in order to deal with "threats to international peace and security". The use of mandatory sanctions is intended to apply pressure on a state or entity to comply with the objectives set out by the Security Council without resorting to the use of force. Sanctions thus offer the Security Council an important instrument to enforce its decisions. Moreover, the universal character of the United Nations makes it an especially appropriate body to establish and to monitor such measures.

Traditionally, the UN Security Council imposed sanctions against states. In the period since the UN was formed until 1990, the Security

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6 *Misheva/Duic,* The EU Restrictive Measures - What if the Court of Justice of European Union finds them not Being Legal: Cases in Croatia and Republic of Macedonia, Balkan Social Science Review, Vol. 6, December 2015, pp. 21-41.

7 On this issue see *Bretherton/Vogler*, The European Union as a Global Actor, Routledge, 2006, pp. 158-183.

Council used Article 41 of the Charter to impose sanctions only on two states: a 1966 trade embargo against Southern Rhodesia's white minority government and a 1977 arms embargo against the South African apartheid regime. The imposition of sanctions regimes towards states increased considerably during the 1990s. Only recently, the Security Council started imposing sanctions against non-state actors.

According to Tostensen and Bull, "it is exceedingly difficult to predict what internal political dynamics a sanctions regime will create in the targeted state"[8]. The effects of sanctions on targeted regimes cannot be easily evaluated. This is mainly due to the fact that those trying to design effective sanctions have little research at their disposal on the effects of sanctions on targeted states' decision-making processes.[9]

While being an important device in the hands of the Security Council, economic sanctions are raising concerns regarding their negative effect particularly on vulnerable civilian populations and the possible collateral effects on third states. The concept of so-called 'smart' or 'targeted' sanctions is designed to raise the targeted regime's costs of noncompliance while avoiding the general suffering that comprehensive sanctions often create. As a result, the use of targeted or smart sanctions has increased over the years. Such sanctions mainly include measures such as targeted financial sanctions, arms embargoes, travel bans and diplomatic sanctions directed against named individuals and organizations. They are assumed to be more effective in targeting and penalizing political elites and other individuals. Moreover, the scope of grounds justifying their use has also expanded. Targeted sanctions are now used as a tool to restore democracy and human rights, to prevent aggression, or pressure regimes that are supporting terrorist activities and others charged with international crimes.[10] In the development of targeted sanctions regimes particular interest was put primarily on financial sanctions, as well as on travel and aviation bans, and embargoes on specific commodities such as arms or diamonds. Therefore, the following instruments can be applied: financial sanctions – freezing of funds and other finan-

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8 *Tostensen/Bull*, Are Smart Sanctions Feasible?, 54 World Politics, 2002, pp. 373-403.

9 *Ibid*.

10 See *Cortright/López* in *Cortright/López* (eds.), Smart Sanctions: Targeting Economic Statecraft, 2002.

cial assets[11], ban on transactions, investment restrictions; trade restrictions on particular goods, e.g. arms, diamonds, oil, lumber, or services; travel restrictions; diplomatic constraints; cultural and sports restrictions and air traffic restrictions.

II. Use of Targeted Sanctions in the EU

Sanctions or restrictive measures towards governments of third countries or non-state entities and individuals have been frequently imposed by the EU in recent years. They have been mainly used as a form of coercive diplomacy. This was done either on autonomous EU basis or by implementing a binding UN Security Council Resolution within the framework of the Common Foreign and Security Policy.

EU sanctions are agreed upon in the CFSP framework where decisions are taken by unanimity and where each member state has a formal veto. Under the Lisbon Treaty, a CFSP act – 'CFSP Common Position' before the Lisbon Treaty or 'Council Decision' thereafter – must be adopted under Chapter 2 of Title V of the Treaty on European Union (TEU) on a joint proposal from the High Representative and the European Commission.[12] The legal basis therefor is Article 215 TFEU, which explicitly provides for the adoption of both sanctions against third countries as well as individuals, groups and non-state entities. Article 215 TFEU sets forth that:

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[11] Financial assets and economic benefits of any kind include: cash; cheques, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures, derivatives contracts; interest, dividends or other income on or value accruing from or generated by assets; credit, rights of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale; documents evidencing an interest in funds or financial resources.

[12] For further explanation on the legal basis and implementation before and after the Treaty of Lisbon see: *Portela*, Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level, study for the Directorate – General for External Policies, 2018, pp. 10-13; *Eckes*, EU Counter-Terrorism Politics and Fundamental Rights, 2009, pp. 78-124; *Wessel*, Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?, European Foreign Affairs Review, 2015, pp. 4-15.

"1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities."

Furthermore, under the Lisbon Treaty, a separate article regulates the adoption of sanctions against individuals, specifically in the field of terrorism. Article 75 TFEU provides for the adoption of "administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". Such measures are to be adopted by the Council and the European Parliament through ordinary legislative procedure. Implementation is by a Council act on a Commission proposal, without the European Parliament's participation. The adoption of terrorist listings under Article 75 TFEU contrasts with the adoption of other sanctions, mainly because it is part of the Area of Justice, Freedom and Security rather than the CFSP. When the EU applies sanctions in implementation of UNSC Resolutions, the same procedure applies. In this case, the only difference is that the CFSP act includes a reference to the UNSC Resolution it gives effect to.[13]

The CFSP decision is directly binding on EU Member States and requires them to take appropriate measures to give effect to its objectives. When CFSP Council decisions set out arms embargoes and travel bans, these measures are directly implemented at national level. By contrast asset freezes and export bans, i.e. economic measures, are an EU competence and they are implemented by EU regulations.[14]

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[13] *Portela*, Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level, study for the Directorate – General for External Policies, 2018, pp. 10-11.

[14] *Eckes,* The Law and Practice of EU Sanctions, in: Blockmans/Koutrakos (eds.) Research Handbook on CFSP/CSDP, 2018, pp. 206-230.

The European Union is committed to the effective use of targeted sanctions as an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and its Common Foreign and Security Policy.[15] Therefore, the Union fulfills its obligations under the UN Charter and farther, it imposes autonomous EU sanctions in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance.[16] Restrictive measures imposed by the Union, may include: diplomatic sanctions (expulsion of diplomats, severing of diplomatic ties, suspension of official visits); boycotts of sport or cultural events; trade sanctions (general or specific trade sanctions, arms embargoes); financial sanctions (freezing of funds or economic resources, prohibition on financial transactions, restrictions on export credits or investment); flight bans; and restrictions on admission.[17]

Recently, the EU is showing an inclination to impose autonomous targeted sanctions which are going beyond UN measures. In addition, the Union displays a certain readiness to impose "tough" measures that have serious economic implications.[18] This may not come as a surprise since the EU sanctions policy is one its strongest foreign policy tools, as it leverages the Union's significant economic power to promote its external objectives. As a consequence, the threat or the imposition of economic and financial sanctions can be a powerful device in the Union's hands in order to exert influence on the conduct of other actors on the international arena. It is also important to stress that the European Union is in a much better position to impose sanctions than its Member States, since EU sanctions have a greater impact on the international stage.[19] Currently, there is a number of important examples of such

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15 *Kuijper/Wouters/et al.,* The Law of EU External Relations, 2013, pp. 243-365.

16 *Basic Principles on the Use of Restrictive Measures (Sanctions),* Council of the European Union, Brussels, 07/06/2004.

17 For more on this issue see *Anthony*, Sanctions Applied by the European Union and United Nations*,* SIPRY Yearbook, 2002: Armaments, Disarmaments and International Security, pp. 203-228.

18 See *de Vries/Portela/Guijarro-Usobiaga*, Improving the Effectiveness of Sanctions: A Checklist for the EU, CEPS Special Report No. 95, November 2014, p. 1.

19 *Portela,* Are European Union sanctions "targeted"?, Cambridge Review of International Affairs, Vol. 29, 2016, pp. 912-929.

autonomous sanctions being levied on Belarus, Moldova, Russian Federation, Syria. The catalogue of EU targeted sanctions is diverse and includes numerous possible restrictive measures which can be imposed by the Union based on the decision which measure or package of measures is most appropriate in order to promote the desired outcome.

When it comes to targeted sanctions that are imposed by the United Nations Security Council, especially taking into consideration that targeted sanctions are measures directed at individuals who are named on ad hoc lists, a distinction has to be made between the situations in which the lists are established and maintained by the UNSC or a specialized sanctions committee[20]. If the former, crucial decisions concerning listing and delisting are taken at UN level. If the latter, the UNSC confines itself to deciding that sanctions are to be imposed upon certain subjects, leaving the concrete identification and listing of those subjects to the EU[21].

Until very recently, the CFSP's only sanctions regime was the anti-terrorism blacklist, implementing the UN's al-Qaida/Taliban sanctions list created in the aftermath of 9/11.[22] According to Portela, for more than 15 years this was something of an anomaly in the CFSP's multifarious sanctions toolbox.[23] This was the case until autumn 2018 when the EU adopted a sanctions instrument to address the use and proliferation of chemical weapons, allowing it to apply travel bans and asset freezes to hose "involved in the development and use of chemical weapons anywhere"[24].

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20 Resolution 1267, of 1997 concerning Al Qaeda.

21 Regime established under Resolution 1373 of 2001: in this case it is the EU that has to identify individuals and groups involved in terrorism.

22 View more in: *Eckes,* EU Restrictive Measures against Natural and Legal Persons: from Counterterrorist to Third Country Sanctions, Common Market Law Review 51, 2014, pp. 869–906.

23 See *de Vries/Portela/Guijarro-Usobiaga*, Improving the Effectiveness of Sanctions: A Checklist for the EU, CEPS Special Report No. 95, November 2014, p. 3.

24 Council Decision (CFSP) 2018/1544.

D. Implementation of EU Targeted Sanctions Legislation in Candidate Countries

After reviewing the use and models of sanctions within the European Union and the targeted sanctions regime in particular, an analysis of the implementation of the said regime in EU candidate countries will follow. The legal and institutional framework in this area will be considered on the examples of two Western Balkan countries – the Republic of Macedonia and the Republic of Albania.

After the Eastern enlargement, the European Union initiated a process in the Western Balkans aimed at contributing towards the stabilization of the region and the subsequent association of Western Balkan countries to the EU. The Stabilisation and Association Process was launched in 1999 and provided the Western Balkan countries with the status of potential candidate countries. However, the start of the SAP did not mean instant cooperation in the area of imposition of restrictive measures. The potential candidate countries were mainly aligning their foreign policies with the UN in the area of targeted sanctions. In 2003, the prospect of membership was emphasised at the European Council in Thessaloniki. The "Thessaloniki Agenda for the Western Balkans: moving towards European integration" provided for European Partnerships, promoted political dialogue and cooperation in the area of CFSP, the strengthening of parliamentary cooperation and more financial means for institution building.[25]

By promoting political dialogue and cooperation in the area of CFSP, the European Union enabled a closer collaboration with Western Balkan countries in the implementation of targeted sanctions. This means that after an EU Council Decision on imposition of restrictive measures is enacted, Western Balkan countries need to take all necessary steps to align their foreign policies in this matter with the EU. Therefore, both countries have established a legal framework enabling their institutions to cooperate effectively in the implementation of targeted sanctions. They have established coordination agencies responsible for the development and dissemination of information, compliance initiatives, consideration of exemptions, administration of assets, and enforcement

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[25] *Thessaloniki Agenda for the Western Balkans: moving towards European integration,* Thessaloniki: General Affairs and External Relations Council (GAERC) Conclusions, 16 June 2003.

efforts. As it will be seen in the case studies presented below, usually such role is taken on by the Ministry of Foreign Affairs. The main functions of the coordination agency within the country is the determination of penalties for violations of targeted sanctions; granting of exemptions; receiving information from, and cooperating with, economic operators (including financial and credit institutions); reporting upon their implementation to the Commission. For UN sanctions, the coordination agency liaisons with Security Council sanctions committees if required with respect to specific exemption and delisting requests.

What follows is a case study of two Western Balkan candidate countries discussing the specific manner in which their legal and institutional structure implementing the EU sanctions regime was created. The Republic of Macedonia and the Republic of Albania are candidate countries to join the EU which at present are more or less at the same stage of integration: their candidate status has been granted and both are waiting to start accession negotiations with the European Union in mid-2019.

I. Implementation of EU Targeted Sanctions in Macedonia

The Republic of Macedonia has signed the Stabilisation and Association Agreement (SAA) with the European Union in 2001 and was granted the status of candidate country in 2005. The Commission made its first recommendation to the Council to open negotiations with the country and to move to the second phase of SAA implementation in October 2009. However, the country has not yet started the negotiations process. Conditional progress has been made after signing the Prespa Agreement with neighboring Greece for resolving the name issue. If the Prespa Agreement is ratified by both countries and its implementation is ongoing, the country will begin the screening process with the European Union with negotiations potentially starting as early as mid-2019.

In the framework of the Stabilisation and Association Process, Macedonia cooperates with the Union in the area of Common Foreign and Security Policy. This is done on several different levels[26]. One of them is

[26] They include: the regular political dialogue between the EU and Macedonia, which covers foreign policy issues on an on-going basis; alignment with the common foreign and security policy; the issues connected with the conflict prevention; the issues con-

the process of alignment of Macedonian foreign policy with EU statements and common positions relating to the CFSP. Moreover, the country takes part in implementation of targeted sanctions applied both on autonomous EU basis and by binding UN Security Council Resolutions. This process is monitored and reported within the European Commission Progress Report in the Chapter on Foreign, Security and Defense Policy. In its latest report, the Commission concluded "the country is moderately prepared in this area". As per the Commission's report Macedonia supported the Global Strategy for the European Union's Foreign and Security Policy and on Common Foreign and Security Policy the country aligned, when invited, with 53 out of 65 EU declarations and Council Decisions (around 83 % alignment). However, the country did not align its foreign policy with certain Council Decisions including EU restrictive measures related to Russia and Ukraine.[27]

In Macedonia, the process of implementation of targeted sanctions is provided by the Law on Restrictive Measures. The Parliament enacted the first Law on Restrictive Measures in 2007[28] and afterwards a new Law on Restrictive Measures was enacted in 2011[29]. However, due to the need of defining more clearly a number of issues connected to financial measures, the manner of their implementation as well as the supervision of violation of such implementation, in 2017, a proposal for a new Law on Restrictive Measures was submitted by the Ministry of Foreign Affairs. This new Law was adopted in December 2017[30]. According to it, the Coordination body for the monitoring implementation of international restrictive measures consists of representatives from the Ministry of Foreign Affairs, the Ministry of Defense, the Ministry of Interior, the Ministry of Economy, the Ministry of Finance, the Public Prosecutor's Office, the Intelligence Agency, Customs Administration, Taken Property Management Agency and Financial Intelligence Directorate. The members of the coordination body are appointed for a four-year term and meet regularly. The Ministry of Foreign Affairs deals with the administra-

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nected with the non-proliferation; the cooperation with international organisations; participation in civil and military crisis management operations.

27 European Commission, Progress Report, The Former Yugoslav Republic of Macedonia Report 2018, Strasbourg, 18.04.2018.

28 Official Gazette of Republic of Macedonia, No. 36/07, 23.03.2007.

29 Official Gazette of Republic of Macedonia, No. 36/11, 23.03.2011.

30 Official Gazette of Republic of Macedonia, No. 190/17, 25.12.2017.

tive issues connected to the work of the coordination body. In this manner, the inter-institutional cooperation in the process of implementation of restrictive measures is strengthened.

Another important instrument in this process is the Register of International Restrictive Measures kept by the Ministry of Foreign Affairs and made public through the web page of the Ministry[31]. Additionally, different sub-registers are established and kept within other competent institutions. The list of individuals and legal persons upon which targeted sanctions are implemented is separate from the Registry but also falls in the responsibility of the Ministry of Foreign Affairs. Macedonia regularly updates the lists of individuals in accordance with the information received from the European Union or the Sanctions Committees of the UN.

The procedure of implementation of targeted sanctions in Macedonia has been streamlined under the new Law on Restrictive Measures. According to the new law, the Government is the starting point where the decision for implementation of targeted sanctions is taken. Based on the applicable EU Council regulation or the UNSC Resolution, the Governmental decision[32] provides the type of measure together with the list of responsible institutions within the country that are tasked with its implementation.

Speed is particularly important in case of asset freezes where funds can move quickly. Therefore, there is an obligation for the Financial Intelligence Directorate to act immediately and to send the relevant information to responsible financial institutions as well as to the Agency for Real Estate Cadastre. However, the time gap between the adoption of the Council regulation and the adoption of the Governmental decision is quite wide. The whole process begins with the translation of the regulation in Macedonian and the adoption procedure of the Governmental decision is, in itself, quite time consuming. For that reason, unofficial signals are usually sent to the Financial Intelligence Directorate in order to be alerted for upcoming targeted sanctions.

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[31] The Registry can be accessed online at: http://www.mfa.gov.mk/?q=nadvoresna-politika/megjunarodni-pozicii (28/11/2018).

[32] All decisions of the Macedonian Government for the implementation of the restrictive measures are published in the Official Gazette of Republic of Macedonia.

Another important aspect in the process of implementing targeted financial sanctions aimed at strengthening the fight against terrorism is the establishment of an anti-money laundering legislative and institutional framework. The new Law on Prevention of Money-Laundering and Financing of Terrorism, incorporating the revised Financial Action Task Force (FATF) recommendations was enacted in 2014[33]. The main aim of the Law is the monitoring and prevention of money laundering and financing of terrorism, as well as the establishment of a body that will coordinate those activities. The Financial Intelligence Unit, functioning as a part of the Ministry of Finance was established for that purpose and is one of the main pillars in the implementation of targeted financial sanctions. Besides coordinating with the financial institutions in the country and the Ministry of Interior, the Unit monitors financial transactions of natural and legal persons.

Finally, an additional improvement in the area of implementation of targeted sanctions are the fines provided by the Law on Restrictive Measures which are imposed on natural and legal persons that are obstructing the process of implementation.

II. Implementation EU Targeted Sanctions in Albania

The Process of Stabilisation and Association for the Republic of Albania started a bit later than for the Republic of Macedonia. Namely, the Stabilisation and Association Agreement between the EU and Albania was signed in June 2006 and entered into force in April 2009. In its 2012 Progress Report for Albania[34], the Commission recommended the Council to grant Albania the status of a candidate country. This is mainly due to the "key judicial and public administration reform measures being completed and the parliamentary rules of procedure being revised"[35]. The Republic of Albania has become a candidate country in 2014 and is expected to start accession negotiations in mid-2019.

As regards the Common Foreign and Security Policy, Albania aligns its foreign policy with the one of the European Union and, consequently,

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33 Official Gazette of Republic of Macedonia, No. 130/14, 03.09.2014.

34 European Commission, Progress Report for the Republic of Albania, 10/10/2012.

35 Füle, EU Commissioner for Enlargement and Neighbourhood Policy, Enlargement Package 2012: Address to the Committee on Foreign Affairs (AFET).

implements EU's targeted sanctions applied to third states and non-state actors introduced by Council Decisions.

Unlike Macedonia, Albania has not enacted a Law on Restrictive Measures to provide for a unified procedure for implementation of restrictive measures. The legal basis for the implementation of EU and UN imposed restrictive measures can be found in the Albanian Constitution. According to Article 5 of the Constitution, international law is binding upon domestic law, if it is ratified in a relevant procedure. Moreover, Article 122 (3) of the Constitution stipulates, "the norms of international organizations have superiority in case of conflict, over the national legislation if the agreement for participation in the organization ratified by the Republic of Albania expressly contemplates their direct applicability". Therefore, both EU Council Decisions and UNSC Resolutions, as long as they are accessible for the public and provide for self-execution, are directly applicable in Albania. In opposite cases, when they are not considered self-executing, the Council of Ministers has to adopt normative legal acts for their implementation. The authorities responsible for the implementation of targeted sanctions are appointed by such normative acts. After the lapse of the fixed period of time for which sanctions are imposed, they are tacitly repealed within the internal legal order without normative action being required.

However, targeted financial sanctions are regulated in detail by the Law on Measures against Financing of Terrorism[36]. The Law provides for the basic definition of assets and other properties[37] that are subjected to targeted financial sanctions. In its Article 5 (1) the Law provides that pursuant to UNSC Resolutions the Council of Ministers adopts a decision to include declared persons on the list of individuals upon whom targeted sanctions need to be implemented. Moreover, the second paragraph

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[36] Law No. 157/2013 "On Measures against the Financing of Terrorism" as amended by Law No 43/2017.

[37] According to Article 3 (3) of the Law on Measures against Financing of Terorrism No. 157/2013, assets and other properties are financial assets and property of any kind, real estate or personal property, regardless of the way of benefit and legal documents or instruments of any kind, including electronic and digital documents that prove the ownership or interests in these assets and other properties. The definition includes, but not limited on, bank credits, bank or traveler's cheques, order payments, shares, bonds, ballot, payments, letters of credit and any other interest, dividend or other incomes and the values collected or generated from assets or other properties.

of Article 5 widens the obligation of the Council of Ministers to the inclusion of individuals on the list based on "the acts of other international organizations or from other international agreements, where the Republic of Albania is a party." This paragraph implicitly applies to EU Council Decisions. The responsible authority to implement targeted financial sanctions is the Ministry of Finance and Economy, which takes the decision for temporary blocking, confiscation or freezing of funds and other financial assets.

Additionally, the Law appoints the General Directorate for Prevention of Money Laundering as the responsible authority for the collection, processing, analysing and exchanging of data in the implementation of measures against terrorism. The organizational structure and the main functions of the General Directorate for Prevention of Money Laundering are provided by the Law on Prevention of Money Laundering and Financing of Terrorism[38]. According to this Law, the General Directorate for Prevention of Money Laundering reports directly to the Minister of Finance and Economy and serves as the Financial Intelligence Unit of Albania.

Finally, since there is no Law on Restrictive Measures, fines for non-implementation of targeted sanctions in general, do not exist. However, the aforementioned laws provide for fines when their provisions are not observed.

E. Conclusion

Sanctions constitute one of the most frequently used foreign policy tools in international relations. They are traditionally resorted to by states but they also have been used by international organisations in order to assist them in fulfilling their mandates. The emergence of targeted sanctions happened in the mid-1990s. This was due to the humanitarian impact of embargoes, which were deemed unacceptable, accentuating the need for a shift to measures designed to affect only the wrongdoers. More than twenty years on, this paper considers the extent to which the EU uses targeted sanctions as a tool of its CFSP and how it affects the countries that are candidate states for EU membership.

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[38] Law No. 9917/2008 "On the Prevention of Money Laundering and Financing of Terrorism".

Since their early beginnings, EU targeted sanctions have become a cornerstone of European CFSP. The EU acts to implement UN sanctions more effectively, or it uses sanctions as a very particular instrument of its own Common Foreign and Security Policy. On the one hand, sanctions are a tool of EU foreign relations serving general policy objectives; and on the other, they are individualized decisions aimed to directly interfere with fundamental rights of singled-out persons. The imposition of targeted sanctions as a CFSP tool has increased steadily since the 1990s, in particular over the past decade. The catalogue of measures when it comes to the targeted sanctions is open-ended. They are often tailored to affect leaderships or elites, taking into account that circumstances vary from country to country. Therefore, there are new forms of targeted sanctions continually being devised.

EU sanctions targeting individuals – no matter whether they are terrorist suspects or regimes supporters, is a powerful tool which slowly but surely replaces comprehensive state sanctions. These developments in the sanctions regime of the Union put an additional pressure on candidate countries, especially when it comes to the implementation of complex EU legislation in this area.

Western Balkan countries are part of the Stabilisation and Association Process that was launched in 1999, which did not mean instant cooperation in the sphere of imposition of restrictive measures. By emphasising the prospects of membership in Thessaloniki in 2003 and through the promotion of political dialogue and cooperation in the area of CFSP, the European Union enabled a closer cooperation with countries from the Western Balkan region in the implementation of targeted sanctions. The study of the two candidate countries – the Republic of Macedonia and the Republic of Albania, has shown that these countries have established a viable legal framework that will enable their institutions to collaborate effectively in the implementation of targeted sanctions. The two countries have a different approach when it comes to the type of legislation regulating this field, but they both provide the legal framework required to implement EU legislation on the use of targeted sanctions. The next challenge facing the two candidate countries in this process is the enhancement of the capacity of national institutions and their cooperation. Even though there were numerous actions undertaken over the past years, there is a need for further development of the legislative and institutional structure in this respect.

On a policy level, there is an inception of cooperation among the Western Balkan states in the area of targeted sanctions which is essential for their effective implementation. This regional cooperation needs to be further developed and much more resources need to be allocated to it. Especially when it comes to the fight against terrorism in the Western Balkans, regional cooperation is particularly important and needs to be strengthened.

The adoption of legislation for implementation of targeted sanctions, together with the establishment of a supporting institutional structure within the candidate countries sends a strong political signal to the European Union and to the international community in general that the Wester Balkans are willing and ready to respect established regulations on targeted sanctions. Moreover, this is a signal to third states as well that there is no chance of escaping international standards in the area of the imposition of targeted sanctions in these countries.

Current Challenges in Conforming the Macedonian Penitentiary System to the European and the International Standards

Aleksandra Gruevska-Drakulevski[*]

"The degree of civilization in a society can be judged by entering its prisons."

Fyodor Dostoevsky
("*The House of the Dead*", 1862)

Abstract

In this paper, the author analyzes the characteristics of the Macedonian penitentiary system, the position of prisoners de jure and de facto, and the protection of the rights of prisoners.

The author concludes that the penitentiary system of Macedonia has the features of a modern system. It is one of the penitentiary systems that fully incorporates the Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules in the Law on Execution of Sanctions. However, the system shows weaknesses, especially where objective conditions for the execution of sanctions in accordance with the principles of execution of sanctions, especially imprisonment, have not been created.

The author of the article concludes that the penitentiary system in Macedonia has de jure characteristics of a modern system, but de facto faces serious challenges. In addition, the author discusses the question why prisoners, given the current state of the penitentiary system, do not request judicial protection of their rights. Additionally, the author emphasizes the need for systematic research on the protection of prisoners' rights resorting to legal means, such as, legal advice and the right to appeal to international bodies.

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A. Introduction

The Republic of Macedonia, as a candidate country for EU membership, faces numerous challenges in the effective implementation of serious reforms in the legal, political and economic system. In this context, the penitentiary system is also an important segment.

The penitentiary system in the Republic of Macedonia is defined by the Law on Execution of Sanctions[1] (LES) adopted in 2006. In 2010, given Macedonia's intention to harmonize its legislation with that of the European Union, LES was considerably amended. In 2013, 2014, 2015 and 2016, six more changes were made to the LES. Within a short period, LES was progressively amended and a new Law on Execution of Sanctions was drafted, which points to the dynamic nature of the issues regulated under this Law.

By affirming the concept of human rights and freedoms as the highest value in a modern civil society, numerous documents have been adopted guaranteeing the rights of humans, including the prisoners.[2]

On an international level, the rights of prisoners are guaranteed by the Nelson Mandela Rules - Revised Standard Minimum Rules for the Treatment of Prisoners (NMP-SMRTP)[3]. At the Council of Europe level, the central document is represented by the European Prison Rules (EPR).[4] Penitentiary issues have been dealt with in other instruments of the Council of Europe, most notably: the conventions, the recommenda-

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1 Law on Execution of Sanctions, Official Gazette of the Republic of Macedonia, 2016, No. 2/2006; 57/2010; 170/2013, 43/2014, 166/2014, 33/2015, 98/2015 and 11/2016.

2 UN General Assembly, Universal Declaration of Human Rights, 217A (III), 10/12/1948; UN General Assembly, International Covenant on Civil and Political Rights, 2200A (XXI), 23/3/1976; UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39/46, 10/12/1984; UN General Assembly, Code of Conduct for Law Enforcement Officials, 34/169, 17/12/1979.

3 UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015 [*on the report of the Third Committee (A/70/490)*] (17/4/2018); Standard Minimum Rules for the Treatment of Prisoners", adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

4 Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules, 11/1/2006.

tions,[5] the case law of the European Court of Human Rights and the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Ensuing from the above, this paper shall analyze the characteristics of the penitentiary system in the Republic of Macedonia, the problems that the penitentiary system faces, the position of prisoners *de jure* and *de facto* and the mechanisms for protecting the rights of prisoners.

B. Characteristics of the Penitentiary System in Macedonia and Mechanisms for Protection of the Rights of Prisoners

Upon examination of the principles of execution of sanctions for criminal acts and misdemeanors, especially the principles of execution of the sentence of imprisonment, it can be concluded that the penitentiary system of Macedonia has the characteristics of a modern system. It is one of the penitentiary systems that completely incorporates the Nelson Mandela Rules – Revised Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules in the Law on Execution of Sanctions. Through all the elements of organization, functioning and realization of the educational process, the penitentiary system aims to ensure humane treatment of prisoners, protection of their interests and integrity, approximation of the living conditions in the penitentiary institutions with the conditions for life at liberty, with a single goal - to achieve their re-socialization. This is, in fact, the principle of modern penology.[6]

Considering the general and the specific principles upon which the system of execution of sanctions is based, it is clear that this is a dynamic system that is constantly evolving and changing in correlation with the

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[5] Important Recommendations of Council of Europe: No. R (89) 12 on education in prison, 13/10/1989; No. R (93) 6 concerning prison and criminological aspects of the control of transmissible diseases including Aids and related health problems in prison, 18/10/1993; No. R (97) 12 on staff concerned with the implementation of sanctions and measures, 10/9/1997; No. R (98) 7 concerning the ethical and organisational aspects of health care in prison, 8/4/1998; No. R (99) 22 concerning prison overcrowding and prison population inflation, 30/9/1999; Rec (2003) 22 on conditional release (parole), 24/9/2003; Rec (2003) 23 on the management by prison administrations of life sentence and other long-term prisoners, 9/10/2003.

[6] *Arnaudovski/Gruevska-Drakulevski*, Law on Execution of Sanctions: integral text with preface, short explanations and a register of terms with appendixes, 2011, p. 23.

effects of the re-socialization of convicts. The system shows however weaknesses, especially there where objective conditions for the execution of sanctions in accordance with the foregoing principles have not been created. This is one of the reasons why the system for the execution of sanctions requires constant supervision by competent authorities.

Across the world, it has been confirmed that national enforcement authorities generally violate the freedom and rights of their citizens. The Law on Execution of Sanctions aims to protect Macedonian citizens and legal entities from excessive, unlawful, inhuman, irrational and unnecessary application of force by state organs, as well as from abuse of power by the authorities. The provisions of the LES stipulate, *"The persons, against whom sanctions are being applied, shall be treated humanely, by respecting their personality and dignity, preserving their physical and mental health, considering the achievement of the goals in specific sanctions*".[7] Furthermore, Article 38 provides that *"During the execution of the imprisonment sentence, the psycho-physical and moral integrity of the convicted person must be protected, and his/her personality and dignity must be respected. Any kind of torture, inhuman or degrading treatment and punishment is prohibited. The right to personal security of the convicted person and the respect of his/her personality must be insured*". In this manner, the Law provides for the protection and realization of the guaranteed rights and freedoms of the convicted persons. It further stipulates that the rules on the execution of sanctions shall be applied impartially. Discrimination on the grounds of race, color of skin, sex, language, religion, political or other beliefs, national or social origin, property and social status or some other status of the person against whom the sanctions are applied, is prohibited. The religion, personal convictions and moral norms of the person against whom sanctions are applied have to be respected.[8] Furthermore, *"[...] the persons, against whom the sanctions are being applied, shall be treated in a manner which, to the extent possible, corresponds to their personality. The persons, against whom sanctions are being applied, shall be treated humanely, by respecting their personality and dignity, preserving their physical and mental health, considering the achievement of the goals in specific sanctions*".[9]

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7 Article 6 LES.

8 Article 4 LES.

9 Article 5 LES.

The complexity and the complementarity of the Law on Execution of Sanctions are expressed through the many bodies involved in the execution of sanctions. The execution of sanctions includes several forms of supervision of the activity of the institutions involved. The basic form of supervision is an aspect of the principle of legality - legal execution of the judgments. The following form of supervision is in relation to the principle of legitimacy of the execution of sanctions provided by law. These forms of supervision and control provided for in the Law on Execution of Sanctions are designated as judicial supervision in the execution of sanctions and are entrusted to the Judge for Execution of Sanctions.[10]

Another form of supervision and control is the expert-instructor supervision in the execution of the sanctions, which is entrusted to the Directorate for Execution of Sanctions (DES) as a body within the Ministry of Justice.[11] In case of irregularities, the Director of the DES is empowered to issue an order for their removal.

The Law on Execution of Sanctions also provides supervision of the execution of sanctions by the State Commission for Supervision established by the Government.[12] The State Commission has the task to conduct occasional visits to the institutions to review the situation regarding the application of the law and other regulations and rules on the execution of sanctions, the treatment of convicted persons, the conditions in which they live and work and conduct a survey on the position and the rights of the prisoners. Based on its findings, the State Commission shall prepare a report with appropriate proposals and measures addressing the irregularities and establish a deadline for their removal. The State Commission shall submit this report to the Government, the bodies and the court competent for the execution of sanctions.[13] Despite it looking good on paper, this Commission is unfortunately not functional in practice.[14]

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[10] Article 78-81 LES.

[11] Article 77 LES.

[12] Article 82 LES.

[13] *Ibid.*

[14] Considering the non-functioning of the State Commission for Supervision, in the proposal for amendments of the new LES, its existence is not foreseen.

Preventive visits by the Committee of the Council of Europe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[15] and the National Preventive Mechanism (NPM)[16] of the Ombudsman are of no lesser importance for the protection of the rights of convicts.

The CPT organizes visits to places of detention, in order to assess how persons deprived of their liberty are treated. These places include prisons, juvenile detention centers, police stations, holding centers for immigration detainees, psychiatric hospitals, social care homes, etc.[17]

CPT delegations have unlimited access to places of detention, and the right to move inside such places without restriction. They interview persons deprived of their liberty in private and communicate freely with anyone who can provide information. After each visit, the CPT sends a detailed report to the State concerned. This report includes the CPT's findings and its recommendations, comments and requests for information. The CPT also requests a detailed response to the issues raised in its report.[18]

The National Preventive Mechanism (NPM),[19] according to the Optional Protocol to the Convention against Torture and Other Cruel, In-

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15 http://www.cpt.coe.int/en/ (20/11/2018).

16 http://www.ombudsman.mk/mk/nacionalen_preventiven_mehanizam.aspx (20/11/2018).

17 http://www.cpt.coe.int/en/about.htm (20/11/2018).

18 http://www.cpt.coe.int/en/about.htm (20/11/2018).

19 The Republic of Macedonia signed the Optional Protocol to the Convention against Torture on 1 September 2006, while the Parliament of the Republic of Macedonia ratified the same protocol on 30/12/2008, thus appointing the Ombudsman to act as National Preventive Mechanism (NPM) in the Republic of Macedonia the main task is the prevention of torture and other cruel, inhuman and degrading treatment or punishment. The National Preventive Mechanism in the Republic of Macedonia draws its mandate and competences from the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Law on the Ombudsman, and has also prepared a separate Rulebook on the manner of prevention and methodology for the manner of conducting preventive visits. The National Preventive Mechanism implements its activities in accordance with the Annual Work Program approved by the Ombudsman.

human or Degrading Treatment or Punishment[20], is a national body that regularly reviews the treatment of persons deprived of their liberty in order to strengthen, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment.[21]

C. The Position of Prisoners

The position of prisoners while serving their prison sentence can be assesses through their defined rights, duties and disciplinary responsibilities. Modern penitentiary systems, including Macedonia's, guarantee rights to prisoners that must not be violated and determine obligations whose fulfillment does not degrade their personality.

In practice, there is a discrepancy between the positions of prisoners *de jure* and *de facto*.

I. The Position of Prisoners De Jure

When someone is deprived of their liberty, probably one does not speak of the "rights", but of the "legal status" of the convicted person that should be guaranteed. In a separate chapter titled "The position of the convicted persons" spanning twenty-one sections, the Law on Execution of Sanctions regulates the issues of classification of prisoners, accommodation, clothing and bedding, personal hygiene, food, rest, work, pension insurance, health care, education, entertainment, sport and recreation for prisoners, educational work with prisoners, religious needs, contact with the outside world through correspondence, telephoning, visits and receiving packages, marriage of convicts, privileges, displacement of prisoners (progression, re-progression and relocation of prisoners), termination of serving the sentence, relation of the officials with the prisoners, protection of the prisoners by using legal means for protection (legal advice and legal means of the prisoners, appeal of the prisoners to international bodies and organs) and protection of the

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[20] Optional Protocol of the UN General Assembly to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution A/RES/57/199, in force as of 22/6/2006, available at: http://www.ohchr.org/en/ProfessionalInterest/Pages/OPCAT.aspx (20/11/2018).

[21] http://www.ombudsman.mk/mk/nacionalen_preventiven_mehanizam/npm_vo_rm.aspx (20/11/2018).

rights of collaborators of justice,[22] disciplinary responsibility of the prisoners and material liability of the prisoners.[23] This is one of the most important chapters of the Law, because it provides means and methods that will ensure the treatment of prisoners in order to achieve their resocialization as the main purpose of the execution of the sentence of imprisonment. In this chapter, the provisions that give the convict access to legal means for the protection of their rights are of particular importance. These provisions essentially alter the relationship between employees (the formal system in the institution) and prisoners, and relationships are created in which they appear as equal sides.

As mentioned previously in this paper, these provisions of the LES fully incorporate the standards for treatment of prisoners provided by the Nelson Mandela Rules, the revised Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules.

II. The Position of Prisoners De Facto

The position of prisoners in the Republic of Macedonia *de facto* differs greatly from what is provided in the international documents and the national regulations.

Several reports contain information on the country's penitentiary system, such as the reports of the CPT, the annual reports of the NPM and the annual reports of the DES.

After their last visit, the CPT published a highly critical report on the prisons in the Republic of Macedonia.[24] In a report published on October 12, 2017 regarding a visit in December 2016, the CPT criticized the conditions of imprisonment and treatment of prisoners in Idrizovo Peniten-

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22 Article 101-175 LES.

23 Article 176-185 LES.

24 Council of Europe, CPT/Inf (2017) 30, Report to the Government of "the former Yugoslav Republic of Macedonia" on the visit to "the former Yugoslav Republic of Macedonia" carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 9 December 2016 of 12/10/2017, available at: https://rm.coe.int/pdf/168075d656 (1/7/2018).

tiary, in which about 60% of the prisoners in the country serve their prison sentence.[25]

The Report recalls that since 2006, the CPT has on several occasions highlighted some basic structural issues, such as *"[...] lack of policy on how to manage complex institutions, an inadequate system of reporting and supervision, and the poor management and performance of staff".*[26] The findings of the visit in December 2016 show little progress has been made to address these issues. Also, in the Idrizovo Penitentiary, *"[...] the provision of health care remains completely inadequate and the places where prisoners live at risk; the absence of appropriate treatment means that prisoners have nothing to do constructively; and conditions for imprisonment in several parts of the prison can be considered inhuman"*.[27]

The problem of corruption in Idrizovo Penitentiary is particularly emphasized. The CPT found that *"[...] at Idrizovo Penitentiary, every aspect of imprisonment is up for sale, from obtaining a place in a decent cell, to home leave, to medication, to mobile phones and drugs"*.[28]

The report further states that *"[...] ill-treatment, inter-prisoner violence, corruption and a lack of activities offered to prisoners at Idrizovo Penitentiary are intrinsically linked to the insufficient number of prison staff and the lack of training and support provided to them"*.[29]

Regarding the detention unit at Skopje Prison, the CPT qualifies the regime offered to the detainees as a relic of a repressive past. Detainees are locked in their cells for 23 hours a day for up to two years, and they are offered no activities except for reading, playing cards and listening to the radio. Material conditions are again criticized.[30]

Although the situation in the closed part of Stip Penitentiary is not as bad as in the Idrizovo Penitentiary, the report recommends, inter alia,

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25 https://www.coe.int/en/web/cpt/-/cpt-publishes-highly-critical-report-on-prisons-in-the-former-yugoslav-republic-of-macedonia-?desktop=true (1/7/2018).

26 *Ibid.,* p. 6.

27 *Ibid.,* pp. 12-17.

28 *Ibid.,* p. 5.

29 *Ibid.,* p. 10.

30 *Ibid.,* p. 15.

reducing the extreme overcrowding in certain cells, improving the material conditions and offering activities to prisoners.[31]

The CPT completes the report stating *"[...] time has come for the rule of law and protection of human rights to be applied fully in the prison system and for "the former Yugoslav Republic of Macedonia" to abide by its international obligations to cooperate with the CPT"*.[32]

The CPT for 2019 has announced a visit in order to investigate the treatment of persons deprived of their liberty in the Republic of Macedonia.[33]

D. Key Problems of the Penitentiary System in the Republic of Macedonia

The key problems that the penitentiary system in the Republic of Macedonia is facing are: overcrowding in penitentiary institutions; a lack of prison staff; a high rate of recidivism; the problem of "vulnerable categories" of prisoners in the penitentiary institution; inadequate conditions; inadequate health care of prisoners; inadequate treatment of prisoners in order to achieve the re-socialization process; ill-treatment and corruption.

Below, this paper will give a brief review of the current problems of the penitentiary system, which consequently violates the rights of prisoners guaranteed by international and national documents.

I. Prison Overcrowding

The penitentiary system in the Republic of Macedonia faces a serious problem of overcrowding in the penitentiary institutions. It is estimated that there are almost twice as many prisoners as the institutions' capacity allows. For years, almost all the penitentiaries have faced the problem of overcrowding. The total number of prisoners has constantly been exceeding 3000 at a total maximum capacity of the prison system of 2026. This means that there are 1.5 prisoners for each bed. At Idrizovo

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31 *Ibid.*

32 *Ibid.,* p. 23.

33 https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-announces-visits-to-eight-states-in-2019 (1/7/2018).

Penitentiary, for instance, the situation has been most dramatic. The facility has a capacity of 700-800 prisoners (some adaptations of the premises made contrary to the CPT standards have increased the capacity to 1,094 places) although nearly 2,000 prisoners have been accommodated there for years in a row. The same situation is found in other prisons.

After the adoption of the Law on Amnesty in 2017 and the release of 815 people from detention, the issue of accommodation shortage has become less pressing. Nonetheless, overcrowding is still evident in Idrizovo Penitentiary, Stip Penitentiary and Tetovo Prison (see Table 1). It must be noted that this 'resolution' of the problem of overcrowding is only temporary. This conclusion is supported by the data on judicial penal policy (according to which, prison sentences are still the most predominant ones), as well as by the high rate of recidivism. Illustrating the latter, after only four hours of being released from prison in accordance with the Law on Amnesty of 2007 an individual committed a new crime.[34] Experience from previous amnesty laws shows that a high percentage of persons given amnesty reoffend.

Penitentiary	Capacity: unit/institution	Total number: prisoners	%
Skopje Prison	128	65	50,8
Tetovo Prison	48	64	133,3
Bitola Prison	60	43	71,7
Prilep Prison	85	59	69,4
Gevgelija Prison	43	36	83,7
Kumanovo Prison	178	54	30,3
Ohrid Prison	35	8	22,9
Strumica Prison	62	53	85,5
Idrizovo Penitentiary	1094	1223	111,8
Stip Penitentiary	210	253	120,5
Open section in Kriva Palanka	23	5	21,7
Struga Penitentiary	60	22	36,7
Total	2026	1885	93,0
Tetovo Correction Penitentiary	/	22	/

Capacity and current number of convicted persons in penitentiary institutions (20.3.2018)
Source: Directorate for Execution of Sanctions

[34] https://infomax.mk/wp/рекордни-четири-часа-на-слобода-амнес/ (1/7/2018).

The problem of overcrowding violates the right of prisoners to a minimum living space ($4m^2/9m^3$) that further generates other problems (failure, due to the lack of staff and other pressures, to carry out the resocialization process) resulting in increased recidivism.

Unfortunately, there is a trend of continuous growth of the prison population, which worsens the problem of overcrowding in the penitentiary institutions.[35] In such a situation, efforts are being made to build new prisons to provide new (expensive) prison places, which are likely to be filled quickly (and will be overcrowded) in a relatively short period, and this will not be beneficial for improving security in the community. Hence, a revised penal policy is needed to reduce the number (or at least to stop the growth) of the prison population.

Recommendation No. R (99) 22 of the Committee of Ministers to Member States on prison overcrowding and the increase in the prison population and Recommendation Rec (92) 17 on consistency in sentencing should also be taken into account. A series of other international documents also apply to this issue.[36]

One of the possible solutions to reduce prison overcrowding is the frequent use of alternative sanctions and measures. As a first step,

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[35] See the Annual Reports of the Directorate for Execution of Sanctions on the Condition and Operation of Penitentiaries in the Republic of Macedonia for 2008-2017, available at:http://www.pravda.gov.mk/tekstoviuis.asp?lang=mak&id=godizv (1/9/2018).

[36] European Convention on the Supervision of Conditionally Condemned or Conditionally Discharged Persons, ETS no. 51, 30/11/1964; Recommendation CM / Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe on the probation rules, 20/1/2010; Recommendation Rec (2003) 22 of the Committee of Ministers to member states on conditional release (parole), 24/9/2003; Recommendation Rec (2000) 22 of the Committee of Ministers to member states on the promotion of the application of the European rules on sanctions and measures applied in the community, 29/11/2000; Recommendation No. R (99) 19 to the Committee of Ministers to member states concerning mediation in penal matters, 15/9/1999; Recommendation No. R (92) 16 of the Committee of Ministers to member States on the European rules on sanctions and measures applicable in the community, 19/10/1992; Recommendation Rec (79) 14 of the Committee of Ministers to member states concerning the application of the European Convention for the Supervision of Conditionally Condemned or Conditionally Discharged Persons, 14/7/1979; Resolution (70) 1 (adopted by the Ministers` Deputies) on the practical organization of the surveillance measures and the subsequent care of convicted or conditionally discharged persons, 26/1/1970.

judges should be encouraged to impose alternative measures provided in the Criminal Code,[37] but also to convince the wider public that such measures do not question the system of criminal justice, on the contrary, they hold a greater benefit than imprisonment.[38]

Another solution is the frequent application of conditional release (parole). In the Recommendation Rec (2003) 22 on conditional release, the Committee of Ministers of the Council of Europe points out that *"[...] conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community"*.[39] The domestic criminal practice faces weaknesses of the conditional release system, which has been proven empirically. From the data on the use of conditional release in Macedonian penitentiary practice, it can be concluded that it is very rarely used, and even in cases when the appeal for release on parole is accepted, it is usually granted to prisoners sentenced to short sentences, and is approved for a period of up to 3 months prior to release.[40] The conclusion is that the main goal of conditional release is not achieved, which is to motivate prisoners to actively engage in their own re-socialization process, to encourage their good behavior and to actively participate in work engagement in the institution. In the future amendments to the LES, the procedural safeguards of the Recommendation should be implemented that will strengthen the position of the convicted person when seeking parole. Hence, *"Recognizing that conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community [...]; Considering that the financial cost of imprisonment places a severe burden on society and that research has shown that detention often*

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[37] See Article 48-59-a Criminal Code, Official Gazette of the Republic of Macedonia, No. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014 and 132/2014.

[38] See *Buzarovska,* Alternatives to Imprisonment, 2003, p. 48 and *Gruevska-Drakulevski,* The Impact of Imprisonment on Recidivism, 2010, p. 294.

[39] See *Gruevska-Drakulevski,* Conditional Release (Parole) in the System of Execution of Sanctions in the Republic of Macedonia: Is it in Accordance with the Recommendation Rec (2003) 22 on Conditional Release (Parole), Iustinianus Primus Law Review 2012, p. 3.

[40] *Arnaudovski/Gruevska-Drakulevski,* Penology (first and second part), 2013, p. 238.

has adverse effects and fails to rehabilitate offenders [...]",[41] judges should be more prone to approve requests for conditional release when the conditions are met.

Furthermore, a possible solution to the problem of overcrowding would be the establishment of a Probation Service. Probably the most effective way to reduce the size of the prison population is to introduce a well-equipped Probation Service, which will provide support for the prison system and alternative measures in which the courts and the wider public will have confidence. The Directorate for Execution of Sanctions has already prepared a comprehensive Strategy for establishing the Probation Service and funds have already been allocated for its establishment.[42] According to the last short report on the work of the DES, *"[...] the probation service is being established gradually, i.e., as a pilot project in April 2017, the probation office was first started on the territory of the Basic Court Skopje1 - Skopje within the DES. [...] and then it is planned to establish other local probation offices across the country in the area of the basic courts with extended competence in Bitola, Prilep, Ohrid, Gostivar, Tetovo, Kumanovo, Kocani, Veles, Strumica and Stip"*.[43]

II. Lack of Staff in Penitentiaries

The penitentiary system in the Republic of Macedonia also faces the problem of an insufficient number of prison staff in proportion to the number of prisoners. Almost 70% of the employees work in the Security Sector (Prison Police). The second and the third categories of employees are in administration and finance (13%) and in the sector for resocialization (12.4%).[44] The CPT repeatedly underlines the problem of insufficient number of prison staff. In the latest report, the CPT states: "*Ensuring a positive climate requires a professional team of staff, who must be present in adequate numbers at any given time in detention areas and in*

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41 See Preamble of Recommendation Rec (2003) 22 of the Committee of Ministers to member states on conditional release (parole), 24/9/2003.

42 http://www.pravda.gov.mk/tekstoviuis.asp?lang=mak&id=uisstrat (2/7/2018).

43 http://www.pravda.gov.mk/Upload/Editor_Upload//izvestaj 0108_2012_2017.pdf (2/7/2018).

44 See Annual Reports of the Directorate for Execution of Sanctions on the Condition and Operation of the Penitentiaries in the Republic of Macedonia for 2008-2017, available at: http://www.pravda.gov.mk/tekstoviuis.asp?lang=mak&id=godizv (1/9/2018).

facilities used by prisoners for activities. An overall low staff complement, which diminishes the possibilities of direct contact with prisoners, will certainly impede the development of positive relations; more generally, it will hinder any efforts to maintain effective control and will generate an insecure environment for both staff and prisoners. Furthermore, low staffing levels make it nearly impossible to provide an acceptable regime for prisoners".[45]

At Skopje Prison, the number of prison officers remained the same as had been observed during the October 2014 visit (i.e. 110). "*Nevertheless, steps should be taken to ensure that at least one female prison officer is on duty at all times in the detention area which was not the case at the time of the visit.*"[46] In Stip Penitentiary, there are only 64 members of prison staff for a prison population of 359 people. Hence, the CPT recommends increasing the number of prison officers in Stip Prison. In Idrizovo Penitentiary, the CPT reiterates that issues such as harassment, violence among prisoners, corruption and lack of activities offered to prisoners are essentially related to the insufficient number of prison staff and the lack of training and support for them. All prison staff should be provided with appropriate training. The situation regarding "educators" at Idrizovo remains the same as that observed at the time of the 2014 visit. Many prisoners complained that they hardly ever saw their educator and a considerable number of inmates alleged that educators usually sought a reward whenever they were asked to make a recommendation about home leave or another prison-related matter. Similar complaints were received at Stip Prison concerning the educators.[47] The CPT reiterates the importance of having a sufficient number of suitably qualified tutors adequately supervised by the management. Furthermore, there is a need to increase the number of educators who speak Albanian and employ at least one Roma educator.

The NPM have confirmed these considerations as well. For example, in the special report of the NPM for the visit of the Idrizovo Penitentiary from March 2017, it was stated that *"According to the Rulebook on the systematization of work places in the Idrizovo Penitentiary with an open department in Veles, the projected number of employees in this institution is 430, however from the conversation with the director, as well as from the*

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45 Council of Europe, (fn. 25).

46 *Ibid.*

47 *Ibid.*

insight in the table overview of the jobs, it follows that the actual number of filled positions is 272".[48]

The next problem is the lack of properly trained (competent and professional) personnel at different levels in the system. Studies show a very low level of training among the prison staff.[49] It is extremely important to provide opportunities and resources for continuous training.

The CPT advocates a professional management career within the prison system, and the hierarchical relationship between prison directors and the Director of DES should be clearly defined.

III. The Problem of High Recidivism Rates

The rate of recidivism is high. Analysis shows that over 53% of prisoners are recidivists, which only confirms the hypothesis that prisons are "schools of crime".[50]

Of particular concern is the high rate of drug addicts among the prison population, which has seen rapid growth in recent years.[51] Therefore,

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[48] Ombudsman "Special report on the visit to the Idrizovo Penitentiary - Skopje, March 2018, available at: http://ombudsman.mk/upload/documents/2017/1/Poseben-izvestaj-Idrizovo-2016.pdf (2/7/2018).

[49] Analysis of the results of the examination of the knowledge of the employees in the penitentiary and correctional institutions, Directorate for Execution of Sanctions, Skopje, 2011, available at: http://www.pravda.gov.mk/UIS/ANALIZA%20NA%20REZULTATITE%20OD%20PROVERKA%20NA%20ZNAENJATA%20NA%20VRABOTENITE%20VO%20KPU%20I%20VPU.pdf (1/7/2018).

[50] *Gruevska-Drakulevski,* The Impact of Imprisonment on Recidivism, 2010, p. 144.

[51] It should be emphasized that according to the data from the Ministry of Justice in the penitentiary institutions in the country, the number of prisoners who are drug addicts is worrying. Namely, in the period 2000-2004, 260-410 people were drug users (mostly heroin) every year. In 2008, 649 prisoners were addicted to drugs (31% of 2101 prisoners). In 2009, there were 516 prisoners of drug addicts (23.3% of the total number of 2215 prisoners). In 2012 there were 1,148 prisoners - drug addicts who requested 3,055 health check-ups. Most striking is the situation in the Idrizovo Penitentiary where most of the prisoners are drug addicts. Thus, in 2006, 197 addicts were detected; in 2007 - 209 and in 2008 - 466 addicts (36.8% of the total number of 1268 prisoners in Idrizovo). In the department for addicts and chronically ill prisoners, there were 66 prisoners, of which 37 were addicted under methadone therapy, and 29 elderly prisoners remained in the geriatric unit. And in 2009, the largest number of drug addicts were registered in Idrizovo with 386 registered drug addicts (29.6% of the total number of 1,304 prisoners). In Bitola Prison, 48 prisoners (43.2% of the total number of 111 prisoners on

consideration should be given to opening specialized penitentiary facilities for drug addicts. First, they will be provided with appropriate treatment, and secondly, they will be protected from further criminal infection.

Some prisoners who are addicted to drugs also have mental health problems and require appropriate treatment.[52] Therefore, it is necessary to establish a specialized penitentiary institution for people with addictions to alcohol, drugs and other psychotropic substances, especially since drug or alcohol addiction is a strong prognostic factor for future recidivism. In specialized institutions for prisoners with mental disorders, these categories of prisoners should receive appropriate treatment.

From the above analysis, one can notice a violation of the right of this category of prisoners to appropriate treatment for addictions and mental disorders.

IV. The Problem of "Vulnerable Categories" of Prisoners

The penitentiary system faces the problem of prisoners who become vulnerable because of their minority status and different cultural characteristics. The 2012 NPM Annual Report shows that 44% of prisoners were Macedonians, 32% Albanians, 15% Roma, 4% Turks, 2% Serbs and 3% others. One of the minority groups (Roma) is subjected to greater marginalization and discrimination than other prisoners, although this appears to be due to their different cultural characteristics rather than to their minority status. The 2012 NPM report commented on this issue in detail and called on the authorities to implement the necessary safeguards.[53]

31.12.2009) were addicted to drugs. Furthermore, unofficial data indicate that 80% of prisoners are addicted to drugs. There are also many prisoners who have become addicted during serving the sentence of imprisonment. Currently, the Regional Methadone Centre has been set up at the Idrizovo Prison. It is also planned to establish a drug-free department, see *Arnaudovski/Gruevska-Drakulevski*, Penology (first and second part), 2013, p. 77.

[52] In 2012 there were 399 prisoners with mental disorders who requested 1,497 medical examinations.

[53] Ombudsman, National Preventive Mechanism, Annual Report of the NPM for 2012, May 2013, available at: http://www.ombudsman.mk/upload/NPMdokumenti/Izvestai/

V. The Problem of Inadequate Conditions

In terms of accommodation of prisoners, the CPT and the NPM have concluded for years that the living conditions of prisoners, as well as detainees, are below the standards prescribed by national laws and international documents. It is necessary to undertake concrete measures and activities for the construction of new accommodation facilities that will meet national and international law standards.[54]

At the time of the 2016 visit, insalubrious and severely overcrowded living conditions in an unsafe and unhygienic environment prevailed in many of the living quarters. Two days of intense cleaning prior to the delegation's visit made little difference. The conditions of detention in the un-renovated B Wing (notably Wings 2 and 5) of the closed section of the prison, most of the rooms in the "school", the admission unit and the "ambulanta" could certainly be described as inhuman and degrading treatment[55] taking into consideration the European Court of Human Rights' most authoritative judgment[56] to date on this matter.

"The sanitary annexes to these areas were in a stunning state (filthy, foul-smelling, damaged and leaking), many of the showers did not work and there was hardly any provision of hot water. The heating was working for several hours a day. Not surprisingly, the delegation observed that many prisoners suffered from insect bites and infections such as scabies" [57]

But, *"In the midst of a sea of misery at Idrizovo Penitentiary, the CPT's delegation found a wing (No.9) with excellent conditions; cells of 11m² accommodating two persons, in a good state of repair with carpets on the floors and furnished with leather sofas and wooden framed beds, plasma screen TV sets, fridges, cooking appliances and individual air conditioning systems, all bought with the inmates' own funds. The common areas were pleasant with an aquarium, tables, chairs and sofas, a freezer and a gym with weights equipment and exercise bicycles. The contrast was striking.*

NPM%20Godisen%20izvestaj-2012.pdf (2/7/2018).

54 See the Reports of NPM and CPT, available at:http://www.ombudsman.mk/mk/nacionalen_preventiven_mehanizam/izveshtai/godishni_izveshtai.aspx or http://www.cpt.coe.int/en/states/mkd.htm (2/7/2018).

55 Council of Europe, (fn. 25).

56 EctHR [GC], no. 7334/13, *Muršić v Croatia,* judgment of 20/10/2016.

57 Council of Europe, (fn. 25), p. 12.

Unfortunately, it was a flagrant manifestation of a corrupt system and showed clearly where the power within the prison lay".[58]

In conclusion, hygiene, clothing, bedding and food for prisoners should not be a reason for their dissatisfaction with the system. There are standards, which must be met in this regard, as they will help the successful re-socialization of prisoners. This is especially true when it comes to food because the penal institutions have conditions for food production that will meet the needs of prisoners.[59]

VI. Inadequate Health Care for Prisoners

The level of health care for prisoners in the country is below the level of what is required by the best practices and on many occasions, the CPT points out negative remarks. The current state of the health care system in penitentiary and correctional institutions shows a deficit in human and material resources. Namely, there is an insufficient number of employees (especially qualified medical personnel), but also inadequate conditions for accommodation of convicts who need treatment.[60] Another problem is the health insurance of prisoners, a right afforded to them under the LES,[61] which, unfortunately, is not realized.

Consequently, the health policy in penitentiary institutions should be integrated and aligned to the national health policy. The prison health service should have a sufficient number of qualified medical, hospital and technical personnel, as well as appropriate premises, quality installations and equipment similar, if not the same to what is available for the community. The role of the Ministry of Health should be strengthened in the area of quality assessment of hygiene, health care and or-

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[58] *Ibid.,* p. 13.

[59] "*The delegation once again was able to observe for itself both the meagre portions and the inadequacy of the diet, including no fresh fruit. For example, on one day of the visit, lunch was potato and chicken stew, except that the delegation observed that the portions being served out of large containers to the prisoners contained no chicken, only potato. Further, the manner in which the food was distributed had little regard to hygiene or to the dignity of prisoners." Ibid.,* p. 14.

[60] See the Reports of the NPM and the CPT, available at: http://www.ombudsman.mk/mk/nacionalen_preventiven_mehanizam/izveshtai/godishni_izveshtai.aspx or http://www.cpt.coe.int/en/states/mkd.htm (2/7/2018).

[61] Article 117 LES.

ganization of health services. A clear division of responsibilities and powers should be established between the Ministry of Health and other competent ministries, who should cooperate in the implementation of an integrated health policy in prisons. In addition, international documents in this area should be respected.[62]

A step forward has been made in order to solve this problem by placing the responsibility for health services (including in the penitentiary system) under the Ministry of Health and a positive outcome from such a measure is expected. Otherwise, the challenges faced by healthcare workers in prisons are enormous, including lack of staff, the inadequate health check of newly admitted prisoners, inadequate dental and psychiatric care and poor practice of treating drug addiction.[63]

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[62] Recommendation No. R (98) 7 of the Committee of Ministers to member states concerning ethical and organizational aspects of prison health care, 8/4/1998; Recommendation No. R (93) 6 of the Committee of Ministers to member states concerning prison and criminological aspects of the control of transmissible diseases, including AIDS and related health problems in prisons, 18/10/1993.

[63] *"The health care staffing team at Idrizovo Penitentiary consisted of two doctors (a general practitioner and a psychiatrist) and two nurses for a population of over 1,800 prisoners. This is totally inadequate and, consequently, the team was overwhelmed. The delegation received many complaints relating to access to health care which is scarcely surprising. Officially, inmates made a request to the director to see the doctor, which was filtered by the prison officers. Weeks could go by before the request reached the doctors and even then it was not certain that the doctor would call the inmate. Alternatively, an inmate could persuade a prison officer that he needed to see a doctor urgently. The material conditions of the medical facilities remained inadequate and in a state of neglect and dilapidation. They need to be completely renovated and re-equipped. Further, the dental equipment should be repaired to enable the full-time dentist to work. The Idrizovo health care team was supported by six "assistant" prisoners who were essentially performing nursing duties such as maintaining the health care registers, distributing medication and being on-call to deliver care to other prisoners when no member of the health care team was present (notably deciding on whether to call the emergency response service in Skopje which they did on more than 200 occasions in 2016). In the CPT's opinion, prisoners should never be involved in health care duties. The CPT reiterates its recommendation that immediate steps be taken to replace prisoners performing such nursing duties with qualified health care staff. […] The CPT reiterates its recommendation that every newly arrived prisoner be adequately interviewed and physically examined as soon as possible, and at the latest within 24 hours (cases of examination were noticed in the Idrizovo Penitentiary after 7 or 10 days after admission) upon receipt by a doctor or a fully qualified nurse who will notify the doctor and all allegations of ill-treatment and signs of injury should be fully recorded in accordance with the appropriate instructions. Furthermore, screening of prisoners for infectious diseases, in particular hepatitis and HIV, should be offered, along with voluntary counselling. The CPT calls on the national authorities to take*

VII. The Problem of Inadequate Treatment of Prisoners in Terms of the Re-socialization Process

The main purpose of the prison sentence – resocialization - is not realized in penitentiary institutions across the country. This is primarily due to inadequate treatment of convicted persons. In this respect, special attention should be paid to the following considerations.

First, a significant part of the treatment is the education of convicted persons, given the fact that the majority of prisoners have finished secondary education, as well as elementary education. Vocational training of prisoners is also significant. Convicts should be allowed training for a particular profession. It is very important that vocational education be developed in a way that will strengthen the employment opportunities of prisoners after their release, as this will ensure basic literacy for those who need it.[64]

The second issue that needs attention is providing opportunities for convicted persons to work. The current situation is quite unfavorable. The NPM report for 2012 highlights the importance of the working engagement of convicted persons as an important factor in favor of resocialization, but adds that *"Only convicts with a milder treatment regime (semi-open or open treatment) are provided through work the opportunity to gain and to develop work habits and acquire specialized knowledge for work at liberty [...] In most of the penitentiary institutions, convicts from closed departments are not engaged in work [...] (which) may negatively affect the process of resocialization"*.[65]

Especially important is the application of specific programs for certain categories of prisoners.[66]

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steps to ensure that medical confidentiality is fully guaranteed in all prisons." Council of Europe, (fn. 25).

64 Recommendation No. R (89) 12 of the Committee of Ministers to Member States on Education in Prison, 13/10/1989.

65 Ombudsman, (fn. 54).

66 Treatment of convicted persons who abuse drugs and other psychotropic substances; Treatment of convicted alcohol abusers; Treatment of convicted persons who committed sexual acts; Treatment of convicted persons by violent behaviour; Treatment of persons convicted of crimes with elements of violence; Treatment of younger adult convicts; Treatment of convicted persons – juveniles; Treatment of convicted persons – women; Treatment of convicted persons to life imprisonment; The medical and psychological treatment of the convicts.

Post-penal assistance after release from prison is an extended part of the treatment of convicted persons. This type of treatment is an element of the re-socialization of the prisoner as a continuous process that aims to provide the latter with a successful, positive life in the aftermath of his release from prison.

Because in Macedonia recidivism mostly occurs in the period immediately following the release, i.e. 4-6 months and 1-3 years after release, it can be concluded that this is a critical period when assistance is necessary. In assessing the problems that the former convicted face after release from prison and how to solve these issues, there is a need for a more active role of the judge for the execution of sanctions and the Center for Social Work.[67]

Assistance after release as a form of penal treatment requires the realization of the principle of humanity in the execution of criminal sanctions. Upon release from prison, the convict is in a state of psychological tension related to the day of release and the path to freedom. Experience has shown that inmates experience life's freedom differently and manifest different feelings and moods. Some show great joy and are eagerly awaiting the day of leaving the institution as the day they meet their new life. Others are determined to lead a normal social life, to respect the positive social norms in order not to regain the status of a prisoner again. Thirdly, some are indifferent to what they expect on the day of release. Fourthly, some have fears about the uncertainty of their lives.[68]

For better results after release from penitentiary institutions as the final phase of the re-socialization process, it is necessary, first of all, to treat the former inmates in the same way as others members of society.

Currently, we are witnessing a paradoxical phenomenon in Macedonia. Because of the difficult situation in the country, it often happens that immediately after release from prison, individuals commit new offenses in order to return to prison because there they are provided with a place to live, as well as food, conditions that they would otherwise not be able to provide for themselves outside of prison.[69]

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67 *Gruevska-Drakulevski,* Imprisonment and Recidivism, 2017, p. 356.

68 *Gruevska-Drakulevski,* Post Penal Assistance of Ex-Prisoners: The Case of the Republic of Macedonia, Iustinianus Primus Law Review 2011, p. 21.

69 *Gruevska Drakulevski,* The Impact of Imprisonment on Recidivism, 2010, p. 344.

Thus, it is necessary to undertake initiatives to establish organizations that would assist convicted persons after their release, since these organizations will not only help a large number of former inmates but also have an indirect effect on society as a whole.

VIII. Ill-treatment and Corruption

In general, with a few exceptions, the CPT's delegation received no allegations of ill-treatment by prison officers in Skopje Prison and Stip Penitentiary.

By contrast, ill-treatment by staff and inter-prisoner violence at Idrizovo Penitentiary remain serious problems.[70] The violence in Idrizovo Penitentiary is integrally linked to the endemic corruption that has pervaded the whole prison and involves prison officers, including officers of all grades up to the most senior officers, and educators.[71]

Prison staff must respect the right of prisoners to physical and mental integrity. Prisoners should be able to submit requests and complaints without fear of retaliation.

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[70] *"The CPT's delegation received a number of consistent allegations of deliberate physical illtreatment of prisoners by prison officers. The alleged ill-treatment consisted mainly of slaps, punches, kicks and blows with a baton to various parts of the body and once again apparently occurred in the control room3 on the ground floor of the main closed accommodation building and dormitories. Physical violence was said to be used by prison staff as a tool to impose discipline, as an unofficial punishment for possession of illicit items such as mobile phones and following instances of inter-prisoner fights, or as a reaction to requests and complaints made by the prisoners concerned. Several of the prisoners interviewed also stated that during frequent cell searches, prison staff behaved roughly and often destroyed inmates' property. The delegation again found that newly-arrived prisoners sentenced for sexual offences were ill-treated by other inmates in the admission unit"*, Council of Europe, (fn. 25).

[71] *"Prisoners said that they paid up to 2,000 Euros to be allocated to a cell rather than a dormitory and allegedly 400 Euros for home leave. Mobile phones were present throughout the prison, with smart phones costing some 300 Euros plus a small daily payment to prison officers to look the other way. Indeed, the fact that almost all the "public" card phones were out of order at the time of the visit contributed to feed the business of mobile phones. Mobile phones were openly used. Each wing had a prisoner ("winger") who acted as the prison staff's intermediary for all transactions and usually had better living conditions*.", Council of Europe, (fn. 25).

"The CPT remains concerned that deaths in custody are not systematically the subject of a thorough investigation to ascertain, inter alia, the cause of death, the facts leading up to the death, including any contributing factors, and whether the death might have been prevented".[72]

IX. Other Issues

Another problem pointed out by the CPT is the disciplinary procedure and the solitary confinement as a disciplinary punishment for juveniles, which according to the CPT recommendations should be abolished.

Also, the CPT once again reiterated its recommendation that a „State Commission be established without further delay and that steps be taken to ensure that it and existing supervisory mechanisms operate in a professional, transparent and independent manner."[73]

E. Conclusion

By analyzing the principles for the execution of sanctions for criminal acts and misdemeanors, especially the principles for the execution of the sentence of imprisonment, it can be concluded that the Macedonian penitentiary system has the characteristics of a modern system. It is one of the penitentiary systems that fully incorporates the Nelson Mandela Rules, the revised Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules in the Law on Execution of Sanctions.

Considering the general and specific principles upon which the penitentiary system is based, it is clear that this is a dynamic system that is constantly evolving and changing in correlation with the effects of the re-socialization of the convicted persons. Nevertheless, the system shows weaknesses, especially there where objective conditions for the execution of sanctions in accordance with the foregoing principles have not been created.

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[72] *"At Idrizovo Penitentiary, nine inmates died in 2016 and another three in January 2017. Autopsies were carried out by the Institute for Forensic Medicine but the prison was not always informed of the outcome and no steps were taken to investigate the cause of the death.",* Council of Europe, (fn. 25).

[73] Council of Europe, (fn. 25).

The difficulties faced by the prison system in the Republic of Macedonia cannot be attributed to the lack of laws and by-laws. On the contrary, there is "inflation" of by-laws that to some extent hamper the work of the prison staff. The problem lies in the fact that laws are not always applied consistently enough.

Further, the need of providing human resources, as well as technical and material preconditions for the smooth functioning of the penitentiary institutions should be addressed in order to guarantee respect of the rights of persons deprived of their liberty. It is also necessary to strengthen the supervision of the work of the institutions, in particular, the judicial supervision of the execution of the sanctions entrusted to the judge for the execution of the sanctions and the expert-instructor supervision in the execution of the sanctions entrusted to the Ministry of Justice through the Directorate for Execution of Sanctions. Given the fact that the State Commission for Supervision established by the Government does not function, measures should be taken to ensure that it fulfills its responsibilities.

In this context, a question arises as to why prisoners, given the current state of the penitentiary system, do not request judicial protection of their rights. There is almost no data on court procedures that protect the rights of prisoners. Hence, there is a need for systematic research on the protection of the rights of convicted persons by resorting to legal means, such as legal advice and the right to appeal of convicted persons to international bodies.

Surprisingly, in a position of severe violations of the rights of prisoners in Macedonia, none has asked for protection of his/her rights before the European Court of Human Rights (ECtHR) in Strasbourg. This is not the case with prisoners from other states. Complaint before the ECtHR have dealt with the hygienic conditions in prisons, ill-treatment by prison staff, prison overcrowding, frequent displacements of prisoners from one institution to another, imposing disciplinary solitary confinement, searches of prisoners, surveillance of cells, inadequate treatment of mentally ill persons, inappropriate calorie value of food, inadequate medical assistance provided, hunger strikes that resulted in a death of a prisoner or forcibly feeding prisoners and a series of other cases of violations of the rights guaranteed to prisoners by international and na-

tional law.[74] In most cases, the ECtHR held that there had been a violation of Article 3 of the Convention on the prohibition of inhuman or degrading treatment.

[74] European Court of Human Rights, Factsheet – Detention conditions and treatment of prisoners, September 2018; European Court of Human Rights, Factsheet – Detention and mental health, June 2018; European Court of Human Rights, Factsheet – Prisoners' health-related rights, May 2018; European Court of Human Rights, Factsheet – Hunger strikes in detention, August 2015.

Combating Money Laundering and Terrorism Financing in Albania

Amendments to the Legislation on AML/CTF*

*Rezana Balla***

Abstract

Organized crime in both public and private sectors tends to be camouflaged through the exploitation of legal pathways and loopholes. This paper analyzes the criminal justice system in relation to the combating of money laundering and the financing of terrorism. It addresses the national and international legal and institutional response to violations of fundamental values of humanity, as well as the factors that have been key to the strengthening and evolution of the criminal justice system in Albania.

The article takes a general international approach and provides a detailed account of the legislations of the European Union and Albania based on the Financial Action Task Force[1] Recommendations and other international standards. The paper does not only aim to review the criminal justice response at national and international levels but also looks at the best international institutional practices for combating money laundering and terrorism financing which are capable of fighting endemic corruption and end impunity for politicians. It also discusses the issues resulting from the practice of delegation of criminal prosecution to private financial institutions that are engaged in financial activities such as banks and other non-bank institutions, considering that this function has been historically in the public do-

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* The abbreviation stands for Anti-Money Laundering and Counter-Terrorism Financing.

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1 The FATF Recommendations, set an international standard, which countries should implement through measures adapted to their particular circumstances. The FATF Standards comprise the Recommendations themselves and their Interpretive Notes. http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (13/12/2018).

main. Based on the conclusions of this article, some recommendations are given on reformation of the legal and institutional systems in order to make the fight against money laundering and terrorism financing more effective, by aligning national laws to the acquis communitaire and the relevant international standards.

A. Introduction

The Republic of Albania is currently undergoing a reform of its justice system. The amendments to the Albanian Constitution have been in force since 21 July 2016. The said reform and the new Constitution aim to redefine especially the judiciary and the prosecution system, stop the flourishing corruption in the field of justice[2], and break the bonds of judges and prosecutors with politics and crime. The amendments contain sound dispositions for the future institutional design of the Albanian judiciary and are largely coherent and compatible with European standards. The European Union pushes for independence of the country's judiciary, which should be made capable of fighting endemic corruption and end impunity for politicians.

Albania has been a NATO member since 2009 and became a candidate to join the European Union in June 2014. Brussels has demanded that the country do more to tackle crime, corruption, public administration and human and property rights and has set reforming the judiciary as its top priority.[3] The route of the reform package was seen as remarkable considering that some Albanian leaders, who in the past have escaped corruption convictions on technicalities from friendly judges, could be threatened by an independent judiciary and the real functioning of the rule of law. Judges who have been dismissed through the vetting process for not justifying held property have not actually been prosecuted for money laundering.

During the years of communism, Albania could not have been perceived as waging a war against money laundering since state control at

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2 *Balla,* Constitutional Reform, Criminal Justice Reform on Prevention of Organized Crime and Corruption, Proceedings of International Scientific Conference at Faculty of Law, 2017, p. 368.

3 European Commission Progres Report 2018 and other yearly progress reports for Albania, p.4, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf (09/11/2018).

the time was so powerful that no one could engage in illegal activities to launder money. The necessity to fight against money laundering[4] was born and developed during the first years of democracy. But even at the international level, the struggle against money laundering has begun to evolve and become sustainable during the 1970s, by raising international interest[5] in preventing money laundering. The state can prosecute, freeze and seize and even confiscate assets acquired through the exercise of illegal activities. However, criminals try to obscure the illegal origin[6] of goods derived from crime, as well as the ownership of such earnings. In principle, actions tackling money laundering make it more difficult for criminals to benefit from crime revenues.

Since the 1990s, anti-money laundering rules have been extended, enhanced and reformulated but have never been substantially revised. Most states in the world have adopted the 40 Financial Action Task Force (FATF) Recommendations on Combating Money Laundering and the Financing of Terrorism and Proliferation[7] (Recommendations).

These Recommendations include the criminalization of money laundering and terrorism financing, freezing and seizure of means intended for financing terrorism, preventive measures against money laundering and terrorism financing for financial institutions, intelligence units, and international co-operation. However, all or the majority of these Recommendations oblige financial institutions such as banks or non-bank institutions to implement them, which puts the onus on the private sec-

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4 *Shegan*, La lutte contre le terrorisme: étude de droit comparé (droit français, droit albanais) et de droit pénal international, 2010, p. 237.

5 *Balla,* Witness and Justice Collaborators Protection, Tirane, 2013, p. 52; International collaboration was initiated by *Giovani Falcone*, an Italian prosecutor. Falcone cooperated with Swiss prosecutor *Carla del Ponte* on money laundering of Italian mafia in the banks of Switzerland to freeze and seize mafia ‘s assets.

6 *Hartley*, Corporate Crime. Contemporary World Issues, 2008, p. 87.

7 Taken together, the FATF 40 Recommendations and the 9 Special Recommendations on terrorist financing provide a comprehensive set of measures for an effective legal and institutional regime against money-laundering and the financing of terrorism. Resolution 1617 (2005) of the UN Security Council and the Annexed Plan of Action of Resolution 60/288 of the UN General Assembly (20 Sept 2006), stress the importance of the implementation of the FATF 40 Recommendations and the 9 Special Recommendations on terrorist financing. https://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html (21/08/2017).

tor. Some authors[8] are skeptical whether this delegation of criminal law enforcement from the public domain and governmental enforcement institutions to the private sector will function effectively. It seems that the answer is rather a negative one, particularly when looking at resounding cases such as the Enron fraud[9] or the Madoff investment scandal[10] wherein many international banks have been fined for aiding companies to commit fraud. Compliance issues at financial institutions are becoming increasingly crucial, with banks required to monitor transactions and report to authorities – usually Financial Intelligence Units (FIU) – suspicious activities and recommend law enforcement where investigations should be made.[11] This extent of criminal law enforcement may be too much to expect from the private sector itself.

Another recent investigation has revealed that up to USD 30 billion of ex-Soviet and Russian money had potentially passed through the Estonian branch of Denmark's largest bank, Danske Bank.[12] Other headlines were made in September 2018 by the Dutch bank ING Groep NV which admitted that criminals have been able to launder money through its accounts.[13] ING was fined EUR 775 milion for "structural infringement".

The above instances raise a series of questions: what is done to address money laundering not only in Europe but worldwide? Is the legislation responding effectively to this criminal activity?

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8 *Gordon*, Losing the War Against Dirty Money, Duke Journal of Comparative and International Law 2011, p. 503.

9 https://www.nytimes.com/2003/07/29/business/2-banks-settle-accusations-they-aided-in-enron-fraud.html (15/12/2018).

10 https://dealbook.nytimes.com/2014/01/07/jpmorgan-settles-with-federal-authorities-in-madoff-case/ (15/12/2018).

11 Based on the Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance), it is decribed more accurately and clearly that the compliance officer must report at Board Members to ensure its independency and to fulfill all compliance functions. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843 (15/12/2018).

12 https://www.reuters.com/article/us-danske-bank-moneylaundering/estonia-makes-first-arrests-over-danske-money-laundering-idUSKBN1OI0NL (15/12/2018).

13 https://www.reuters.com/article/us-ing-groep-settlement-money-laundering/dutch-bank-ing-fined-900-million-for-failing-to-spot-money-laundering-idUSKCN1LK0PE (15/12/2018).

B. International Standards on Combating Money Laundering and Terrorism Financing

The first international legal instrument that not only addressed the fight against money laundering but also criminalized money laundering was the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances[14] of 1988. There were later two other UN Conventions that enhanced the definition and scope of money laundering by broadening them. Money laundering provisions were to be applied not only to proceeds of illicit drug trafficking but had to also be extended to proceeds from various other serious crimes. The aforementioned conventions are the United Nations Convention against Transnational Organized Crime[15] and the United Nations Convention against Corruption[16]. Both conventions require, for the first time, the establishment of a supervisory and regulatory system for all banks and non-bank financial institutions and other natural and legal persons vulnerable to be involved in money laundering schemes. The Conventions also require the establishment of financial intelligence units. Farther, the International Convention for the Suppression of the Financing of Terrorism came into force in April 2002. It requires States, amongst others, to commit to the freezing and seizure of funds intended for terrorist activities. In September 2001, the UN Security Council adopted Resolution No. 1373, which established obligations for States to take preventive measure to counter terrorist acts and to suppress the financing of terrorist acts. By the UN Convention against Corruption of 2005, States are also to tackle various types of corruption, such as embezzlement and money laundering.

The leading standards in the fight against money laundering are the 40 Recommendations devised in 1990 by the Financial Action Task Force, an initiative of the G7 countries. The standards, which have been

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[14] United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, availbale at: https://www.unodc.org/unodc/en/treaties/illicit-trafficking.html (15/12/2018).

[15] United Nations Convention against Transnational Organized Crime and the Protocols Thereto, available at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (15/12/2018).

[16] United Nations Conventions against Corruption, available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (15/12/2018).

completely revised in 1996 and 2003, require financial institutions[17] to monitor customer transactions and upon suspicion that revenues or assets originate from criminal activities[18] to report them to FIUs. Upon this request and based on other data and findings, FIUs can then present the case to law enforcement institutions for criminal investigation. The events of 11 September 2001 have strengthened legal measures not only in the fight against money laundering but also against the financing of terrorism. Countries across the world have endorsed most of the foregoing international standards and many requests for suspected transactions have been sent to FIUs but no information has been made public on how many persons were investigated, prosecuted or convicted based on forwarded requests.[19]

Anti-money laundering issues are regulated not only at international level but at European level too. An important instrument in this regard is the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[20], which aims to facilitate mutual assistance in the investigation of crimes and the confiscation of proceeds of crime.

In July 2018, the fifth Directive on Anti-Money Laundering[21] came into force. The Directive elaborates on concepts such as whole-firm risk assessment, internal control officer responsible for compliance, screening of relevant employees, independent audit function, client due diligence, politically exposed persons, as well as establishes institutions for its implementation, etc. This new Directive requires Members States to take the necessary measures to transpose its requirements into national

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17 See the Interpretive Note to Recommendation 16.FATF, the category of financial institutions is broadened by exchange offices, lawyers, accountants, notaries, etc. http://www.fatf-gafi.org/glossary/fatfrecommendations/d-i/ (21/12/2018)

18 *Gilbert/Pontell*, International Handbook of White-Collar Corporate Crime, 2007, p. 67.

19 Based on the Report of Committee of experts on the evaluation of anti-money laundering measures and the financing of terrorism for Albania, 2018, Immediate Outcome 7, p. 37, "Only a small part of proportion of money laundering investigations results in indictments. The vast majority of ML proceedings offences are suspended and/or dismissed by the prosecution".

20 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, https://rm.coe.int/168008371f (15/12/2018).

21 Directive (EU) 2018/843, (ft. 9).

legislations before 10 January 2020. The Directive aims to set out an efficient and comprehensive legal framework for addressing the collection of money or property intended for financing terrorism by requiring Member States to identify, understand and mitigate the risks related to money laundering and terrorism financing. The innovation of this fifth Anti-Money Laundering Directive is that it contains more prescriptive provisions than previous legislation; it requires the risk assessment of a business as a whole by including customer risk, geographic risk, product risk, transaction and delivery channel risk. For the first time, a Directive takes into consideration digital currencies, and pre-paid cards. According to it, financial institutions must investigate and identify the pre-paid card holder where the card has a value exceeding EUR 150.

Based on the foregoing international standards and especially based on the fifth Directive on Anti-Money Laundering, it is established that financial institutions should create and maintain a customer identity profile by evaluating the legal title holder of the account and the controller and beneficial owner of the account. Financial institutions should also maintain customer profiles and collect accurate data, in order to have up to date information on their customers. Banks and financial institutions should monitor customer transactions[22] to evaluate whether they are compatible with existing profiles and whether they are legitimate. If banks find something suspicious and have reasonable doubts to believe transactions infringe anti-money laundering rules, they should report such transaction to the financial supervisory authority. Based on these standards, it is established that the supervisory authority should make sure that financial institutions comply with preventive measurements and investigation and prosecution mechanisms. The above standards, by prescribing legal and institutionals measures, aim to exclude access of criminals and their assets to the financial system.[23] Another objective of these standards is to establish a supervisory system providing for legal preventive measures for the private sector and a prosecution system for prosecuting criminals and terrorists.

The legal response to money laundering issues from the international and European institutions has been consistent and as a consequence

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[22] *Roberts*, Big Brother Isn't Just Watching You, He's Also Wasting Your Tax Payer Dollars: An Analysis of the Anti-Money Laundering Provisions of the USA Patriot Act, RUTGERS L. REV., 2004, pp. 573, 586.

[23] *Fernandez-Sanchez*, International Legal Dimension of Terrorism, 2009, p. 154.

adequate legal instruments and institutional response have been established. Are such mechanisms truly effective though? Taking into consideration the fact that the biggest banks in the world have been fined for being involved in money laundering schemes the effectiveness of the legal instruments in force is questionable.

C. Legal and Institutional Measurements in Albania

As mentioned, the Republic of Albania is currently undertaking important legal and institutional measures to tackle money laundering and terrorism financing. For instance, within the framework of the justice reform, the Law on Organizing and Functioning of Institutions against Corruption and Organized Crime[24] and the Law on Organizing and Functioning of the Prosecution[25] were adopted. An important role in this process has undoubtedly been played by the new amendments to the Criminal Procedure Law which require further revision of the Law No. 9917/2008 "On the prevention of money laundering and terrorism financing" [26]and the Law no.157/2013 "On measures against terrorism financing", in order to ensure their compliance with the judicial reform, the new constitutional and Criminal Procedure Law amendments and to unify the relevant legislation in the country.

Senior officials at European institutions such as Johannes Hahn[27], the EU Commissioner for the European Neighbourhood Policy and Enlargement Negotiations, shared their optimism that the European Commission will offer a positive assessment in its annual progress report on Albania. During 2016, alongside the justice reform and constitutional amendments, Albania approved an amendment on fighting organized crime and corruption. This, together with the the implementation of the vetting process at state institutions has been a major step for-

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[24] OJ No.133 of 22/05/2017, http://qbz.gov.al/Ligje.pdf/drejtesi/Ligj_10192_03122009_perditesuar_2017.pdf (15/12/2018).

[25] OJ No. 209 of 07/11/2016, http://www.pp.gov.al/web/ Kuadri_Ligjor_546_1.php#.XDtwLc17nIU (15/12/2018).

[26] OJ No. 215 of 08/12/2011, http://aab.al/wp-content/uploads/2017/06/LIGJI-9917-DATE-19-05-2008-PER-PARANDALIMIN-E-PASTRIMIT-TE-PARAVE-DHE-FINANCIMIN-E-TERRORIZMIT-I-NDRYSHUAR.pdf (23/11/2018).

[27] https://europeanwesternbalkans.com/2018/01/12/2018-crucial-year-albania-european-path/ (17/04/2018).

ward for EU accession. The vetting law aims to clean up the judiciary system from corrupted judges, prosecutors and senior state officials.

The first results of the vetting process are encouraging and hope remains that the fight against corruption will be severe. Around 15 judges and prosecutors have resigned recently fearing that because they cannot justify their properties they will be subjected to prosecution for money laundering. Such measures taken recently in Albania, as for example, the thorough examination of all assets and properties of judges and prosecutors are considered by EU representatives as crucial for the process of opening accession negotiations. The Law No. 9917/2008 "On the prevention of the money laundering and terrorism financing" has been amended a few times and as a general observation it can be said that international standards are being met. In the framework of reinforcing the fight against money laundering and terrorism financing, the Council of Ministers has undertaken new legal initiatives[28] to improve the current law. A fresh draft law on "the prevention of money laundering and terrorism financing"[29] determines that the information on national or international data exchange, on persons against whom there are grounded suspicions for the involvement in any form of financing terrorism will be performed not only by the finance minister, minister of interior, minister for foreign affairs, justice minister, defense minister, state information service director, bank of Albania governor and general attorney but also the head of special prosecution. While this is a welcome measure, it is equally important that cooperation between the police and prosecution is further strengthened so that criminal networks could be dismantled more effectively.[30] This collaboration is crucial in the fight against money laundering. As per the Reports of the European

[28] The discussion presented in this paper focuses on the comments given by the Albanian Association of Banks in the process of public consultations on not on the dispositions of the draft per se. The draft has not yet been approved by the Parliament.

[29] See Albanian Anti-Money Laundering Directory website, https://www.parlament.al/News/Index/7243, (15/12/2018).

[30] Based on the Annual Progress Report 2016 for Albania of the European Commission published at the website: https://ec.europa.eu/neighbourhood enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_albania.pdf (17/04/2018).

Commission, Albania has good legislation on paper but lacks proper implementation of it.[31]

The aforementioned draft law lays down that for the consideration of proposed cases under Article 15 (1) and (2) thereof, the finance minister may request the establishment of a special consultative committee with high-ranking representatives from the ministry of interior, ministry for foreign affairs, justice ministry, defense ministry, office of the general attorney, state information service directory, bank of Albania and anti-money laundering directory.

Furthermore, the draft law provides that the finance minister may order, without prior notification of the funds holder and the relevant decision of the Council of Ministers, the temporary blocking of funds or other assets where reasonable doubt exists as to an infringement of anti-money laundering rules. Where this is the only way to ensure implementation of the measures provided for in the draft law, the finance minister must notify the general prosecutor and the head of the special prosecution for the purpose of instituting possible criminal proceedings.

The need for commencing criminal proceedings except in cases directed at limiting the physical freedom of the funds holder usually aim at taking control of goods or properties which are proceeds of crime, to the extent that they may affect or impair the functioning and progress of criminal proceedings[32]. The presence of criminal assets may exacerbate or prolong the consequences of crime or facilitate the commission of other offenses. In this case, seizure is an instrument for the realization of property coercion, as opposed to personal security measures which have a different purpose.

The procedure, the modalities and the limitations provided for by criminal procedural law with respect to the determination of property security measures in criminal proceedings are shaped by the constitutional guarantees related to property rights, such as the right to property provided for in Article 41(1) of the Constitution, as well as the freedom of economic activity provided by Article 11 of the Constitution. This is motivated by the need to equitably balance the public interest and protection of the society from criminal actions against the fundamental constitutional rights of the individual in relation to disproportionate and

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31 *Ibid*.

32 *Elezi/Kaçupi/Haxhia*, Criminal Code Commentary, 2009, p. 40.

unjustified interference. In this context, for instance, the competence given to the prosecution under Article 210 of the Criminal Proceedings Code "in urgent cases this decision [on seizure] is taken by the prosecutor" can be evaluated as a violation of the constitutional principle of the separation of powers[33] as the prosecution charges the accused and is not part of the judiciary. Nevertheless, when balancing the public interest of fighting money laundering and criminal activities against the personal interest of the individual in property protection, the public interest will prevail. For this reason, laws against money laundering and terrorism financing contain restrictive provisions on rights and freedoms including property rights. However, not all exceptions can be justified. For example, the competence of the finance minister to order temporary blocking of funds without prior notification – which might somehow be legitimized in the context of combating criminal activity – cannot be viewed positively as it constitutes a violation of the constitutional principle of separation of powers and the concept that limitation of rights and freedoms can only be done by law and by a competent court established by law.

Farther, the draft law, attempts to define the term "business relationship" as "any professional or trade relationship, which is related to activities exercised by the subjects of this law and their clients". In fact, the terminology used in the Civil Code[34] and the Commercial Code[35] is that of "an economic or commercial activity". Thus, in order to avoid the creation of new terms which while interpreting may create confusions and based on the principles of legislative technique[36] a simple definition[37] for "business relationship" is suggested instead as "the economic or commercial activity exercised by subjects of the law and their clients".

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33 *Anastasi/Omari*, Constitutional Law, 2010, p. 154.

34 Civil Code of the Republic of Albania approved by law no. 7850 of 29.07.1994 amended.

35 Commercial Code of the Republic of Albania approved by law no. 9901 of 14.04.1994 amended.

36 *Dorsey*, Legislative Drafter's Desk Book, 2006, pp. 169-240.

37 A similar definition is given by Kosovo Anti-Money Laundering Law which is approved on 25 May 2016. Published on the Kosovo Parliament web page: http://kuvendi5.votaime.org/Uploads/Data/Documents/LIGJI_NR._05_L096_LIGJ_PER_PARANDAL-MIN_E_PASTRIMIT_TE_PARAVE_DHE_LUFTIMIN_E_FINANCIMIT_TE_TERRORIZMITLIGJI_NR._05_L_-096___LIGJ_PER_PARANDALIMIN_E_P____xGEXFHgfc8.pdf (16/02/2018).

The draft law also aims to define politically exposed persons (PEP) but considering the international and European legislation in this area, further revisions are required particularly for clarifying what will constitute a 'high level of leadership' and how it correlates to functions already defined by the law. As provided in the Law on Civil Servants, Senior Civil Servants are persons holding the following positions: a) General Secretary; b) department manager; c) general director of directorates; d) equivalent positions with the first three. For this reason, the definition of PEP must be revised to match the above positions, aiming for an exhaustive list that would exclude subjective interpretations. When attempting to define PEPs, the draft law refers to persons who "hold or held functions" however only in relation to “high level of leadership” and foreign PEPs. A proper definition for the Political Exposed Persons status is lacking which means that other categories of persons referred to in the draft would stop being PEPs practically immediately after the completion of their function/end of their mandate. This definition is in violation of the Recommendations which provide that the PEP status is held for a period of 3 years after the release from function, whereas the high-level PEP status is lifelong. Based on the Recommendations, upon request of the responsible authority, the PEP status may be extended beyond the 3 years term.

Article 11 of the draft law further stipulates that the "product of the criminal offense" has the same meaning as is provided for in the Criminal Code. Such an undefined reference might however lead to misinterpretations. Thus, it is suggested to reflect the content of Article 287 of the Criminal Code in the foregoing provision to ensure that the reference is accurate. Even if amendments to Article 287 of the Criminal Code are made at a later time, they will also be reproduced in the meaning and implementation of this draft law.

The draft law envisages that the identification of the beneficial owner will be reduced to ownership or control of 10% of shares or voting rights in a company, but this decrease is premature for Albania as this percentage is much lower than the one set in Directive 2005/60/EC[38] of 25%, which is currently being implemented by banks in the EU and second-tier banks in Albania. Article 12 of the draft law also seeks to amend the terminology used for “beneficial owner” by adding the terms "the most

[38] Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309/15, Art. 3(6).

recent effective control over a legal entity or legal organization." Since the term "legal organization" is unclear and undefined, only the reference to "legal entity" should be kept. The Albanian Commercial and Civil Codes only use the terms 'legal persons' or 'juridical persons' and thus it is suggested to remove the term 'legal organization' as to exclude confusions or alternatively, to redefine it.

The draft law further provides that the bank shall carry out the verification of the documentation sent by the client. As currently worded, such a "verification of information" sent by the client is an impossible task for a bank as banks do not have access to the databases where citizen data is registered. In addition, the term "verification" in the Albanian language is different in meaning from the term "identification" and should the former be required, it might cause perturbance in the practical application of the law. Moreover, legal entities such as banks do not have the task of verifying the documentation submitted by their clients as this is unrealistic for both resident and non-resident clients and legal entities. Taking into consideration these issues, the term "verify" must be revised.

Another provision of the draft law aims at extending the term for maintaining documents of financial institutions to 10 years. However, this provision is excessive and goes far beyond the FATF Recommendation No. 11, which stipulates that all necessary documents and data on transactions both national and international should be retained by financial institutions for at least five years so as to enable them to easily meet the requirements of competent authorities in terms of monitoring and reporting. Furthermore, this data should be sufficient to allow the reconstruction of individual transactions by matching the amounts and type of currency in order to provide, if necessary, evidence to the enforcement agencies for prosecution purposes. Financial institutions should thus be required to keep copies of official identification documents (passports, ID cards, driving licenses or similar documents), business correspondence, including the results of analyses carried out, such as investigations on the nature and purpose of complex and unusual transactions for at least 5 years after the business relationship has been completed or a casual transaction has taken place.

The draft law purports to ensure that financial institutions are not allowed to carry out correspondent services with shell banks. Subjects should terminate business relationships and report to the responsible

authority when assessing that correspondent bank accounts are used by shell banks.

Furthermore, the draft law requires that financial institutions shall take appropriate measures [to implement the law] under the draft law and other subordinate legal acts. However, the draft does not specifically lay out these subordinated legal acts (which are issued in Albania on the basis of and for the implementation of the laws). Such a formulation contradicts Article 118(2) of the Constitution which states that a law [thus the draft as well] must designate the competent organ (Council of Ministers, or Finance Minister) that will issue the subordinate legal act, the type (Decision, Ordinance) of such act and specify the issues to be regulated, as well as principles on the basis of which such issues shall be regulated. In the current wording, the provision leaves plenty of room for abuse and misinterpretation.

Under the draft law all employees are required to report any data or information that may raise a suspicion of money laundering or terrorism financing. Referring to the term "any data" a more precise formulation is required, as the term is very wide. This obligation should be clearly defined as referring only to data related to a particular transaction or action.

Moreover, the draft law provides that financial entities should report all transfers with or of value of more than ALL[39] 1 million leaving further details to be stipulated by a subordinate legal act. As mentioned above, such formulation is in breach of Article 118(2) of the Constitution for failing to designate the competent body to issue the subordinate legal act and the matters to be regulated. Furthermore, a subordinate legal act cannot determine reporting deadlines and the principles upon which deadlines are to be set – these are legal criteria which should be defined in the draft law. In addition, the requirement to report all transfers is not anchored in international standards and should be revised or reworded by limiting it only to "on-going transfers abroad and transfers from abroad to foreign currency" excluding interbank transfers and transfers to a customer in a foreign currency within the second-tier banks in Albania.

To lend more support to the competent authorities in the fight against money laundering the draft law foresees the establishment of a

[39] ALL designates the lek which is the official currency of Albania.

national accounts register. Such a register is not comprised in the recommendations of the Task Force and it is unsuitable that this matter is included in this draft law. Based on best international practices, the bank accounts register should be part of tax administration and it should be incumbent on the Council of Ministers to determine the right of access to the register.

As per the draft law, the subjects of the law are prohibited from disclosing suspicious activity and all reports sent and correspondence kept with the responsible authority to 'other supervisory authorities or any other structure' without the prior approval of the authority where the reports are sent. With regard to this provision, the term 'any other structure' should be reformulated to specifically determine what is to be understood by 'any other structure'. At the same time, the provision should be revised to also comply with the Criminal Code. Financial institutions such as banks are obliged to report to prosecutors or enforcement institutions or other authorities such as the Taxation Directorate, etc. Thus, this provision should be drafted in harmony with other legal prescriptions in order to not contradict or violate them, especially those that stand higher in the hierarchy of legal acts or it risks being null and void.

In cases of suspicion of money laundering, the draft law empowers the responsible authority to carry out a temporary blocking or temporary freezing of the transaction for a period of not more than 5 calendar days. Within this deadline, if it detects elements of a criminal offense, the responsible authority shall send the case to the prosecutor's office by submitting a copy of the order to suspend the transaction or to freeze the account. As concerning this 5 day time period, it must be noted that a transfer cannot be held for 5 days without a seizure order issued by the competent authorities. Furthermore, the Directorate for the Prevention of Money Laundering is an executive institution and based on the Constitution, it cannot have judicial competencies, it can proceed only administratively. Blocking of the accounts is a security measure and therefore constitutes a judicial power which can be exercised only by a court via a court judgment. Notably, in accordance with Article 210 of the Criminal Procedure Code, the court may order the seizure of moneys deposited on current accounts. In cases of emergency, where a reasonable doubt as to the illegitimate origin of such moneys exists, to speed up proceedings, the Prosecution is given the competence to transfer or remove money from accounts. This provision is criticisable as the draft law cannot establish rights or obligations which violate or con-

tradict the Criminal Procedure Code, because this is a simple law that will be approved by a simple majority. Moreover, this amendment is also not in compliance with the FATF Recommendations and best practices because a financial institution can not hold a transaction for 5 days without notifying its client as to the reasons and purposes of the blocking. Practically, this requirement is both imposible and unreasonable and exposes the financial institutions to conflict situations with its customers. Financial institutions may agree with this provision only if it gives the bank or other entity the right to notify the client about the blocking order by delivering a copy thereof, thus removing the classification of this document as "secret".

To find an administrative offense, the draft law requires that the subjects of the law "in repeated and significant manner" commit serious violations relating to money laundering and terrorism financing. Use of the term "significant" proposed above is too general and may leave room for abuse. For accuracy, the relevant provision should be reworded to find an administrative offense when "the subjects of the law have repeatedly committed serious violations and have affected the country's economy and reputation and have influenced the national risk assessment on money laundering and terrorism financing."

Another issue is the predicted increase in the level of penalties in this draft law which is extremely high. In comparison to the existing law, penalties are projected to increase by three to five times. This increase does not serve at all to prevent money laundering or enhance the awareness of the subjects, but on the contrary, it may lead to a lack of transparency and efficiency as the margin is too wide and there is no methodology for calculating penalties. Furthermore, this provision contradicts the assessment of Albania's national risk by international institutions where banks have the main contribution to this assessment as they have the highest specific weight in preventing money laundering among financial institutions. By comparison, the legislation of other countries of the Balkan region, which aspire to join the European Union and have the same risk assessment mechanisms, provides for a maximum fine for administrative offences of EUR 100.000 and the methodology of application of penalties is clearly defined. Farther, the draft law sets out that in cases where the provisions of this law are not implemented and the respective offenses are expressly defined in other laws or in other subordinate legal acts, the authorities can still apply administrative fines based on other laws. This provision must also be reworded

as it is not possible to determine an administrative offense if no concrete violation is established in the draft law. The way the provision is drafted leads to misinterpretation. According to the principles of legislative technique, administrative violations determined by subordinate legal acts cannot constitute penalties. Violations for which penalties are foreseen must be clear and stipulated by law. If a fine or penalty is imposed and no concrete violation is established in the law, this constitutes a violation of the constitutional and general principles of the rule of law and legal security.

Also questionable is the proposal for fines or penalties imposed by the Money Laundering Prevention Directorate to be considered as executive titles. In the public consultations process, practically all financial institutions have expressed their disagreement in this respect. The discretion proposed to be given to the Money Laundering Prevention Directorate is the exclusive jurisdiction of the court. Based on the Constitution and the Civil Procedures Code, the court should be the one to issue executive titles via a court decision. In the current wording, this provision runs against the constitutional attributes and guarantees which are given to courts and which are based on the principle of the separation of powers. The executive title is the competence of the court and its purpose is to execute a final court decision. The penalty or fine imposed by an executive authority cannot perform the role of a court decision. The provisions of the Civil Procedure Code on Executive Titles may not be applied in this case either.

It the meanwhile, further amendments have been brought forward to establish an institution/a supervisory authority which will approve the amount of the fine proposed by the responsible authority (Money Laundering Prevention Directorate). Hence, the imposition of fines will not be the attribute and decision of a single institution, but it would be approved by a superior authority that will evaluate the findings of a violation. Such a provision will also enable an effective right to appeal of the subjects of the law.

The general suggestions and recommendations discussed above were provided to the government through the Association of Banks in

Albania[40]. Thus far, the draft law has not yet been approved by the Parliament.

However, the executive government has not launched only legal initiatives. The government is also undertaking institutional initiatives such as the recent agreement of the Albanian state with Greece on the verification of bank accounts of Albanian politicians who are suspected to deposit their assets in the Greek State. The Greek government will exercise monitoring of the assets of all Albanian political persons in Greece.

D. Judicial Practice

As per the Decision[41] No. 105 dated 24.02.2016 of the Administrative College of the Supreme Court of Albania, Tirana Administrative District Court and Tirana Administrative Appeal Court had accepted the lawsuit filed by the company "Ak-Con" Ltd requesting the abrogation of an administrative act whereunder the company was fined for violation of anti-money laundering rules. Plaintiff, a construction company, was found to be a subject of the Law on Money Laundering Prevention. Based on the inspections and the investigations performed by the AML unit with respect to the Plaintiff, it was established that Plaintiff carried out transactions exceeding 6 million ALL without assigning an individual[42] to deal with the monitoring of such transactions for purposes of money laundering prevention. Furthermore, the entity did not have internal procedures/guidelines in this respect. The Supreme Court found that the lower courts have acted in contradiction with the law by ordering the abrogation of the administrative act since there is an obligation of the subjects of the Law on Money Laundering Prevention to report high-value transactions to the AML unit (which Plaintiff failed to do).

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40 The Explanatory Note to the Draft Law acknowledges the Albanian Association of Banks as a contributor to the new draft law, https://www.konultimipublik.gov.al/Konsultime/Detaje/134, (11/12/2018).

41 Administrative College of the High Supreme Court, decision no. 105 of 24.02.2016, https://www.gjykataelarte.gov.al/vendim, (11/05/2017).

42 Assignment of a person to exercise the AML functions is established by Task Force Recommendations and based on the new Directive (EU) 2018/843 is prescribed more clearly that banks and other financial institutions must appoint a person to ensure due diligence on transactions performed.

The Criminal College of the Supreme Court of Albania reviewed and denied the prosecution's request for seizing the property of the Defendant, a deputy in the Albanian Parliament and his wife, a former deputy. At the time (May 2017), Defendant became shareholder at a second-tier bank in the Republic of Albania. Upon investigation, the prosecution found that Defendant was hiding his personal income and by failing to declare it, had committed tax evasion. The prosecution charged Defendant with the criminal offense of money laundering, but the prosecution's request for the seizure of Defendant's property was not accepted by the Supreme Court. This case is very illustrative of the practical difficulties of fighting corruption and sentencing politicians for corruption-related crimes in Albania. Based on several international reports[43] on monitoring the justice reform and the rule of law in Albania, corruption is widespread and it is common for senior officials to go unpunished.

There are hopes for change with the recent charge[44] brought against the ex-General Prosecutor of Albania who resigned to escape vetting and is presumed to have left the country. Namely, the prosecution office has charged the former General Prosecutor with money laundering of products of criminal offences. The prosecution, as reported in the media, has declared that there are reasonable grounds to believe that a series of acquisitions and transactions which occurred within a very short period of time and at very high difference in the price of immovable property, have been carried out to benefit the ex-General Prosecutor. The case is pending.

E. Conclusions

On both international and European levels, the legislation to combant the issue of money laundering and terrorism financing is indeed very progressive. However, despite institutional and judicial efforts to address, prevent and fight these phenomena, the system does not fully work as it contains hypothetical, academical and practical impediments.

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43 European Commission, several Yearly Progress Reports 2005-2017.

44 http://abcnews.al/lu-kemi-prova-per-korrupsion-nga-adriatik-llalla/ (15/06/2018); http://top-channel.tv/2018/07/23/sekuestro-pasurive-te-ish-kryeprokurorit-adriatik-llalla/ (23/07/2018).

The Task Force Recommendations and European legal acts require financial institutions to draft and enforce customer monitoring and reporting requirements with respect to persons or transactions which raise suspicions of money laundering and terrorism financing, to exercise due diligence and, in some cases, enhance diligence on banking transactions performed by customers. However, these Recommendations are unclearly drafted, they oftentimes contain requirements devoted to private sector financial institutions only and provide high financial and human resources costs, as well as high penalties. All of these factors lead to the inefficiency of these recommendations.

The result is that most of the time financial institutions are reporting to the AML unit but in order to enhance the process cooperation with other law enforcement authorities is needed. Moreover, it is necessary to establish clear and practical guidance for all agencies involved in the process of fighting money laundering and terrorism financing.

Undoubtedly, financial institutions play an irreplaceable role in reporting suspicious transactions, but this role should be complementary. Financial institutions, despite their goodwill to fight criminality, cannot bear the main weight of the fight against money laundering and terrorism financing.