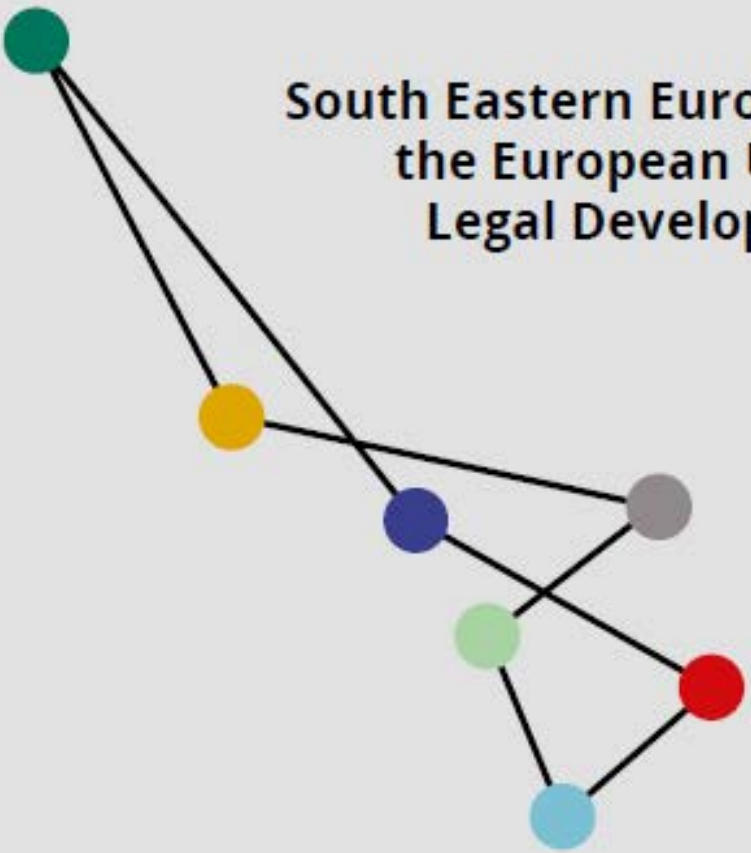
see eu

CLUSTER OF EXCELLENCE
IN EUROPEAN AND
INTERNATIONAL LAW

SERIES OF PAPERS
VOL. 7

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

South Eastern Europe and the European Union – Legal Developments



Verlag Alma Mater

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

SERIES OF PAPERS

Volume 7

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

Southeastern Europe and the European Union – Legal Developments

Verlag Alma Mater, Saarbrücken

Publisher: SEE | EU Cluster of Excellence in European and International Law
Editors: Dr. Mareike Fröhlich LL.M., Boris Belortaja LL.M., Jana Katharina Kirst LL.B.

Die Deutsche Nationalbibliothek verzeichnet diese Veröffentlichung in der Deutschen Nationalbibliographie. Die bibliographischen Daten im Detail finden Sie im Internet unter http://dnb.ddb.de.

Die Deutsche Nationalbibliothek lists this publication in the Deutschen Nationalbibliographie. Detailed bibliographic data is available on the internet at http://dnb.ddb.de.

www.verlag-alma-mater.de

Druck: Conte, St. Ingbert

ISBN 978-3-946851-72-1

Preface

This publication is the seventh 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 Southeastern 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 (North 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) and the German Federal Ministry of Education and Research and aims to promote outstanding capabilities in research and teaching in 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 Southeastern 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, as well as 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, several research projects, summer schools, library cooperation, and various publications.

This collection of papers is intended 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 approximation of legislation in the region of Southeastern Europe and the EU. The

series is published every year and is peer-reviewed by the Editorial Board.

The SEE | EU Cluster of Excellence in European and International Law • Series of Papers 2022 encompasses eight papers from academic staff and junior researchers from the law faculties in Belgrade, Skopje, Tirana, Zagreb, Zenica, and the Europa-Institut. This issue covers a broad variety of topics and illustrates the wide range of subjects connected to European and International Law. Topics in this volume discuss various law issues from a European and International Law perspective, including the rule of law in the European Union, the impact of the Union's enlargement policy on the Western Balkan and Eastern Partnership Countries, and judicial reforms in the Western Balkan as part of the European Union accession talks, to name a few.

We would like to express our deepest gratitude to the German Academic Exchange Service (DAAD) and the German Federal Ministry for Education and Research for their financial support. We owe special thanks to all authors for their contributions as well as to Dr. Mareike Fröhlich LL.M., Boris Belortaja LL.M., Meltem Yildirim LL.M., Jana Katharina Kirst LL.B., Norah Kibaka-Vibila LL.M., and Theresa Mainusch 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, April 2022

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

Prof. Dr. Thomas Giegerich LL.M., Director
Europa-Institut of Saarland University

Prof. Dr. Neda Zdraveva, Manager
Centre for the South-East European Law School Network (SEELS)

Contents

The Rule of Law in the European Union – Countering Recent Challenges to Self-Evident Truths Politically, Judicially, and Financially

Thomas Giegerich[*]

A. The Commitment to Constitutional Values of the EU and its Member States

The European unification process has from the outset been a project that is committed to constitutional values. The common constitutional values of the EU and the Member States are now set forth in Art. 2 TEU. Art. 49 (1) sentence 1 TEU expressly stipulates that only those European States which respect these values and are committed to promoting them can join the EU. At their core, the constitutional values of Art. 2 TEU are inviolable. It is part of the judicial functions of the Court of Justice of the EU (CJEU) pursuant to Art. 19 (1) subparagraph 1 TEU to define and uphold that core.

On the relationship between the values enshrined in Art. 2 TEU, the EU legislature said this: "While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa."[1]

---

[*] Paper presented at the Final Conference "Current Issues of European Integration and Western Balkans" by the SEE|EU Cluster of Excellence in European and International Law on 17 December 2021. For an earlier and more extensive German version, see *Giegerich*, Die Unabhängigkeit der Gerichte als Strukturvorgabe der Unionsverfassung und ihr effektiver Schutz vor autoritären Versuchungen in den Mitgliedstaaten, Zeitschrift für Europarechtliche Studien 22 (2019), pp. 61–111.

[1] Recital (6) of the preamble to Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433 I, p. 1).

B. The Special importance of the Rule of Law for European Integration: The EU as a "Union Based on the Rule of Law"

The rule of law plays a prominent role at the Union and national levels because the EU is a "Union based on the rule of law" which the CJEU has defined by the following three characteristics: firstly, the primacy of EU law over the law of the Member States;[2] secondly, the direct applicability of many EU law provisions;[3] and thirdly, the comprehensive judicial protection of natural and legal persons against acts of the EU institutions as well as national measures relating to the application to them of an EU act.[4]

C. The Courts as Integration Factors in the Multilevel System of the EU

In the "Union based on the rule of law", the courts both at the Union and the national levels have always been important integration factors. Individuals enforce their rights emerging from EU law in the national courts that act as courts of the Union in the functional sense and cooperate with the CJEU in the preliminary ruling procedure under Art. 267 TFEU in order to implement those rights effectively.[5]

Such utilisation of Member States' courts by the EU, in order to achieve effective enforcement of Union law *vis-à-vis* the Member States' executive and legislative branches of government, has broken open the national sovereignties: The classic international confrontation of the Member States and the EU has been replaced by a common supranational confrontation of the EU, Union citizens and national courts *vis-à-vis* the political branches of the Member States.[6]

---

2 ECJ, Case 6/64, *Costa v. ENEL*, ECR 1964, 1251; confirmed by the Declaration (no. 17) concerning primacy in the annex to the Final Act of the Intergovernmental Conference of Lisbon of 13 Dec. 2007 (OJ C 306, p.256).

3 ECJ, Case 26/62, *van Gend & Loos*, ECR 1963, 1.

4 ECJ/CJEU, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518 margin note 66; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117 margin note 31; Case C-216/18 PPU*, LM*, ECLI:EU:C:2018: 586 margin note 49.

5 *Lenaerts,* New Horizons for the Rule of Law Within the EU, German Law Journal 21 (2020), 29 f.

6 *Lenaerts* (note 5), 31.

At the same time, Art. 267 TFEU has also split up the judiciaries of the Member States: The lower instance national courts are supposed to use their comprehensive right of requesting preliminary rulings from the CJEU also in opposition to the higher instance national courts. With the help of the CJEU, the lower instance national courts can and should induce the national supreme courts to keep the national legal systems in conformity with Union law. It is important to note in this context that Art. 267 (2) TFEU guarantees to every court of a Member State the right to request a preliminary ruling from the CJEU if it considers that a decision on a question of Union law is necessary to enable it to give judgment in a case pending before it. That right cannot be limited by national law.[7]

D. Independence as an Elementary Prerequisite of a Functioning Judiciary and its Protection under EU Law

The independence of the courts is an elementary prerequisite of a functioning judiciary. Judicial independence is not only a compulsory requirement of the separation of powers principle but also a condition of the proper functioning of the Member States' courts in the EU: A national court cannot effectively enforce Union law *vis-à-vis* the national political branches if it is dependent on them. A lower national court which is dependent on the national Supreme Court cannot effectively join forces with the CJEU to overcome the latter's resistance to Union law. The independence of national courts must not only be protected against interferences by the political branches. Rather, the independence of courts and individual judges must not be jeopardised either by intra-judicial interferences such as those originating from court presidents, higher courts or self-governing bodies of the judiciary (e.g., supreme judicial councils). On the other hand, the integration of the judicial branch in the democratic system of government needs to be maintained, too, because judges deliver their decisions "in the name of the people". It is therefore important to ensure that the judiciary does

---

7 ECJ/CJEU, Joined Cases C-188/10 und C-189/10, *Melki*, ECR 2010, I-5667 margin notes 40 ff.; Case C-416/10, *Križan*, ECLI:EU:C:2013:8, margin notes 62 ff.; Case C-112/13, *A./. B u.a.,* ECLI:EU:C:2014:2195, margin notes 28 ff.; Case C-614/14, *Ognyanov*, ECLI:EU:C:2016:514, margin notes 14 ff.; C-564/19, *IS*, ECLI:EU:C:2021:949, margin notes 67 ff. (see *Bárd*, The Sanctity of Preliminary References, Verfassungsblog, 26 November 2021).

not develop into a state within the state but remains accountable to the public.[8] This amounts to a tightrope walk in any constitutional system that takes both democratic legitimacy and separation of powers seriously. Member States have a certain margin in achieving the proper balance between independence and accountability of their judiciary, but they must not undermine the independence of the courts and of individual judges which is at the core of the principle of the rule of law.

The independence of the courts has long explicitly been guaranteed by public international law as well as Union law. First and foremost, Art. 6 (1) ECHR which extends to civil and criminal proceedings comes to mind,[9] as well as Art. 47 CFR, which covers all judicial proceedings concerning rights or freedoms guaranteed by Union law. The CJEU has meanwhile determined that judicial independence is part and parcel of the essence of the right to a fair trial enshrined in Art. 47 (2) CFR[10] so that any restriction in that regard is absolutely precluded.[11]

It is true that Art. 47 CFR, like all fundamental rights of the Union, binds Member States only when they are implementing Union law.[12] However, courts cannot be independent with regard to proceedings pertaining to EU law, and dependent with regard to other proceedings. Only if the independence of the national courts is guaranteed comprehensively, Member States will fulfil the rule of law requirements of Art. 2 TEU, which are indivisible. This has been reconfirmed by the recent case-law of the CJEU that brought Art. 19 (1) subparagraph 2 TEU into play in this context. That provision covers every Member State court which could be called upon to rule on questions concerning the application or interpretation of EU law.[13] This is true for practically all

---

8 *Seibert-Fohr,* European Standards for the Rule of Law and Independent Courts, Journal für Rechtspolitik 20 (2012), 161 (166 f.).

9 See ECtHR, judgment of 9 February 2021, *Xhoxhaj v. Albania* (No. 15227/19); judgment of 7 May 2021, *Xero Flor v. Poland* (No. 4907/18); judgment of 22 July 2021, *Gumenyuk and others v. Ukraine* (No. 11423/19).

10 CJEU, Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, margin notes 59, 63.

11 See Art. 52 (1) CFR.

12 Art. 51 (1) CFR.

13 CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117. See also the cases concerning Poland below under VI.2.

national courts, given the extensive penetration of EU law into the legal systems of the Member States.

E. The Copenhagen Rule of Law Criterion in Accession Negotiations

According to the Copenhagen criteria, the stability of the constitutional structures of a candidate country and in particular its respect for the rule of law, including the independence of its courts, is crucial for accession to the EU.[14] In the context of the EU's eastward and south-eastward enlargements, the rule of law came into focus because the candidate countries from the former Communist bloc had been dictatorships for decades, without independent courts, where political power could arbitrarily disregard the law.

Some time ago, the Commission included judicial reform in its pre-accession strategy in order to ensure the independence, impartiality and effectiveness of the courts, bringing candidate countries closer to relevant EU standards even before the start of the actual accession negotiations. In the course of the accession negotiations, the establishment of an independent, impartial, professional and efficient court system of integrity plays a prominent role. Negotiations on other topics will be frozen until the candidate country has remedied shortcomings in this regard.[15] In support of the pre-accession strategy, association agreements with candidate countries now always include specific commitments regarding the further development of the rule of law, in particular the strengthening of the independence of the judiciary.[16]

---

[14] Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, para. 7 A iii (https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf [20 March 2020]).

[15] See *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A credible enlargement perspective for and enhanced EU engagement with the Western Balkans – COM(2018) 65 final, pp. 3 ff., 10, 17; European Commission, 2018 Communication on EU Enlargement Policy – COM(2018) 450 final, p. 2.

[16] See e.g. Art. 2, Art. 74 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the former Yugoslav Republic of Macedonia, of the other part of 9 April 2001 (OJ 2004 L 84, p. 13); Art. 1 (2) lit. a, Art. 2, Art. 80 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part of 29 April 2008 (OJ 2013 L 278, p. 16); Art. 1 (2) lit. a,

The Act of Accession of Romania and Bulgaria established a special regime with benchmarks for judicial reform and the fight against corruption under the supervision of the Commission even after the EU accession of these two States.[17] The CJEU ruled last May that the mechanism for cooperation and verification of progress in Romania established by the Commission is binding on Romania and establishes binding benchmarks that Romania is required to meet and not frustrate. Moreover, the benchmarks have direct effect, so that Romanian courts are required to disapply national provisions contrary to them, even if they have constitutional status.[18]

F. Mechanisms to Enforce the Rule of Law Requirement *vis-à-vis* Member States

The EU is taking the Copenhagen political criteria seriously even after accession, as has become clear in the last three years. If there are reasonable doubts regarding respect for the rule of law by a Member State because it undermines the independence of its courts, three enforcement procedures must be distinguished – a political one pursuant to Art. 7 TEU in conjunction with Art. 354 TFEU, a judicial one before the CJEU, based on Art. 258 or Art. 267 TFEU with a financial enforcement component, and a purely financial one that has recently been introduced but not yet applied. The Commission introduced a new rule

---

Art. 2, Art. 78 of the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and Bosnia and Herzegovina, of the other part of 16 June 2008 (OJ 2015 L 164, p. 2); Art. 1 (2) lit. a, Art. 3, Art. 83 of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part of 27 October 2015 (OJ 2016 L 71, p. 3).

17 Art. 4 (3) of the Treaty of Accession (OJ 2005 L 157, p. 11), Art. 37, 38 of the Act of Accession (OJ 2005 L 157, p. 203), Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56) and Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 58).

18 CJEU, Joined Cases C-83/19, C-127/19, C-195/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393. See *Tănăsescu/Selejan-Gutan*, The ECJ Ruling on Judicial Independence in Romania, Verfassungsblog of 2 June 2021.

of law mechanism in 2020 that accompanies these enforcement procedures. That mechanism provides for annual rule of law reports by the Commission elaborating on the strengths and weaknesses of all the Member States in this regard.[19]

I. Political Enforcement Mechanism pursuant to Art. 7 TEU in conjunction with Art. 354 TFEU

Four years ago, the Commission initiated the political enforcement mechanism against Poland regarding a serious breach of the rule of law.[20] The Commission accuses Poland of systematically undermining the independence of its courts.[21] Concerning Hungary, the European Parliament initiated the procedure under Art. 7 TEU more than three years ago.[22] The Council has not taken any decision on either Poland or Hungary. The handling of the two Art. 7 TEU procedures proves that the political enforcement mechanism is a paper tiger.

II. Judicial Enforcement Procedures before the CJEU (Art. 258, 267 TFEU)

The apparent ineffectiveness of the political enforcement procedures draws the attention to the CJEU in order to protect the "Union based on the rule of law" and its judicial component, the independence of the judiciary. Both the infringement procedure pursuant to Art. 258 TFEU and the preliminary ruling procedure pursuant to Art. 267 TFEU can be and have been used. For the sake of brevity, I will confine myself to the infringement procedures. With regard to specific rule of law

---

19 2020 Rule of Law Report: The rule of law situation in the European Union, COM (2020) 580 final, 30 Sept. 2020 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN).

20 COM (2017) 835 final (https://ec.europa.eu/transparency/regdoc/rep/1/2017/DE/COM-2017-835-F1-DE-MAIN-PART-1.PDF [12/03/2020]).

21 See the Commission's pertinent press release of 20 December 2017 (https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367 [12/03/2020]).

22 P8_TA(2018)0340 (https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf [12/03/2020]). Hungary's action for annulment of that resolution was dismissed by the CJEU (Case C-650/18, ECLI:EU:C:2021:426).

issues, there is only one condemnation of Hungary by the CJEU so far,[23] but there is a whole series of pertinent decisions against Poland of which I only mention four.

In 2019, the CJEU determined that Poland had violated Art. 19 (1) subparagraph 2 TEU (to be interpreted in the light of Art. 47 CFR) with regard to the Supreme Court by disregarding the principles of the irremovability of judges and judicial independence.[24] While the Court recognised that the organisation of justice in the Member States fell within their competence, they were required to comply with their obligations deriving from EU law when exercising that competence, including those pursuant to Art. 19 (1) subparagraph 2 TEU.[25] It then underlined that the "requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded …"[26] The Court also pointed out that by acceding to the EU, all Member States had "freely and voluntarily committed themselves to the common values referred to in Article 2 TEU".[27]

In the parallel case concerning the lower courts in Poland, the CJEU unsurprisingly also found a violation of Art. 19 (1) subparagraph 2 TEU (to be interpreted in the light of Art. 47 CFR), as the challenged legal changes were incompatible with the principles of the irremovability of judges and judicial independence.[28]

In a third treaty-infringement procedure concerning disciplinary proceedings against judges and the newly established Disciplinary Chamber of the Supreme Court, the CJEU held that Poland had violated

---

23 CJEU, Case C-286/12, ECLI:EU:C:2012:687. But see also CJEU, Case C-66/18, ECLI:EU:C:2020:792: Violation of fundamental rights by law that compelled the Central European University to close its Budapest campus.

24 CJEU, Case C-619/18, ECLI:EU:C:2019:531.

25 Id., margin note 52.

26 Id., margin note 58.

27 Id., margin note 42.

28 CJEU, Case C-192/18, ECLI:EU:C:2019:924.

Art. 19 (1) subparagraph 2 TEU and Art. 267 TFEU.[29] In this case, the Commission has meanwhile initiated the enforcement procedure according to Art. 260 (2) TFEU because of non-compliance by Poland.[30]

A fourth still pending procedure concerns the so-called Polish muzzle law that tries to prevent Polish judges from ensuring effective judicial protection and fair trial rights in consequence of the aforementioned and other CJEU case law, particularly by increasing the powers of the Disciplinary Chamber of the Supreme Court whose independence and impartiality are not guaranteed.[31] The Commission charges Poland with violations of Art. 19 (1) subparagraph 2 TEU, Art. 47 CFR, Art. 267 TFEU and the principle of primacy of EU law. On 14 July 2021, the Vice-President of the CJEU issued an Order under Art. 279 TFEU requiring Poland immediately to suspend the application of the relevant national provisions, pending delivery of the final judgment.[32] On 6 October 2021, the Vice-President rejected the application by Poland seeking cancellation of that Order.[33] Because of Polish non-compliance, the Vice-President, on 27 October 2021, imposed a daily penalty payment of EUR 1 000 000 on Poland.[34] If Poland continuously refuses to pay the imposed penalty, the EU could set off its claim against that Member State's pecuniary claims arising under EU law. Since set-off is recognized as a method of reciprocal settlement of claims in the legal systems of all Member States, one can infer that a corresponding unwritten general principle of EU law exists. Ultimately, this is the only way to ensure the effectiveness of CJEU rulings,[35] without which the EU's character as Union based on the rule of law would be lost.

This recent case law proves that violations of the constitutional values of the EU enshrined in Art. 2 TEU are not only enforceable in the political procedure under Art. 7 TEU, but also in the judicial

---

29 CJEU, Case C-791/19, ECLI:EU:C:2021:596.

30 See the Commission Press Release of 7 Sept. 2021 (https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4587).

31 Pending Case C-204/21.

32 Case C-204/21 R, ECLI:EU:C:2021:593.

33 Case C-204/21 R-RAP, ECLI:EU:C:2021:834.

34 Case C-204/21 R, ECLI:EU:C:2021:878.

35 According to Art. 280, 299 TFEU, imposition of penalty payments on Member States by the CJEU are not otherwise enforceable.

infringement procedure under Art. 258 TFEU. It is true that Art. 269 TFEU largely excludes the CJEU from exercising jurisdiction in proceedings pursuant to Art. 7 TEU. However, that does not mean that the Court of Justice would be prevented from exercising jurisdiction in relation to Art. 2 TEU in the infringement procedure. Yet, Art. 269 TFEU may be the reason why the Commission has not charged any Member State directly with violating Art. 2 TEU as such and the CJEU has not made any such determination.

III. The New Financial Rule of Law Mechanism: Regulation 2020/2092

Every year, Poland and Hungary receive billions of Euros from the EU funds.[36] Therefore, the question was raised as to if and how financial means of coercion could be used against them to remedy their violations of fundamental constitutional values of the Union. This discussion resulted in the adoption of Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.[37] The Regulation is a compromise between the European Parliament that intended to use the budget to protect the rule of law and argued for a broad application, and the Council that wanted to use rule of law requirements to protect the budget and insisted on a direct link between breaches of rule of law principles and negative budgetary effects.[38] The Regulation is based on Art. 322 (1) (a) TFEU that empowers the EU legislature to adopt financial rules for implementing the EU budget. It aims to protect "the Union budget in the case of breaches of the principles of the rule of law in the Member States" (Art. 1).

---

[36] In the period of 2014-2020, Poland received more than € 86 billion from various EU funds (http://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-fact-sheet/esi_funds_country_factsheet_pl_en.pdf [12/03/2020]); Hungary received € 25 billion (http://ec.europa.eu/regional_policy/sources/policy/what/investment-policy/esif-country-fact-sheet/esi_funds_country_factsheet_hu_en.pdf [12 March 2020]).

[37] OJ 2020 L 433 I, p. 1. For an initial assessment, see *Hott*, Der neue Konditionalitätsmechanismus – ein scharfes Schwert?, Saar Blueprints, 10/21 DE, available at https://jean-monnet-saar.eu/wp-content/uploads/2021/10/Luis_Hott_Konditionalitaetsverordnung.pdf.

[38] See Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, § 86.

Invoking the rule of law value enshrined in Art. 2 TEU, Art. 2 lit. a of the Regulation defines the "rule of law" (for purposes of the Regulation) as including "the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."[39] According to Art. 3 of the Regulation, "endangering the independence of the judiciary … may be indicative of breaches of the principles of the rule of law".

Hungary and Poland opposed that Regulation but were unable to prevent it because the Council could adopt it by a qualified majority. However, a political link existed between the Regulation and the Multiannual Financial Framework 2021-2027[40] and the EU Recovery Instrument (Next Generation EU)[41] which required unanimity in the Council, pursuant to Art. 312 (2) and Art. 311 (3) TFEU, respectively.[42] In order to prevent an impending veto by Hungary and Poland against the latter two legal acts, a compromise was found at the European Council of December 2020.[43] According to that compromise with which the Commission specifically agreed, the Commission will "adopt guidelines on the way it will apply the regulation", to be developed in close consultation with the Member States. Should an action for annulment be lodged against the regulation, the guidelines would be finalised only after the judgment of the CJEU. The Commission promised that it would not propose measures under the regulation before the guidelines were finalised.

---

[39] The same definition appears in the 2020 Rule of Law Report (note 19), p. 1, where it has general application. The Commission there adds that "[t]hese principles have been recognised by the European Court of Justice and the European Court of Human Rights."

[40] Council Regulation 2020/2093 of 17 December 2020 (OJ 2020 L 433 I, p. 11).

[41] See Art. 2 (1), 3 (3) of Regulation 2020/2092 of 14 December 2020 (OJ 2020 L 433 I, p. 23), referring to necessary amendments of the EU's Own Resources Decision to enable implementation of Next Generation EU.

[42] See Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§87 ff.

[43] Conclusions of the European Council (EUCO 22/20) of 11 December 2020, paras. 2, 3. See Editorial Comments, Compromising (on) the general conditionality mechanism and the rule of law, CMLRev 2021, 262 ff.

Since Hungary and Poland have lodged annulment actions that are still pending,[44] the guidelines have not yet been finalised and the regulation thus not been applied. This intervention by the European Council in the adoption and implementation of a legislative act has been criticised as being *ultra vires*.[45] The continued inaction of the Commission regarding implementation of the regulation has led the European Parliament to institute proceedings against the Commission for failure to act pursuant to Art. 265 TFEU.[46]

With regard to the actions for annulment by Hungary and Poland against Regulation 2020/2092, the CJEU decided to assign the cases to the full Court and granted the request by the European Parliament to hear them in the expedited procedure.[47] Both measures are very exceptional and indicate the importance of the cases. Ten Member States and the Commission have intervened in support of the defendants, the European Parliament and the Council of the EU. In his opinions of 2 December 2021, the Advocate General proposed dismissal of both actions.[48] He explained in particular that the EU legislature had used the appropriate legal basis and that the procedures pursuant to Art. 7 TEU are not exclusive as means to protect the rule of law.

The regulatory technique used by Art. 6 (9) – (11) of the Regulation (and accepted by the Advocate General[49]) is the conferral of implementing powers on the Council in accordance with Art. 291 (2) TFEU. The Council is empowered to adopt an implementing decision on appropriate financial measures by a qualified majority,[50] upon the proposal of the Commission (which it may amend also by a qualified

---

44 Case C-156/21 and C-157/21.

45 *Alemanno/Chamon*, To Save the Rule of Law you Must Apparently Break it, Verfassungsblog, 11 December 2020; *Scheppele/Pech/Platon*, Compromising the Rule of Law while Compromising on the Rule of Law, Verfassungsblog, 13 December 2020; *Stäsche*, Europäischer Rechtsstaat als Spielball der EU-Institutionen?, Zeitschrift für Europarechtliche Studien 24 (2021), pp. 561, 610 ff.

46 Pending Case C-675/21.

47 Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 3, 16.

48 Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974; Opinion of the Advocate General in Case C-157/21, ECLI:EU:C:2021:978.

49 Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 252 ff.

50 Art. 16 (3) – (4) TEU.

majority). The Commission is obliged to initiate the sanctioning procedure if it has reasonable grounds to consider that breaches of rule of law principles in a Member State affect or seriously risk affecting the EU's budget or financial interests in a sufficiently direct way, unless "other procedures set out in Union legislation would allow it to protect the Union budget more effectively".[51] The Council is usually required to do adopt an implementing decision within one month, a period that may be extended by a maximum of two months, but only if exceptional circumstances arise. The Commission is expressly referred to its rights under Art. 237 TFEU in order to ensure a timely decision. Recital (23) of the preamble also mentions the Commission's rights under the Council's Rules of Procedure, referring to Art. 11 (1) which empowers the Commission to initiate a vote in the Council. If the Council nevertheless let the deadline pass unused, it will violate the Regulation and likely cause the Commission to bring an action for failure to act pursuant to Art. 265 TFEU. Regulation 2020/2092 leaves little room for discretion to either the Commission or the Council – both are bound to react swiftly and decisively to breaches of rule of law principles with sufficiently direct consequences for the EU's finances; there is, however, discretion with regard to the specific means used to counter those breaches.[52]

Recital (26) of the preamble tries to give the European Council an emergency brake function in that decision-making process on financial sanctions: "The procedure for adopting and lifting the measures should respect the principles of objectivity, non-discrimination and equal treatment of Member States and should be conducted according to a non-partisan and evidence-based approach. If, exceptionally, the Member State concerned considers that there are serious breaches of those principles, it may request the President of the European Council to refer the matter to the next European Council. In such exceptional circumstances, no decision concerning the measures should be taken until the European Council has discussed the matter. This process shall, as a rule, not take longer than three months after the Commission has submitted its proposal to the Council."[53]

---

51 Art. 6 (1) read together with Art. 4 (1) of Regulation 2020/2092.

52 *Stäsche* (fn. 45), p. 598.

53 See also para. 2 (j) of Conclusions of the European Council of 11 December 2020 (EUCO 22/20).

The Advocate General expressly underlined that there is no basis in the Treaties for giving the European Council any emergency brake powers in the legal sense.[54] An appeal to the European Council by a Member State based on recital (26) cannot affect the Council's decision-making power. It can only start a political discussion, subject to Art. 11 (1) of the Council's Rules of Procedure:[55] "The Council shall vote on the initiative of its President. The President shall, furthermore, be required to open a voting procedure on the initiative of a member of the Council or of the Commission, provided that a majority of the Council's members so decides." That means that every single member of the Council and the Commission can cut short the diversions via the European Council by a motion to vote, provided that the motion is supported by a simple majority of the Council.

It remains to be seen how effective the new Regulation will be in repelling attacks by Member States on the rule of law, because its scope is limited: Financial sanctions such as suspension of payments (Art. 5)[56] may be imposed only if "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way" (Art. 4 (1)).[57] The Advocate General placed great emphasis on the requirement of a clear link between breaches of the rule of law and the protection of the EU budget when he confirmed that the Regulation was rightly based on Art. Art. 322 (1) (a) TFEU.[58] This means that the scope of the Regulation may be narrower and thus its deterrent effect on serious breaches of the rule of law more limited than one would hope. It remains to be seen whether the CJEU will follow the Opinion in this regard when it delivers its judgment in early 2022.[59]

---

54 Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 257 ff.

55 OJ 2009 L 325, p. 35.

56 Art. 5 (2) of the Regulation protects the final recipients or beneficiaries of payments from Union funds – the financial sanctions are aimed at governments and not Union citizens.

57 Opinion of the Advocate General in Case C-156/21, ECLI:EU:C:2021:974, §§ 164 ff.

58 Id., §§ 164 ff.

59 See *Gremminger*, The New Rule of Law Conditionality Mechanism clears its first hurdle, European Law Blog, 14 December 2021.

One should not forget in this context that the financial mechanism under the Regulation has a subsidiary character *vis-à-vis* other procedures set out in Union law whose use would allow protecting the Union budget more effectively.[60] This is why the Commission has so far withheld its consent to the spending plans submitted by Hungary and Poland concerning their share of the Next Generation EU Fund.[61]

G. Conclusion: In Defence of European Constitutional Values

We are currently witnessing autocratic offensives in many parts of the world, including Europe. Our common constitutional values that are embodied in Art. 2 TEU, first and foremost the rule of law, are no longer self-evident truths. Rather, we must actively defend them at all levels of the European multi-level system. Our first line of defense is the accession process which has to ensure that only those States can become EU members that credibly and sustainably fulfill the political accession criteria. Our second line of defense runs within the EU. There we must ensure by all available means, both political and legal, that all Member States respect our common constitutional values.

It is true that the EU, as a community of constitutional values, thrives on conditions that it cannot guarantee itself,[62] namely on the consensus of the vast majority of Union citizens on those values. However, such a consensus can erode, if the competent institutions of the EU and the Member States do not fend off attacks on common constitutional values, giving the impression that they are either unwilling or unable to defend them. In this regard, the resolute decisions by the CJEU in rule of law cases against Hungary and Poland are most welcome. So is the new financial rule of law mechanism to protect the EU budget. Hopefully, we will not one day have to consider seriously whether EU law permits or even requires the exclusion of a Member State for betraying the fundamental values of European integration.

---

60 Art. 6 (1) of Regulation 2020/2092. See also Conclusions of the European Council of 11 December 2020 (EUCO 22/20), para. 2 (d).

61 *Stäsche* (fn. 45), p. 613.

62 See *Böckenförde,* Die Entstehung des Staates als Vorgang der Säkularisation, in: *id.*, Recht, Staat, Freiheit, 1991, p. 92, 112.

The PSPP ruling of the German Constitutional Court: A warning shot for Europe?

Miriam Schmitt[*]

Abstract

The paper deals with the PSPP ruling of the German Constitutional Court. The Public Sector Asset Purchase Program (PSPP) is a sub-program of the Expanded Asset Purchase Program (EAPP) and serves to purchase assets issued on the public sector in secondary markets. In 2015, the European Central Bank (ECB) extended this program to the purchase of public sector securities, i.e. government bonds (PSPP) on the secondary market. The aim of this program is to counter the risks of an "excessively long period of low inflation". Asset purchases serve to stimulate the economy by easing of monetary and financial conditions, thus enabling households and firms to borrow more cheaply. The PSPP aims to address the risk of deflation in the euro area and achieve an inflation rate close to 2%. After the ECB adopted the PSPP program, various complaints against it were filed with the German Constitutional Court. The German Constitutional Court suspended the proceedings and referred the case to the European Court of Justice (ECJ) for a preliminary ruling under Article 267 TFEU. The ECJ then confirmed the conformity of the PSPP with European law in its Weiss ruling on 11 December 2018. As a result, the German Constitutional Court issued its PSPP ruling on 5 May 2020. It is the first time the German Constitutional Court has declared a measure of a Union institution to be ultra vires and thus manifestly exceeding its competence and thus contrary to both constitutional and Union law. And even in two respects: regarding the ECB, since it did not sufficiently explain why the PSPP program is to be assigned to monetary policy, and regarding the ECJ, since it did not sufficiently carry out this examination. The conflict is based on a different understanding of the

[*] Miriam Schmitt is a LL.M. candidate and research assistant at the Europa-Institut of the Saarland University.

interpretation and examination of the principle of proportionality (Article 5 I 2 TEU). Since the ECB complied with Germany's demands and submitted recitals, the PSPP ruling had no consequential effects. Nevertheless, the Commission initiated infringement proceedings (Article 258 TFEU), which have since been discontinued.

A. Introduction

On May 05, 2020, the Federal Constitutional Court (BVerfG) for the first time declared a measure of a Union institution to be ultra vires and manifestly exceeding its competence;[1] and thus contrary to both constitutional and Union law.[2] The judgment concerns the PSPP program of the European Central Bank.

The Public Sector Asset Purchase Programme (PSPP) is a sub-programme of the Expanded Asset Purchase Programme (EAPP) and is used to purchase assets issued on the public sector in secondary markets.[3] In 2015, the ECB extended this programme to the purchase of public sector securities, i.e. government bonds (PSPP) on the secondary market.[4] The aim of this programme is to counter the risks of an "excessively long period of low inflation".[5] Asset purchases serve to stimulate the economy by easing of monetary and financial conditions, thus enabling households and firms to borrow more cheaply.[6] The PSPP aims to counter the risk of deflation in the euro area and to achieve an inflation rate close to 2%.[7] Due to numerous complaints against this programme, the BVerfG, in a first step referred the case in

---

1 *Pießkalla*, EuZW 2020, 538.

2 *Zelda/Bamberger,* in: Handlexikon der Europäischen Union, EZB/PSPP-Urteil; *Stepanek*, EuZW 2021, 701; *Siekmann*, EuZW 2020, 491; *Haltern*, NVzW 2020, 817.

3 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 1; *Zelda/Bamberger,* in: Handlexikon der Europäischen Union, EZB/PSPP-Urteil; *Haltern*, NVzW 2020, 817; *Sikora,* EWS 3/2019, 139.

4 ECB, press release of 22 January 2015; Deutsche Bundesbank, Monthly Report June 2016, p. 31; *Ulrich,* EWS 6/2020, 301 (302).

5 ECB, press release of 22 January 2015.

6 ECB, press release of 22 January 2015.

7 *Karpstein*, EuZW 2019, 705; *Gentzsch*, BKR 2020, 576 (577); ECB, press release of 22 January 2015; Deutsche Bundesbank, Monthly Report June 2016, p. 31; *Ulrich* EWS 6/2020, 301 (303).

question to the European Court of Justice (ECJ) for a preliminary ruling pursuant to 267 TFEU[8] , which then resulted in the BVerfG's PSPP ruling of 05 May 2020[9] .

This paper will discuss the PSPP ruling and the historical and legal background of ultra vires review that ultimately led to this ruling. The core statements of the BVerfG are also analysed in detail and compared with the statements of the ECJ in the context of the preliminary ruling. Finally, an evaluation of the compared statements is presented.

B. The PSPP Judgment

I. Historical Development and Legal Justification of Ultra Vires Control

Acts of Union institutions that are ultra vires cannot claim validity in Germany.[10] This was first substantiated by the BVerfG in the Maastricht ruling.[11] An ultra vires act is an act in which the limits of legal ability are exceeded, a so-called breaking of a legal act.[12] This ruling was confirmed by the Lisbon judgment.[13] The BVerfG invokes the principle of democracy enshrined in Article 23 (1) sentence 3 of the German Constitution (GG), from which it derives that the sovereign rights transferred to the EU must not lead to an expansion of competences and that the German Bundestag must retain substantial rights to shape the law.[14] This is guaranteed by the so-called perpetuity clause in Art. 79 (3) GG. An unrestricted transfer of sovereign rights or a competence is contrary to Art. 23 GG and is therefore inadmissible.[15] Art. 23 GG

---

8 BVerfG, order for reference of 18.17.2017 - 2 BvR 859/15, 2 BvR, ECLI:EN:BVerfG:2017:rs20170718.2bvr085915.

9 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:EN:BVerfG:2020:rs20200505.2bvr085915.

10 BVerfGE 89, 155 (188); *Herdegen*, Europarecht, § 10 para. 33.

11 BVerfGE 89, 155.

12 *Meier-Beck,* EuZW 2020, 519; Ehlers in: Europarecht, § 11 para. 26.

13 BVerfGE 123, 267 (268); *Streinz*, Europarecht, para. 239.

14 *Kainer*, EuZW 2020, 533 (534).

15 *Schmidt-Aßmann*, in: Grundgesetz-Kommentar, Art. 19 para. 4, para. 39d; *Gärditz*, EuZW 2020, 505; *Simon/Rathke*, EuZW 2020, 500; *Streinz*, Europarecht, para. 241.

therefore constitutes the limit for the validity of Union law in Germany.[16] Sovereign rights are understood to be the "exercise of public authority in the domestic sphere by legislation, the executive and the judiciary".[17] The transfer of sovereign rights is characterised by the then possible intervention of a supranational organisation on the state's sphere of authority.[18] A violation of Art. 23 (1) sentence 3 in conjunction with Art. 79 (3) GG leads to the nullity of the Union measure. Measures based on this are domestically invalid.[19] The object of review is the consent law, based on the standard of Art. 23 (1) GG.[20]

In the Honeywell decision[21], the Federal Constitutional Court elaborated on its review competence: The assumption of an ultra vires review requires that the infringement of competence on the part of the European institution, which would lead to a violation of the principle of conferral, is sufficiently qualified.[22] For this to be the case, the "action of the Union power in violation of its competences must be obvious and the challenged act must lead to a structurally significant shift in the structure of competences to the detriment of the member states".[23] Furthermore, the BVerfG sets out the requirements that in a possible ultra vires case, the ECJ must first be given the opportunity to comment within the framework of a preliminary ruling procedure (Art. 267 TFEU).[24] The ruling underlines the BVerfG's friendliness towards European law by setting the hurdles for ultra vires review so high.[25]

---

16 *Simon/Rathke*, EuZW 2020, 500.

17 *Streinz*, in: GG, Art. 23, para. 55.

18 *Streinz*, in: GG, Art. 23, para. 56.

19 *Streinz,* in: GG, Art. 23, para. 96.

20 *Streinz,* in: GG, Art. 23, para. 97.

21 BVerfGE 126, 286.

22 *Härtel,* in: Europarecht, § 6 Rn. 47; BVerfGE 126 (304).

23 BVerfGE 126, 286 (304); cf. also: BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 110.

24 BVerfGE 126 (304).

25 BVerfGE 126 (304).

II. Background of the Case

1. Chronology

After the adoption of the PSPP programme by the ECB,[26] various complaints against it were filed with the BVerfG. The BVerfG suspended the proceedings and referred the case to the ECJ for a preliminary ruling pursuant to Article 267 TFEU.[27] The ECJ confirmed the conformity of the PSPP with European law in its Weiss ruling on 11 December 2018.[28] As a result, the BVerfG issued its PSPP ruling on 5 May 2020.[29]

The applicants complained to the Federal Constitutional Court within the framework of a constitutional complaint that their right under Art. 38 (1) sentence 1 in conjunction with Art. 20 (1), (2) in conjunction with Article 79 (3) GG had been violated by failure of the Federal Government and Parliament to act against the PSPP and against the German Bundesbank for failure to act before the ECJ.[30] An omission is actionable if there is a duty to act.[31] The applicants also sought a declaration that the ECJ's Weiss ruling[32] was not applicable within the scope of the German Constitution.[33]

---

26 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 establishing a programme for the purchase of public sector securities in secondary markets (ECB/2015/10), OJ EU, L 121/20.

27 BVerfG, order for reference of 18.17.2017 - 2 BvR 859/15, 2 BvR, ECLI:EN:BVerfG:2017:rs20170718.2bvr085915.

28 ECJ, Judgment of 11 December 2018, Case C-493/14, Weiss and others, ECLI:EU:C:2018:1000, para 168.

29 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:EN:BVerfG:2020:rs20200505.2bvr085915.

30 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, paras 19, 20.

31 *Siekmann*, EuZW 2020, 491 (492); *Schlaich/Korioth*, Das Bundesverfassungsgericht, 4 part, para. 213.

32 ECJ, Judgment of 11 December 2018, Case C-493/14, Weiss and others, ECLI:EU:C:2018:1000.

33 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 21.

2. Possibility of a Constitutional Complaint as a Door Opener of the PSPP Ruling

In principle, no constitutional complaint against direct acts of the Union is possible before the BVerfG, since they do not constitute acts of official authority within the meaning of Article 93 (1) no. 4a GG or Section 90 (1) of the BVerfGG and therefore cannot be a suitable subject matter of a constitutional complaint.[34] Likewise, the BVerfG cannot directly examine measures of the Union institutions.[35] Exceptionally, however, such measures may be examined as a preliminary question if they cause an interference with fundamental rights in the context of the German constitution.[36] This can be assumed if German state organs act or if obligations of German constitutional organs to act or refrain from acting, which follow from the responsibility to integrate, are triggered by the measure. Consequently, the BVerfG examines whether the measures are covered by the integration programme or constitute a violation of the limits set by the German constitution.[37] Secondary and tertiary acts can be examined to determine whether German constitutional bodies have violated the responsibility to integrate when implementing them or whether they actively worked towards this responsibility.[38]

On the merits, the applicants claimed that the Bundestag and the Federal government had violated their responsibility to integrate, which depended on the preliminary question of whether the ECB decisions on the PSPP respected the limits of integration, i.e. whether they were adopted in accordance with their competence. This opened the way to the BVerfG.[39] This responsibility to integrate protects citizens

---

34 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 93; *Schlaich/Korioth*, Das Bundesverfassungsgericht, Part 4, para. 214.

35 *Nettesheim*, NJW 2020, 1631 (1632).

36 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 89; BVerfGE 142, 123.

37 BVerfG, Judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, ECLI:EN:BVerfG:2019:rs20190730.2bvr168514, para 101.

38 BVerfG, Judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, ECLI:EN:BVerfG:2019:rs20190730.2bvr168514, para 102.

39 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 85.

pursuant to Art. 38 (1) sentence 1 in conjunction with Art. 20 (1) and (2) in conjunction with Article 79 (3) GG, because the right to vote also includes the fundamental democratic content.[40] It follows from Art. 20 (2) sentence 1 GG that the citizen may only be subject to democratically legitimised powers, i.e. powers that are based on a will attributable to the citizen.[41] In principle, this also applies within the framework of Union law.[42] The justification for the encroachment on the citizen's right under Article 38 (1) sentence 1 GG by transferring competences to the Union lies in the principle of principle of conferral.[43] At the level of Union law, this principle is taken into account by the fact that the transfer of sovereign rights must comply with democratic principles (Articles 23 (1), 20 (1), (2) in conjunction with Article 79 (3) GG). Moreover, the Bundestag must retain a substantial weight in shaping the Union; its tasks and powers must therefore not be undermined, because otherwise there would be a loss of substance of the rights protected in Art. 38 (1) sentence 1 GG, which would no longer be compatible with the German Constitution.[44] This also prohibits a competence of the Union.[45]

If the BVerfG now establishes an ultra vires act, it follows that there is also a violation of Art. 38 (1) sentence 1 in conjunction with Art. 20 (1), (2) in conjunction with Art. 79 (3) GG. As early as 1993, in the Maastricht judgment, the BVerfG ruled that Art. 38 GG must be recognised as a contestable right within the framework of Art. 23 GG, thus preventing a violation of the democratic principle from being violated by undermining the powers of the Bundestag.[46]

---

40 Cf. also BVerfGE 89, 155 (171).

41 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 99.

42 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 101.

43 BVerfGE 142, 123 (217).

44 BVerfGE 123, 267 (355); BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 103.

45 *Caliess*, NJW 2021, 2845 (2846); *Pießkalla*, EuZW 2020, 538 (539).

46 BVerfGE 89, 155.

3. Analysis

The BVerfG breaks through the primacy of application of Union law in the PSPP ruling because of the possible violation of Art. 38 (1) sentence 1 in conjunction with Art. 20 (1), (2) in conjunction with Art. 79 (3) GG. In the Maastricht ruling,[47] the court thus created an individual right with constitutional rank, which is not provided for in the constitution in this form and can only be justified by an extensive interpretation of Art. 38 GG.[48] Since anyone can demand this control, the BVerfG extends the right to a kind of popular complaint.[49] However, this also means that the BVerfG ultimately reserves for itself the control of the lawfulness of Union legal acts, which is actually the responsibility of the ECJ (cf. Art. 263, 267, 271 in conjunction with 274 and Art. 344 TFEU).[50] This is particularly problematic because the European Parliament, which is elected by the citizens of the Union, now has comprehensive decision-making and control powers, so that the democratic legitimacy of the EU no longer derives solely from the transfer of sovereign powers by the Member States.[51]

III. Core Statements of the Judgment with Comparison to the ECJ's Considerations and Evaluation

In its PSPP ruling, the BVerfG decided on a twofold ultra vires finding. On the one hand, on behalf of the ECB decisions on the PSPP programme, and on the other hand, on behalf of the ECJ due to the Weiss ruling.

---

47 BVerfGE 89, 155.

48 *Dietze/Kellerbauer/Klamert/Malferrari/Scharf/Schnichels*, EuZW 2020, 525 (526); critically also: *Schlaich/Korioth,* Das Bundesverfassungsgericht, 4 Teil, para. 214.

49 *Wegener*, EuR 2020, 347 (349); *Barley*, EuZW 2020, 489; *Caliess* NVwZ 2020, 897 (899); *Haltern*, NVzZ 2020, 817 (819); *Hilpold*, EWS, 181 (183).

50 *Pernice*, EuZW 2020, 508 (509); *Caliess* NVwZ 2020, 897 (899); *Ruffert*, VerfBlog, 2021/12/07, available at: https://verfassungsblog.de/verfahren-eingestellt-problem-gelost/ (last accessed 17.04.2022).

51 *Dietze/Kellerbauer/Klamert/Malferrari/Scharf/Schnichels*, EuZW 2020, 525 (526); *Caliess* NVwZ 2020, 897 (900).

1. ECB acts Ultra Vires

a. Arguments BVerfG

The BVerfG concluded that the ECB acted ultra vires, i.e. beyond its competence, in the context of its PSPP decisions.[52] The BVerfG considers the conditions of the "sufficiently qualified"[53] infringement to be met if the use of competence by a Union institution would require a "treaty amendment pursuant to Article 48 TEU or the use of an evolutionary clause".[54] The delimitation of competences is based on the principle of conferral, Art. 5 (1) sentence 1, (2) sentence 1 TEU, according to which Union institutions may only exercise competences conferred on them.[55] Within the framework of the following examination of competences, the BVerfG examines whether the ECB decision on the PSPP belongs to monetary or economic policy.[56] Monetary policy falls within the exclusive competence of the Union (Art. 3 (1) (c) TFEU), while economic policy essentially remains with the Member States and the EU only takes on coordinating activities (Articles 2 (3) and 5 (1) TEU).[57] In the area of exclusive competence, the Member States are in principle no longer empowered to legislate, as this is reserved for the EU-alone (cf. Art. 2 (1) TEU).[58] Actions of the ECB that do not fall within the scope of monetary policy are therefore to be qualified as exceeding its competence.[59]

The BVerfG reads the principle of proportionality, which results from Art. 5 (1) sentence 2, (4) TEU, into the delimitation of competences and claims that this represents a "corrective function to protect

---

52 BVerfGE 126, 286 (304); cf. also: BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 31.

53 Cf. II. 1. a.

54 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 110.

55 *Caliess*, in: EUV/AEUV, Art. 5 para. 7.

56 BVerfGE 126, 286 (304); cf. also: BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 24 et seq.

57 *Kämmerer,* in: Handbuch des EU-Wirtschaftsrechts, F. I. para. 59; *Dittert*, Europarecht, p. 366; *Gentzsch*, BKR 2020, 576 (578).

58 *Härtel,* in: Europarecht § 6 para. 52.

59 *Kämmerer*, in: Handbuch des EU-Wirtschaftsrechts, F. I. para. 59

competences of the membership".[60] In the three-stage proportionality test, the BVerfG then comes to the conclusion that price stability through inflation close to 2% is legitimate as an objective and that, in the absence of milder means, necessity is to be affirmed.[61] Within the context of reasonableness, however, the BVerfG sees the ultra vires violation.[62] Since the PSPP contains considerable economic policy effects, these should have been weighted and balanced by the ECB.[63] As this has not yet been done by the ECB, it must be assumed that there has been a "failure to weigh and explain the consequences of the PSPP against Article 5 (1) sentence 2, (4) TEU", with the consequence that the PSPP is "not covered by the ECB's economic policy competence under Article 127 (1) sentence 1 TFEU".[64]

As a result, the BVerfG argues that the ECB has exceeded its competences by not carrying out a proportionality test which does not make it sufficiently comprehensible "to what extent the ECB has dealt with the economic policy consequences of its monetary policy action and whether these are proportionate to the monetary policy objectives of the programme."[65] The ECB has thus failed to demonstrate that the measures adopted are proportionate.[66] In doing so, the ECB exceeded its monetary policy mandate and also encroached on the economic policy competence of the member states.[67] To remedy this infringement of competence, the BVerfG gave the ECB three months to

---

60 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 123.

61 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 166.

62 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 167.

63 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 176.

64 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 177.

65 *Zelda/Bamberger,* in: Handlexikon der Europäischen Union, ECB/PSPP judgment.

66 *Derksen*, EuZW 2021, 938.

67 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 97.

comprehensibly demonstrate the proportionality of the PSPP.[68] The ECB Governing Council complied with this in June 2020 and submitted the proportionality considerations, which were forwarded by the Federal Government to the BVerfG.[69] The Federal Government confirmed that the ECB complied with the requests.[70] For this reason, the Bundesbank did not withdraw from the PSPP.[71] Applications for an enforcement order were then rejected by the BVerfG on the grounds that the Federal Government and the Bundestag had complied with the PSPP ruling and had thus fulfilled the prohibition of undercutting by taking extensive measures.[72] Consequently, the PSPP ruling remained without follow-up measures.[73]

b. ECJ View

In contrast, the ECJ took the view that the PSPP does not go beyond the ECB's mandate and therefore does not violate EU law.[74] The context for this is that the PSPP falls into the area of monetary policy, i.e. into the exclusive competence of the EU.[75] For, as already explained in the Gauweiler ruling,[76] the classification of the measure depends above all on the objective.[77] The PSPP programme serves the objective of guaranteeing price stability, which is to be assigned to monetary

---

68 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 235.

69 *Ludwigs*, EWS 4/2020, 186 (187); *Ulrich* EWS 6/2020, 301 (311); *Mögele*, EuZW 2021, 608; cf. also ECB, Meeting 3-4 June 2020, available at: www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html (last accessed 19.04.2020).

70 BT-Drs 19/20621, p. 4.

71 Mögele, EuZW 2021, 608.

72 BVerfG, NJW 2021, 2187 (2192).

73 *Stepanek*, EuZW 2021, 701 (706) footnote 81; *Derksen*, EuZW 2021, 938; *Hellwig* NJW 2020, 2497 (2503).

74 ECJ, judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, ground 1.

75 *Bauerfeind*, GWR 2019, 9 (9).

76 ECJ, Judgment of 16 June 2015, Gauweiler and others, C-62/14, ECLI:EU:C:2015:400, para 46.

77 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para 53.

policy.[78] The independent ECB was to be granted a wide margin of appreciation in the implementation of this objective, so that control was limited to obvious errors of assessment.[79] However, the ECJ does not assume such an error, as the ECB had sufficiently substantiated the suitability and necessity for achieving the objective within the meaning of Article 296 (2) TFEU.[80] The ECJ thus assumes that the independence of the ECB must also be seen in substantive terms and not only in institutional terms.[81] In addition, it argues that the effects of a programme on economic policy do not change its classification as monetary policy.[82]

c. Assessment

The lynchpin of the problem is the demarcation between economic and monetary union. Since the Maastricht Treaty, the creation of such a union has been a fundamental objective of the EU in accordance with Article 3 (4) TFEU.[83] Even though both policy areas are interlinked, a separation of the two areas is nevertheless crucial, because economic policy involves all member states, while monetary union only affects those that have adopted the euro as their currency.[84] At the heart of monetary union are the ECB and the European System of Central Banks (ESCB).[85] As an institution of the EU (Art. 13 TEU), the ECB is thus independent (Art. 130 TEU) and has its own legal personality (Art. 282

---

78 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para. 50 et seq.

79 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para 24.

80 ECJ, judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, paras 44, 56.

81 *Nettesheim*, NJW 2020, 1631 (1633).

82 ECJ, judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para 61; see also ECJ, judgment of 27 November 2012, Pringle, C-370/12, ECLI:EU:C:2012:756, para 56.

83 *Dittert*, Europarecht, p. 366.

84 *Dittert*, Europarecht, p. 366.

85 *Hakenberg,* in: Rechtswörterbuch, Europäische Zentralbank Ziff. 1; *Dittert*, Europarecht, p. 366.

(3) TFEU).[86] This independence of the ECB is necessary for it to be able to pursue the objective of price stability (cf. Art. 127 (1) and 119 (2) TFEU) apart from the democratic process.[87] However, a clear distinction between economic and monetary policy is hardly possible.[88] Especially in the context of the ECB, because according to Art. 127 TFEU the ESCB shall support general economic policy in order to contribute to the achievement of the objectives set out in Art. 3 TEU.

Independence is understood as comprehensive freedom from instructions in the fulfilment of tasks.[89] Of course, this does not mean, that the body can do whatever it wants, far from any control. Independence exists only within the limits of the competences of the body concerned.[90] For the ECB, this means, as far as the ECJ and the Federal Constitutional Court agree, that it can only exercise its independence within the framework of its monetary policy mandate.[91]

First, it is worth taking a brief look at the BVerfG's OMT ruling.[92] It was there that the BVerfG first addressed the question of the scope of he ECB's monetary policy mandate.[93] The OMT programme has parallels to the PSPP, but has not yet been activated.[94] In the OMT ruling, the BVerfG already made it clear that the ECB's actions are subject to certain limits, namely the principle of limited individual authorisation and the requirement of particularly strict judicial review, also from the point of view of proportionality.[95] This was justified as a compelling consequence of the rule of law principle, which derives from Article 263

---

86 *Hakenberg,* in: Rechtswörterbuch, Europäische Zentralbank Ziff. 1; *Dittert*, Europarecht, p. 370.

87 *Caliess,* NVwZ 2020, 897 (898); *Hakenberg* in: Rechtswörterbuch, Europäische Zentralbank Ziff. 2; *Dittert*, Europarecht, p. 371.

88 *Simon/Rathke*, EuZW 2020, 500 (501); *Siekmann*, EUZW 2020, 491 (495).

89 *Hellwig,* NJW 2020, 2497 (2499).

90 *Haltern*, NVzZ 2020, 817 (821).

91 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para 23; BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 10.

92 BVerfGE 142, 123.

93 *Kämmerer*, in: Handbuch des EU-Wirtschaftsrechts, F. I. para. 59.

94 *Sikora*, EWS 3/2019, 139 (140).

95 BVerfGE 142, 123 (217).

(1) TFEU and Article 35.1 ESCB Statute.[96] In the OMT ruling, it was also argued that the lowered level of democratic legitimacy of the independent ECB must be compensated for by strict judicial control.[97] This was also submitted to the ECJ,[98] who however did not elaborate on the BVerfG's concerns in its ruling (Gauweiler case).[99] In the OMT ruling, however, the BVerfG did not certify the ECB as acting ultra vires, which is "obviously outside" the ECB's competences.[100] In the PSPP ruling, the matter is now different. There, the BVerfG assumed ultra vires action by the ECB. The root of the dispute is that the BVerfG and the ECJ have a different understanding of the delimitation of economic and monetary union.

In 2012, the ECJ first attempted to draw the line in 2012[101] by making the classification of a measure as monetary policy dependent on the question of the measure's objective.[102] For this reason, the ECJ also comes to a classification as monetary policy in the Weiss ruling, because the PSPP is directed at the monetary policy objective of avoiding deflation, which is to be assigned to the area of monetary policy, since this cannot be achieved without the PSPP programme; the objective of price stability is thus actually pursued with the PSPP. [103]

The BVerfG does not dispute this basic classification for the time being.[104] However, in the next step, the BVerfG reads the proportionality test into the delimitation question.[105] The proportionality test in a

---

96 BVerfGE 142, 123 (217).

97 BVerfGE 142, 123 (221).

98 BVerfG, Decision of the Second Senate of 14 January 2014, 2 BvR 2728/13, ECLI:EN: BVerfG:2014:rs20140114.2bvr272813.

99 ECJ, Judgment of 16 June 2015, C-62/14, Gauweiler and others, ECLI:EU:C:2015:400; *Zelda/Bamberger,* in: Handlexikon der Europäischen Union, ECB/PSPP judgment.

100 BVerfGE 142, 123 (221).

101 *Hellwig*, NJW 2020, 2497.

102 ECJ, Judgment of 27 November 2012, C-370/12, Pringle, ECLI:EU:C:2012:756, paras 53, 55.

103 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para 57.

104 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505. 2bvr085915, para. 166.

105 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505. 2bvr085915, para. 167.

delimitation of competence is, however, something completely new.[106] The ECJ applies the proportionality test of Article 5 (4) TEU in the context of the exercise of powers, but not in their justification.[107] The BVerfG and the ECJ thus apply the proportionality test differently.[108] It is therefore questionable which interpretation has the better arguments. The principle of proportionality is found in Article 5 (4) TEU. It is a general legal principle and an element of the rule of law.[109] In addition, it is decisive for the regulatory intensity of Union law measures and the protection of the autonomy of the Member States.[110]

The wording of Art. 5 (1) TEU distinguishes between delimitation and exercise of competences.[111] If one reads the second sentence of Art. 5 (1) TEU, it states: "The use of Union competences is governed by the principles of subsidiarity and proportionality". The wording of the provision clearly indicates that the principle of subsidiarity does not serve to delimit but to limit competences, and thus clearly contradicts the interpretation of the BVerfG.[112] The delimitation of competences must be examined according to the principle of conferral.[113] This protects the member states from losing sovereignty that they have not transferred to the EU.[114] It should also be noted that the BVerfG itself, in its Kalkar II ruling, rejected proportionality considerations when delimiting competences between the Federal Government and the

---

106 *Pernice*, EuZW 2020, 508 (511); *Terhechte*, EuR 2020, 569 (580).

107 *Pernice*, EuZW 2020, 508 (511).

108 *Simon/Rathke*, EuZW 2020, 500 (501).

109 *Vedder,* in: Europäisches Unionsrecht, Artikel 5 EUV para. 35; *Caliess,* in Kommentar EUV/AEUV, Art. 5 EUV, para. 45.

110 *Vedder,* in: Europäisches Unionsrecht, Artikel 5 EUV para. 35; *Lienbacher,* in: EU-Kommentar, Artikel 5 EUV, paras. 36, 37.

111 *Pernice*, EuZW 2020, 508 (511).

112 *Pernice*, EuZW 2020, 508 (511); *Wegener*, EuR 2020, 347 (350); *Siekmann*, EuZW 2020, 491 (494); *Hellwig* NJW 2020, 2497 (2498) *Dietze/Kellerbauer/Klamert/Malferrari /Scharf/Schnichels*, EuZW 2020, 525 (527); *Pache,* in: Frankfurter Kommentar, Band I, Art. 5 TEU para. 133; other view: *Ludwigs*, EWS 4/2020, 186 (188); *Vedder,* in: Europäisches Unionsrecht, Artikel 5 EUV para. 35.

113 *Pache,* in: Frankfurter Kommentar, Vol. I, Art. 5 TEU para. 134.

114 *Pache,* in: Frankfurter Kommentar, Vol. I, Art. 5 TEU para. 18.

Länder.[115] It is unclear why something different should now apply in the relationship between member states and the EU.[116]

Irrespective of this, it is not comprehensible why the disproportionate exercise of competences should directly lead to their abolition, but the exceeding of competences should then be curable in the second step and a proportionate exercise should then in turn have the effect of justifying competences.[117] The content of the review of the proportionality also differs between the BVerfG and the ECJ. In principle, as in German law, measures must be appropriate and necessary. [118]

In contrast to German law, Union law grants the Union legislator a wide margin of discretion, so that a European legal act is only unlawful if "it is manifestly unsuitable for achieving the objectives" (prohibition of excessiveness).[119] However, the BVerfG applies a national proportionality test, which also includes appropriateness[120] , but which cannot be transferred to the Union level without restrictions. Article 5 (4) TEU primarily protects the interests of the MS and therefore cannot be equated with the principle of adequacy, which in Germany follows from the principle of the rule of law pursuant to Article 20 (3) GG.[121] Through the requirements of the proportionality that the BVerfG imposes, it examines Union law in a national framework (based on the German constitutional identity), for which it has no decision-making competence.[122] In the context of this proportionality test, the BVerfG also fails to recognise the partial identity of the two fields of economic and monetary policy and thus also the mode of operation of monetary policy.[123] It is also problematic that, according to the BVerfG's review,

---

115 BVerfGE 79, 311.

116 *Hellwig,* NJW 2020, 2497 (2499).

117 *Wegener*, EuR 2020, 347 (350); *Siekmann*, EUZW 2020, 491 (494).

118 *Vedder,* in: Europäisches Unionsrecht, Artikel 5 EUV para. 36; *Lienbacher,* in: EU-Kommentar, Artikel 5 EUV, para. 38; *Caliess,* in Kommentar EUV/AEUV, Art. 5 EUV, Rn. 45.

119 *Vedder,* in: Europäisches Unionsrecht, Artikel 5 EUV para. 36; *Lienbacher,* in: EU-Kommentar, Artikel 5 EUV, para. 36; *Kainer*, EuZW 2020, 533 (535).

120 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 168.

121 *Gentzsch*, BKR 2020, 576 (578).

122 *Derksen*, EuZW 2021, 938 (943).

123 *Pernice*, EuZW 2020, 508 (514).

theoretically any foreseeable measure with a recognisable economic policy effect can then lead to a limitation of the ECB's competence.[124]

As a result, the ECJ's view is to be preferred. Additionally, the BVerfG does not read its proportionality test directly out of the Constitution, but interprets the TEU independently.[125] However, this is reserved for the ECJ in the context of questions of jurisdiction, cf. Art. 267 TFEU.

Furthermore, it can be said that although considerations of the proportionality as a delimitation of competence, while already dogmatically unconvincing, would not suffice to assume ultra vires.[126] This is because the BVerfG overstretches its reserve competence beyond constitutional identity by assuming a structurally significant excess of competence even if the use of the competence would have required a treaty amendment according to Art. 48 TEU.[127] Upon closer examination, this is the case with every transgression of competence, so the criterion of structural relevance would come to nothing.[128] The BVerfG thus elevates itself to general control over questions of competence, a function that it does not have as a national constitutional court with regard to Union law.[129] In doing so, it relativises the Honeywell criteria that it has specifically established by formally affirming them but not substantiating them with convincing arguments.[130] Such a far-reaching claim to control by the BVerfG cannot be intended by the German Constitution in the light of its pro European Attitude, especially since it undermines the ultimate decision-making competence of the ECJ.[131] Even if jurisdictional limitations can be ultra vires, the BVerfG should refrain in future from wielding this sharp sword already in the case of mere disproportionality of the exercise.[132] The possibility of curing the

---

124 *Ulrich,* EWS 6/2020, 301 (308).

125 *Ulrich,* EWS 6/2020, 301 (318).

126 *Ulrich,* EWS 6/2020, 301 (321).

127 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 110; *Ulrich,* EWS 6/2020, 301 (322).

128 *Ludwigs*, EWS 4/2020, 186 (189).

129 *Ulrich,* EWS 6/2020, 301 (322).

130 Caliess*,* NVwZ 2020, 897 (900); *Hilpold*, EWS, 181 (184).

131 *Ludwigs*, EWS 4/2020, 186 (189); *Hilpold*, EWS, 181 (182).

132 *Ulrich,* EWS 6/2020, 301 (317).

presentational deficits, which the BVerfG grants the ECB in order to comply with the principles of proportionality nonetheless, would lead to a situation in which a sufficient statement of reason would decide on the competences of a measure.[133] It is also difficult to find that the ECB has committed a serious infringement of its powers if this can already be corrected by a sufficient statement of reasons.[134]

2. ECJ acts Ultra Vires

As already explained, the BVerfG thus delimited economic and monetary policy by means of a proportionality test. This was done within the framework of an evaluative overall view, according to which monetary policy objectives were weighed against economic policy effects.[135] Since, in the view of the BVerfG, the ECJ only insufficiently carried out this proportionality test, this gave rise to the second ultra vires accusation.[136] From a national point of view, Article 23 GG sets the limits of the legal ability of EU law to act; judgments can thus only be valid insofar as they remain within these limits.[137]

a. Arguments BVerfG

The ECJ focused on the objective of price stability and classified the measure as monetary policy. In the ECJ's view, the ECB additionally acted in a proportionate manner, as it is granted a wide margin of appreciation, which can only be reviewed for obvious errors of assessment.[138] However, according to the BVerfG, the limits of the ECB's

---

133 *Kammerer,* in: Handbuch des EU-Wirtschaftsrechts, F.I. para. 62.

134 *Kammerer,* in: Handbuch des EU-Wirtschaftsrechts, F.I. para. 62; *Nettesheim*, NJW 2020, 1631 (1632).

135 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, Leitsatz 6b.

136 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 119.

137 *Meier-Beck*, EuZW 2020, 519.

138 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para 24.

competence must be fully subject to judicial review.[139] The ECB has only limited democratic legitimacy, therefore a comprehensive clarification regarding the economic policy effects of the PSPP is necessary.[140] It is not compatible with the principle of conferral if, on the one hand, the ECB is granted wide discretionary powers and, on the other hand, the density of judicial control is restricted.[141] By not applying the proportionality test strictly enough, by only discussing the risk of default in the context of adequacy, but not the effects that the PSPP "has on public debt, savings, pensions, real estate prices and the survival of economically non-viable companies",[142] the ECJ has also exceeded its competences and acted ultra vires.[143] After all, if the ECJ decides in a manner that is no longer comprehensible and thus objectively arbitrary, then this is no longer covered by the allocation of functions in Art. 19 (1) sentence 2 TEU and is therefore ultra vires for Germany pursuant to Art. 23 (1) sentence 2 in conjunction with Art. 20 (1), (2) and Art. 79 (3) GG, because the necessary minimum level of democratic legitimacy is missing.[144] Such measures are not covered by the Consent Act and are therefore not applicable in Germany.[145]

b. Analysis

Admittedly, it must be conceded that the BVerfG's choice of the words "badly incomprehensible" and "objectively arbitrary"[146] for the

---

139 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 3, para 143.

140 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 43.

141 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 143; cf. also: *Zelda/Bamberger,* in: Handlexikon der Europäischen Union, EZB/PSPP-Urteil.

142 *Gentzsch*, BKR 2020, 576 (578).

143 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 139.

144 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 112.

145 BVerfGE 123, 267 (268); *Härtel,* in: Europarecht, § 6 para. 42.

146 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 118.

Weiss decision sets a very sharp tone,[147] which could appear exaggerated in the case of a failure of presentation that can be compensated for in the result. However, the Federal Constitutional Court itself established these requirements in the Honeywell ruling and therefore cannot use a different choice of words to justify ultra vires review. It therefore had to continue its own case law.[148] However, it is questionable, whether these requirements actually exist.

In principle, it can also be said, that the BVerfG could only be dissatisfied with the ECJ's answer due to the different understandings of a proportionality review between the BVerfG and the ECJ, as mentioned previously.[149] As outlined above, the fact that the ECJ first states that the ECB is acting within the scope of its competences and only then addresses proportionality considerations cannot be seen as a methodological error, but corresponds to the wording of Article 5 (1) TEU.[150]

However, it must be acknowledged to the BVerfG that the ECJ could have elaborated on the concerns mentioned in the BVerfG's submission and thus treated with the case more sensitively. [151] The ECJ weighed in a considerable amount[152] , but said nothing on the question of whether there is an appropriate relationship between monetary policy and the effects on economic policy.[153] Whether this would have been possible for the ECJ at all due to the ECB's lack of factual submissions or whether it lacked a basis for a decision in this regard, however, cannot be clarified.[154] However, the fact that the ECJ weighed the

147 Cf. *Pernice*, EuZW 2020, 508; *Hilpold*, EWS, 181 (182).

148 *Wernicke*, EuZW 2020, 534; *Ludwigs*, EuZW 2020, 530 (531); *Haltern*, NVzZ 2020, 817 (821).

149 *Pernice*, EuZW 2020, 508 (516).

150 *Pernice*, EuZW 2020, 508 (513).

151 *Caliess,* NVwZ 2020, 897 (903); *Sikora*, EWS 3/2019, 139 (149); *Haltern*, NVzZ 2020, 817 (822); *Ludwigs*, EWS 4/2020, 186 (190); *Simon/Rathke*, EuZW 2020, 500 (503); *Nettesheim*, NJW 2020, 1631 (1633).

152 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018:1000, para. 71 et seq.

153 *Simon/Rathke*, EuZW 2020, 500 (501); *Ludwigs*, EuZW 2020, 530 (531); *Nettesheim*, NJW 2020, 1631 (1633).

154 *Ulrich* EWS 6/2020, 301 (308); Simon/Rathke, EuZW 2020, 500 (501).

matter over 29 paragraphs[155] makes the obvious excess of competence, which is a prerequisite for an ultra vires act, more than questionable.[156] Ultimately, it was a question of a lack of consideration and presentation which, according to the BVerfG's own statements, was curable and was even cured.

The BVerfG does not require the ECJ to draw a clear distinction between economic and monetary policy, but rather to ensure comprehensibility and the associated controllability, which can be achieved through the ECB's explanation of its decisions.[157] This also makes sense, because compensating for the independence of a body through increased control density prevents an abuse of competences.[158] Nevertheless, this does not give the BVerfG the right to substitute its own control for that of the ECJ. Admittedly, it is problematic that there is no further supervisory authority for ECJ decisions.[159] Since the Court of Justice claims the last word according to Art. 267 TFEU, legal recourses reaches its limits in the event of a dispute between the BVerfG and the ECJ.[160] There is a need for cooperation and dialogue between the ECJ and the national constitutional courts.[161] As an outgrowth of this duty to cooperate and its pro-European Attitude, the BVerfG itself has therefore established the requirement that in the case of possible ultra vires acts, the case in question should first be submitted to the ECJ.[162] Although the BVerfG did so with regard to the ECB's exceeding of its competence, it would also have been possible for it to submit the ECJ's Weiss ruling to the ECJ anew as a request for a preliminary ruling.[163]

---

155 ECJ, Judgment of 11 December 2018, Weiss and others, C-493/17, ECLI:EU:C:2018: 1000, paras 71-100.

156 *Dietze/Kellerbauer/Klamert/Malferrari/Scharf/Schnichels*, EuZW 2020, 525 (527).

157 Simon/Rathke, EuZW 2020, 500 (501).

158 *Caliess* NVwZ 2020, 897 (903).

159 *Meier-Beck,* EuZW 2020, 519 (520); *Nettesheim*, ZRP 2021, 222 (223); *Haltern*, NVzZ 2020, 817 (821).

160 *Meier-Beck,* EuZW 2020, 519.

161 *Haltern*, NVzZ 2020, 817 (821); *Gärditz*, EuZW 2020, 505.

162 Cf. BVerfGE 75, 223 (245).

163 *Caliess*, NJW 2021, 2845 (2848); *Möllers*, EuZW 2020, 503 (505); *Ludwigs*, EWS 4/2020, 186 (190); *Dietze/Kellerbauer/Klamert/Malferrari/Scharf/Schnichels,* EuZW 2020, 525

Although it is to be expected that the ECJ would have reaffirmed its own case law, the Federal Constitutional Court could have thus underlined its pro European Attitude. Moreover, there is a precedent in which such a procedure was successful (see Taricco case[164]).[165] In conclusion, it can be said that the high hurdles of ultra vires review set by the BVerfG, that the infringement of competence must be "sufficiently qualified, i.e. obvious and structurally significant", were probably not met. It would have been desirable for the ECJ to have addressed the concerns expressed in the BVerfG's referral orders, as this is the only way for dialogue to function in a court system. One can only hope that the BVerfG and the ECJ will return to the dialogue that is necessary for a court system.

3. Other Statements

a. Federal Government must influence ECB

The BVerfG cannot directly influence Union institutions. Therefore, as mentioned previously, it only has the possibility of obliging the Federal Government and the Federal Parliament to work towards ensuring that the European Central Bank carries out the proportionality review in order to fulfil its responsibility for integration.[166] Such a request is in principle binding on the Federal Government pursuant to § 31 (1) BVerfGG.[167] However, the ECB is independent in the exercise of tasks and powers conferred on it by the Treaty or Statute of the ESCB or of the ECB pursuant to Article 130 TFEU (cf. also Article 88 GG).[168] This independence of the ECB is also necessary, because it protects it from political influence, which is the only way to achieve the goal of safeguarding price stability.[169] As a result, the BVerfG called on the Federal

(528); *Simon/Rathke,* EuZW 2020, 500 (502); *Hellwig,* NJW 2020, 2497 (2499); *Caliess,* NVwZ 2020, 897 (901).

164 ECJ, judgment of 8 September 2015, C-105/14, Taricco, ECLI:EU:C:2015:555.

165 *Caliess* NVwZ 2020, 897 (902).

166 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para 232.

167 Wegener, EuR 2020, 347 (358); Siekmann, EUZW 2020, 491 (492).

168 Dietze/Kellerbauer/Klamert/Malferrari/Scharf/Schnichels, EuZW 2020, 525 (528); Siekmann, EUZW 2020, 491 (497).

169 Pernice, EuZW 2020, 508 (510).

Government to take the risk of violating Article 130 sentence 2 TFEU.[170] The BVerfG should therefore ask itself whether it does not neglect the principle of democracy, on which its entire argumentation is based, by taking the responsibility for integration out of the hands of the Federal Government and the Federal Parliament.[171]

b. Prohibition of monetary state financing, Art. 123 (1) TFEU

The ban of monetary financing prohibits "not only an acquisition of public sector debt instruments directly from the issuers, but also an equivalent acquisition on the secondary markets".[172] However, neither the BVerfG[173] nor the ECJ[174] considered this accusation to be justified in the case of the PSPP.

C. Conclusion

The Federal Constitutional Court has shown quite convincingly in its judgement that independent bodies must be controllable by the courts in terms of their competences and that this control must be based on viable grounds.[175] Blind trust is not acceptable.[176]After all the ECB, like other bodies, is independent only within the scope of the competences conferred on it, but not beyond that.[177] However, it is also unacceptable that mechanisms such as ultra vires control are dispensed with altogether, as the Union could otherwise acquire competences without being subject to control.[178] However, the control of the BVerfG must be

---

170 Dietze/Kellerbauer/Klamert/Malferrari/Scharf/Schnichels, EuZW 2020, 525 (528); Pernice, EuZW 2020, 508 (510); Wegener, EuR 2020, 347 (354).

171 Caliess NVwZ 2020, 897 (898); Ulrich EWS 6/2020, 301 (323).

172 *Gentzsch*: Die EZB ultra vires?, BKR 2020, 576 (579).

173 BVerfG, Judgment of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 180.

174 ECJ, Judgment of 11 December 2018, Case C-493/14, Weiss and others, ECLI:EU:C:2018:1000, para 159.

175 *Siekmann*, EUZW 2020, 491 (497); *Pießkalla*, EuZW 2020, 538 (542).

176 *Pießkalla*, EuZW 2020, 538 (542).

177 *Pießkalla*, EuZW 2020, 538 (542).

178 *Pießkalla*, EuZW 2020, 538 (540).

applied in an integration-friendly manner out of the responsibility for integration under Art. 23 GG, and can only come into play in exceptional cases.[179] This pro-European Attitude was weakened by the PSPP ruling in favour of ultra vires review on the basis of the arguments presented.[180] The BVerfG should therefore remember the high hurdles (obvious and structurally significant infringements of competences) that it has itself set for ultra vires review and should in future review them in a more European law-friendly manner, not only formally but also substantively. Together with the obligation to refer cases and the limitation to obvious infringements, the BVerfG and the ECJ can once again act as partners in the future. For the legal union of the EU to function, the courts must create and maintain a basis of trust in each other.

[179] *Kainer*, EuZW 2020, 533 (535).

[180] Kainer, EuZW 2020, 533 (535).

Employment Policy of the European Union in the Contemporary Moment

Emina Hasanagić[*]

Abstract

In this paper, the author analyzes the impact of the COVID-19 pandemic on the EU employment policy, the measures taken by the EU to overcome the crisis, and the success of these measures and activities. The EU inevitably faces the problem of state resistance to relinquishing part of their sovereignty in favor of the EU in certain areas, which is especially visible in the field of employment policy. This is traditionally the domain of state competence of the Member States. The consequences of the Covid-19 pandemic have highlighted all the weaknesses of the EU's labor market. In this sense, the research and analysis in this paper include the response of the EU to the crisis through the implementation of appropriate programs and measures and their effectiveness in combating the consequences of the Covid-19 pandemic in the area of employment policy.

A. Introduction

The European Union, as a community sui generis of several different European countries, inevitably faces the problem of state resistance to renouncing part of their sovereignty in favor of the European Union in certain areas, especially in the social and employment policy, which traditionally represent the domain of state competence.

„A regional bloc like the EU, consisting of countries that are jealous of their prerogatives and right to sovereignty, has to observe the subsidiarity principle and rely on soft laws. This is particularly true for the

[*] Emina Hasanagić is an Assistant Professor (with Ph.D. and LLM titles) at the Faculty of Law, Dzemal Bijedic University of Mostar, at two branches of law: Labour and Social Law, and European Law. She was a vice-dean from 2019-2020.

areas of social, employment, and labor market policies and their reforms."[1]

This situation is most noticeable in employment policy, where the EU has limited competences, which rely heavily on the application of the principle of subsidiarity and the application of soft law acts. First, these are strategies and agendas, and a particularly important instrument for their implementation – the open method of coordination. Although in general, strategies and agendas and the open method of coordination are not legally binding, they undoubtedly have a strong impact on the convergence of Member States' policies by setting appropriate targets, adopting guidelines and recommendations, and facilitating the exchange of good practice and experience. Strategies are a set of specific measures and activities justified by specific reasons and measurements, with a set time frame for implementation. The Treaty of Amsterdam, despite the introduction of a specific Employment Title, retained the competences of the Member States with regard to employment policy, guaranteeing a Community approach in a unique way for all Member States with a focus on a coordinated employment strategy. The Lisbon Treaty contains relevant provisions governing employment policy (Articles 145-150 TFEU). This policy is in the area of competence of the Member States, while the Union contributes to a high level of employment by encouraging cooperation between the Member States, supporting their action, and if necessary, supplementing it. In order to get a complete picture of the development of employment policy and its place in European integration processes, it is necessary to also give a historical overview of its development. This will be best illustrated by the analysis of the European Employment Strategy and the Europe 2020 Strategy, where the latest was adopted in 2010, as a response of the EU to the 2008 economic crisis. These strategies have had a significant impact on the development of EU employment policy. The paper especially addresses the influence of the Covid-19 pandemic on the labor market and labor relations of the EU and its response to the crisis consequently emerged. The analysis is focused on data on changes and problems in the EU labor market caused by the Covid-19 pandemic and compares the data from 2019 and 2020. In this sense

---

1 *Auer/Gazier*, Social and labour market reforms: four agendas, in: Rogowski/Salais/Whiteside (eds.), Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability, 2011, p. 28.

the research and analysis in this paper include the EU response to the crisis through the implementation of appropriate programs and measures and their effectiveness in combating the consequences of the Covid-19 pandemic in the area of employment policy.

B. Employment Policy of the EU – Overview

The Treaty of Lisbon in Chapter IX, entitled "Employment", in the Articles 145-150 TFEU, contains relevant provisions governing employment policy, which remain a matter of the Member States, while the Union contributes to a high level of employment by encouraging cooperation between the Member States, supports their actions and, if necessary, complements them. „Articles 145-150 TFEU deal with employment policy, which in recent years (due to the social problem of unemployment, which links it to social policy) is high on the list of EU priorities."[2] In accordance with Article 145 TFEU, the Member States and the Union shall work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained, and adaptable workforce and labor markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union. „It is the Member States, who are in the first place competent as regards employment policy. The role of the EU is merely supplementary and coordinating. This follows from the wording of Article 145 of the Title on Employment ...".[3] In accordance with Article 146 (1) (2) TFEU Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 145 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Union adopted pursuant to Article 121 (2) TFEU. The Member States, having regard to national practices related to the responsibilities of management and labor, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 148 TFEU. "Article 146 TFEU (ex 126 EC) makes clear that the principal actors are the Member States."[4]

---

2 *Sokol*, Europska socijalna politika, in: Mintas Hodak Ljerka (ed.), Europska unija, 2010, p. 491.

3 *Blanpain*, European Labour Law, 14th ed. 2014, p. 189.

4 *Barnard*, EU Employment law, 4th ed. 2012, p. 91.

In Luxembourg, the European Council, in 1997, presented the European Employment Strategy, the European Union's main instrument for coordinating EU reforms in the field of the labor market and social policies. „A coordinated strategy for employment policy has been institutionalized by the Amsterdam Treaty. The genuine competence of the Member States in this very area remains uncontested.“[5] Then, in 2000 the Lisbon European Council adopted the Lisbon Strategy, aiming to make the EU "the most competitive and dynamic knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion." Later, the EU revised the objectives of employment policy and adopted several documents for their elaboration, and the Lisbon Strategy itself was revised. The revised Lisbon Strategy was adopted in 2005, and it prioritized objectives on economic growth and employment (more dynamic long-term growth and more quality jobs).

„The Lisbon relaunch did not make any very significant changes to the *content* of the employment guidelines. The familiar themes of full employment, productivity, and social inclusion remained very much in evidence. However, one significant change was that the employment guidelines were linked much more closely to a similar set of guidelines that had been developed elsewhere for economic policy. These are known as the 'broad economic policy guidelines' or BEPGs. The need for the BEPGs arose out of the creation of the euro as a common currency for most of the Member States.“[6]

In 2010. the European Union adopted a Strategy „Europe 2020“ for smart, sustainable, and inclusive growth.[7] With the Europe 2020 Growth Strategy, the EU has set certain goals and envisioned ways to achieve them within a ten-year period. The Strategy is based on the aforementioned Lisbon Strategy with the introduction of new and

---

5 *Weiss*, Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights, in: Schlachter (ed.), EU Labour Law – A Commentary, 2015, p. 24.

6 *Davies*, EU Labour Law, 2012, p. 57.

7 European Commision, Communication from the Commision, Europe 2020 A strategy for smart, sustainable and inclusive growth, Brussels 3.3. 2010 COM(2010)2020 final.

more precise targets[8] in line with current problems in the EU and continued to operate on its basis until its expiration in 2020.

„In the years 2010–2019, a systematic improvement in the implementation of both the EU and the national targets set out in the Europe 2020 Strategy was recorded. The differences in the achievement level of the Europe 2020 Strategy targets were visible,
however, the distance in this respect between the European Union countries was decreasing. It should also be highlighted that none of the EU countries achieved the target values of
the Strategy defined for 2020."[9]

C. Employment Policy of the EU and COVID-19 Pandemic

The sudden onset of the COVID-19 pandemic and the scale of the crisis it caused posed a major challenge for a strong economy like the European Union. The crisis caused by the COVID-19 pandemic was reflected in many social spheres, and thus inevitably in the field of employment and the labor market in the European Union. In general, the EU, unlike previous crises (the economic and financial crisis of 2008, the Brexit process, etc.), has shown a greater ability to adapt and respond more adequately and faster to the crisis caused by the COVID-19 pandemic.

„As the rest of the world, Covid-19 has taken Europe by surprise and created an unprecedented global public policy emergency with

---

[8] The EU five headline targets set in the Strategy are as follows: 75 % of the population aged 20-64 should be employed, 3% of the EU's GDP should be invested in R&D, The "20/20/20" climate/energy targets should be met (including an increase to 30% of emissions reduction if the conditions are right), The share of early school leavers should be under 10% and at least 40% of the younger generation should have a tertiary degree, 20 million less people should be at risk of poverty.

[9] *Walesiak*/*Dehnel*/*Obrębalski*, Assessment of the Europe 2020 Strategy: A Multidimensional Indicator Analysis via Dynamic Relative Taxonomy, *Energies* 2021**,** 14*,* p. 16. The prudential or optimistic approach towards achieving the goals of the Europe 2020 Strategy reveals the prioritisation of the development goals of the individual European Union Member States in various social and economic areas, and thus also the contemporary orientation as well as challenges for the relevant national public policies. The scope of these public policies is quite wide and covers, i.e., innovation policy, employment and labour market policy, educational policy, many aspects of social policy, environmental policy, or energy policy." Ibid., p. 17.

implications on health policies, economic and social policies, security, and the free movement of people both within Europe and beyond EU borders.“[10]

The crisis has left great consequences on the labor market, there have been job losses, loss and reduction of wages, increase in unemployment, transition to flexible forms of employment, and work from home. Vulnerable groups in the labor market, such as women, young workers, the disabled, and the elderly, were particularly at risk.

According to a survey by Eurofound (2020), 8% of the respondents working for an employer became unemployed since the onset of the COVID-19 pandemic. The likelihood of becoming unemployed was even higher for the solo self-employed (13%).[11] Also, 10% of the respondents left the workforce and young women and self-employed respondents were most likely to lose their job.[12]

„Covid-19 pandemic created economic, health, and social crises, and challenges. Companies and organizations in the private and public sectors have adopted teleworking, flexible forms of employment, remote services, and digital transformations. Strict lockdowns and restriction measures raise issues and conversations concerning the balance between public health, human rights, and entrepreneurial freedom.“[13]

The European Commission's Annual Review of the Employment and Social Developments in Europe 2020 shows that before the COVID-19 outbreak put Europe and the world under unprecedented public health, economic and social stress, 2020 had started with continuing positive trends in the EU. It also explains how, despite the deceleration

---

[10] *Wolff/Ladi*, European Union Responses to the Covid-19 Pandemic: adaptability in times of Permanent Emergency, Journal of European Integration, 2020, VOL. 42, NO. 8, p. 1025.

[11] Eurofound (2020), Living, working and COVID-19, COVID-19 series, Publications Office of the European Union, Luxembourg., p. 2.

[12] Ibid., p. 9.

[13] *Triantafillidou/Koutroukis*, (2021). The Impact of Covid-19 Pandemic on The Work Landscape and Employment Policy Responses: Insights From Labor Policies Adopted in The Greek Context. European Scientific Journal, ESJ, 17 (31), p. 179., p. 180.

of economic growth relative to 2018, throughout 2019, the EU had the highest employment rate in history and the lowest unemployment levels on record, while living standards continued to improve and public finances were consolidated.[14]

In the same Annual Review, the European Commission describes how COVID-19, starting as a worldwide health emergency, with a significant cost in human lives and impact on the health of the EU population, has developed into the biggest global socio-economic crisis since the Second World War.[15]

In the 2021 Annual Review of the Employment and Social Developments in Europe of the European Commission, it was stated that despite a major drop in GDP in 2020, the comprehensive public policy measures swiftly adopted at the national and the EU level contributed to cushioning the labor market and lowering the social impact of the pandemic. Also, it is mentioned that the overall increase in the EU unemployment rate in 2020 has been lower than it has been observed during the 2008 financial and economic crisis, while income support measures have mitigated an increase in income inequality thus far.[16]

It is considered that the EU had the ability to anticipate the cascading effect of the pandemic on the economy and so it tried to cushion the devastating socio-economic impact that lockdowns have had. There has been a support to businesses and workers that was made available quickly. Also, as of July 2020 €, 540 million for supporting jobs in the EU was invested, and hundred million euros went into the support to mitigate unemployment risks in an emergency (SURE) and €200 million was made available by the European Investment Bank for the pan-European guarantee fund for loans to companies. Besides that,

---

[14] European Commission, Directorate-General for Employment, Social Affairs and Inclusion Directorate A, Employment and Social Developments in Europe, Leaving no one behind and striving for more: Fairness and solidarity in the European social market economy, Annual review 2020, p. 13.

[15] Ibid.

[16] European Commission, Directorate-General for Employment, Social Affairs and Inclusion Directorate F, Employment and Social Developments in Europe, Towards a strong social Europe in the aftermath of the COVID-19 crisis: Reducing disparities and addressing distributional impacts, Annual review, 2021, p. 15.

€240 million went through the European Stability Mechanism to EU member states for public health-related expenses.[17]

A crucial moment was on 21 July 2020 when the European Council agreed to create a Resilience and Recovery Fund (RRF) of € 750 billion in grants and loans in order to support all member states and to allow them to increase public spending in tackling the Covid-19 pandemic. Later, on 11 September 2020, the Council revised the EU budget for 2020 by an extra € 6.2 billion which aimed to enable the European Commission to invest in the development and deployment of a Covid-19 vaccine. It was not only that, because they were also aimed to address the impact of the pandemic through the Corona Response Investment Initiative (CRII) and the Corona Response Investment Initiative Plus (CRII+).[18]

The first six months of the EU's response showed it as an actor that has been reacting quickly by using the existing crisis and mechanisms tools it had at its disposal. The EU also anticipated future consequences and adopted reforms in terms of recovery funds, support to workers and businesses as well as the development of a health agenda, and investment in a future vaccine.[19] In the Annual Review of the Employment and Social Developments in Europe of the European Commission 2021 it is shown that in 2020, economic activity suffered a significant slump, and EU labor market improvements, which had continued until the end of 2019, came to a halt. The Commission expressed that these adverse developments are observable in the main economic and social indicators, notably for young people, low-skilled workers, people in poor living conditions, older people, and persons with disabilities, who have been among those most affected by the crisis.[20] According to the same Commission's Annual Review, the employment rate stood at 72.4% in 2020 which is 0.7 percentage points lower than in 2019.[21]

---

17 See: *Wolff/Ladi*, (fn. 10), p. 1028.

18 Ibid.

19 Ibid., p. 1029.

20 European Commission, Annual review, 2021, (fn. 16), p. 17.

21 Ibid., p. 17.

In the same Annual Review, it is emphasized that the European Union acted swiftly in response to the Covid-19 outbreak in Europe, with initiatives to support national efforts to tackle the health and economic crisis. It is clarified that these included the activation of the general escape clause of the Stability and Growth Pact; a new temporary framework for state aid; two packages of support (Coronavirus Response Investment Initiative, so-called CRII, and CRII+) introducing extraordinary flexibility in the use of the European Structural and Investment Funds to fight the consequences of Covid-19, as well as a new instrument to provide funding solidarity to the Members States for job-retention measures – the Temporary Support to mitigate Unemployment Risks in an Emergency (SURE).[22]

The European Commission in its Annual Review of the Employment and Social Developments in Europe 2021 gave a number of important conclusions concerning employment and labour relations issues. It emphasized the important facts related to the employment and unemployment rate and the response of the EU to the COVID-19 crisis. It is stated that the EU employment rate declined in 2020 by 0.7pp to stand at 72.4%, with substantial variation across the Member States, and the EU unemployment rate increased in 2020 to 7.0% of the labour force, 0.3pp more than in 2019. The COVID-19 pandemic pushed 1.8 million people into inactivity, especially in the first part of 2020. The exceptional policy response to the COVID-19 crisis has countered the unprecedented labour income loss, COVID-19 has tested the resilience of health systems and placed strong pressure on health workers. Despite the cushioning effect of public measures, the most disadvantaged or fragile still suffered severely from the pandemic.[23]

- the EU employment rate declined in 2020 by 0.7pp to stand at 72.4%, with substantial variation across the Member States,
- The EU unemployment rate increased in 2020 to 7.0% of the labour force, 0.3pp more than in 2019.,
- The COVID-19 pandemic pushed 1.8 million people into inactivity, especially in the first part of 2020.,

[22] Ibid., p. 16.

[23] Ibid., p. 61.

- Exceptional policy response to the COVID-19 crisis has countered the unprecedented labour income loss,
- COVID-19 has tested the resilience of health systems and placed strong pressure on health workers,
- Despite the cushioning effect of public measures, the most disadvantaged or fragile still suffered severely from the pandemic.

D. The Future Prospects of the Development of the Employment Policy of the EU

When thinking about the future employment developments after Covid-19 it is indicative to look at the Annual Review of the Employment and Social Developments in Europe of the European Commission 2021. In this document, the Commission declares that the EU's policy response is now shifting from offering immediate crisis relief to fostering recovery. In order to accelerate the transition to a green and more digitalised economy, while ensuring it is fair and inclusive, this requires an in-depth understanding of the pandemic's profound, multifaceted and uneven socio-economic impacts across population groups and regions in the EU, as well as of the pre-crisis situation and structural weaknesses.[24]

Also, in the same Annual Review, the Commission states that the long-term repercussions of these impacts are still unclear, and the preliminary evidence suggests that the crisis has accelerated structural change. It also explains how although exceptional support measures are likely to have prevented an increase in inequality in the short term, there are indications that inequalities may increase when these measures are progressively phased out and that adverse effects on some vulnerable groups (including children and youth) might reach into the distant future. The Commission concludes that the effects of this crisis are spreading far beyond the potential impact on educational attainment, unemployment, activity, and employment rates as they also bring about a global transformation of working practices and of the definition of the workplace itself.[25]

---

[24] Ibid., p. 15.

[25] Ibid., p. 16.

E. Conclusion

Employment policy is the competence of the EU member states, and here the EU has a limited capacity which is mostly relied on the application of the principle of subsidiarity and the soft law instruments. The crisis caused by the Covid-19 pandemic was reflected in many areas, and thus inevitably in the field of employment and the labor market. The crisis left a huge consequence on the labor market. It has led to job losses, loss and reduction of wages, increase in unemployment, transition to flexible forms of employment, and work from home. In this situation, the vulnerable groups in the labor market, such as women, young workers, the disabled, and the elderly, were particularly at risk.

In the Annual Review of the Employment and Social Developments in Europe of the European Commission in 2021, it was stated that despite a major drop in GDP in 2020, the comprehensive public policy measures swiftly adopted at the national and the EU level contributed to cushioning the labor market and social impact of the pandemic. Also, it is mentioned that overall, the increase in the EU unemployment rate in 2020 has been lower than the one observed during the 2008 financial and economic crisis, while income support measures have mitigated an increase in income inequality so far. Also, in the same Annual Review it is emphasized that the European Union acted swiftly in response to the COVID-19 outbreak in Europe, with initiatives to support national efforts to tackle the health and economic crisis. It is clarified that these included the activation of the general escape clause of the Stability and Growth Pact; a new temporary framework for state aid; two packages of support (Coronavirus Response Investment Initiative, so-called CRII, and CRII+) introducing extraordinary flexibility in the use of the European Structural and Investment Funds to fight the consequences of Covid-19, as well as a new instrument to provide funding solidarity to the Members States for job-retention measures – the Temporary Support to mitigate Unemployment Risks in an Emergency (SURE).

The EU, unlike previous crises, has shown a greater ability to adapt and respond more adequately and quickly to the consequences of the crisis caused by the Covid-19 pandemic. It adopted appropriate measures relatively swiftly to combat the effects of the pandemic on employment and the labor market. This has proved to be effective and

helped the economy to overcome the difficulties that arose from the crisis.

EU Enlargement Policy Meets Eastern Partnership: A Cause for Concern?

Miloš Petrović[*] *and Maja Kovačević*[**]

Abstract

The authors analyze a growing tendency of the EU institutions to treat the membership candidates and eastern partners through similar political, legal-bureaucratic, and other means rather than separating them and argue that such "clustering" is primarily damaging to the Western Balkans (WB). The authors observe two strategic processes: the political marginalization of the enlargement domain, combined with the increasing geopolitical relevance of the eastern neighborhood, which might further sideline the WB for two reasons. Firstly, the geopolitical rivalry with Russia in the eastern neighborhood diverts EU attention to that region. Secondly, as a politically and economically associated region, WB is heavily dependent on the EU, which is unlikely to change considering its small size and enclaved territorial position within the EU, despite the rising Euroscepticism on both sides. The authors argue that geopolitical urgency to engage in the eastern neighborhood is likely to further divert attention from the growingly peripheral WB, whose membership perspective appears to be increasingly vague and uncertain.

[*] Miloš Petrović, is a Research Fellow at the Institute of International Politics and Economics and a Guest Lecturer at the Faculty of Political Science (FPS), University of Belgrade.

[**] Maja Kovačević is a Full Professor at the Faculty of Political Science (FPS), University of Belgrade.

This co-authored manuscript titled "EU enlargement policy meets Eastern Partnership: a cause for concern?", initially submitted in January 2022, has been written specifically for the purpose of SEE | EU Excellence in Law • Series of Papers

A. Introduction

In the early 2000s, the European Union (EU) enlargement domain appeared to be the most comprehensive policy aimed at establishing a (politically) united continent.[1] During their "return to Europe", numerous Central and Eastern European (CEE) countries were successfully undertaking their democratization reforms, which also demonstrated the Union's strategic approach.[2] The Western Balkan (WB) countries were also included in the enlargement agenda, setting in motion their own Europeanization processes, albeit at a slower pace and burdened with numerous challenges.[3] Aware of its growing normative (and other) power, the EU also formulated a new platform – the European neighborhood policy (ENP), to be applied to a number of countries - from the post-Soviet European nations to North Africa, much to the dissatisfaction of countries such as Ukraine, which has always sought EU membership.[4] Meanwhile, a systemic EU economic and financial crisis had protracted since 2008 over several years, prompting demands for reforms, exacerbated by the migrant crisis, the geopolitical conflict in Ukraine, and Brexit, resulting in the marginalization of the WB enlargement agenda. However, while only Croatia managed to conclude membership negotiations (2011), the confrontation between Russia and the EU led to increased geostrategic relevance of the Eastern Partnership (EP), which is a specific neighborhood area tailored for post-Soviet Europe. Comp to the unusually slow developments in the enlargement domain (with only Serbia and Montenegro launching the accession negotiations during the past decade), the eastern neighborhood has become much closer, through privileged EU partnership acts with Armenia, Georgia, Moldova, and Ukraine, as well as through negotiations

---

1 *Moravcsik, Vachudova*, National Interests, State Power, and EU Enlargement, Perspectives 2002, p. 21.

2 *Sedelmeier*, Eastern Enlargement: Risk, Rationality, and Role-Compliance, in: Green Cowles/Smith (eds.), The State of the European Union: Risks, Reform, Resistance, and Revival, DOI:10.1093/0198297572.003.00, p. 2.

3 *Ross Smith, Marković Khaze, Kovačević*, The EU's stability-democracy dilemma in the context of the problematic accession of the Western Balkan states, Journal of Contemporary European Studies 2021, pp. 169-170.

4 *Petrović*, Nastanak ukrajinske krize: od političke iluzije Evropske unije do bitke za postsovjetsku Evropu, 2019, p.10.

with Azerbaijan.[5] The political association with both the WB and the EP has reinforced the sense of an increased alignment, or grouping, to stimulate transformative efforts in both environments, whilst postponing or not considering membership perspectives in either - which forms a wider contextual focus of this paper. More specifically, the authors argue that the EP has overcome the enlargement domain as a strategic priority due to: (1) geopolitical circumstances which surround the strategic rivalry and impaired relations with Russia and (2) the absence of WB progress which is a result of modest progress in meeting the membership criteria, coupled with the EU's reluctance towards admission). Paradoxically, the position held by the WB within the EU territory and its strong involvement in the EU's political processes contribute to the fact that it is given less priority, where membership is concerned, than the more-strategically-relevant eastern neighborhood. The authors argue that, despite the WB's acknowledged prospect of membership (as per the Thessaloniki Declaration), the credibility of accession has been compromised to such a degree that the enlargement policy is producing results that are more adequate for the EP/ENP. The reduced performance of the enlargement domain, combined with the increased relevance, goals, and activities in the EP, leads to similar outcomes, despite the differences between the two areas. Similarities include the existence of advanced political and trade agreements and the distant perspective of EU accession. The authors will first address the notion of "European perspective", and then analyze recent changes in the EU's enlargement policy. These aspects suggest that, while the EU undoubtedly aims to exert greater influence in both areas, the increasingly similar approach represents a symptom of reduced enlargement ambitions.

B. The "European perspective": a "catch-all" concept?

As the enlargement and EP dimensions have increasingly converged, the notion of "European perspective" has become a widely used term in both instances. Given the more and more distant accession date and the absence of such a commitment for the eastern

[5] These countries have been included in Eastern Partnership since 2009 onwards. Attempts to motivate Belarusian participation in EP have been suspended following the legitimacy crisis in that country since 2020.

partners, such a situation is illustrative for comparative purposes. The authors apply both the temporal (focusing primarily on the past decade), and regional (comparing EP and WB countries) analogies, hypothesizing that the vagueness of the membership perspective reflects the EU's reluctance to deepen political integration in the case of WB, which is comparable to the Eastern Partnership, that prefers political association to integration.[6]

The neighborhood policy can be seen as a normative platform, aimed at promoting the transformative processes in the areas of rule of law, security, and stability, avoiding new dividing lines, while increasing the EU's strategic presence on its newly expanded borders.[7] Generally speaking, the EU uses its normative power in both enlargement and ENP, to shape the neighboring regions in its own image. According to Skolimowska, Ian Manners' normative approach is centered around concepts such as liberty, the rule of law, democracy, respect for human dignity, equality, and human rights (Article 21 of TEU); these aspects amongst others are embedded into the European integration process as its legal and political norms and standards.[8] However, as Schimmelfennig and Sedelmeier noted, the prospects for renewed Europeanization of CEE countries have been hindered not only by the enlargement fatigue and absorptive capacity but also, for instance, by the high costs of adopting EU rules in the WB stemming from a lack of statehood and democratic legacy in these countries.[9] According to the External Incentives Model (which focuses on the causal relationship between the conditionality principle and domestic change) Europeanization is promoted through rewards and sanctions, with governments facing various aspects: sizeable rewards, set conditions, credible

---

6 https://www.consilium.europa.eu/en/policies/eastern-partnership/ (15/12/2021); also: *Lustigová,* The place and status of the Eastern Partnership policy in the European external relations law, in: Šišková (ed.), From Eastern Partnership to the Association. A Legal and Political Analysis, 2014, p. 7.

7 *Linkevičius*, The European Union Neighbourhood Policy towards Ukraine, Lithuanian foreign policy review 2008, pp. 62-63.

8 *Skolimowska*, The European Union as a 'Normative Power' in International Relations. Theoretical and Empirical Challenges, Yearbook of Polish European studies 2015, p. 116.

9 *Schimmelfennig, Sedelmeier*, The Europeanization of Eastern Europe: the external incentives model revisited, Journal of European Public Policy 2020, pp. 828-829.

conditionality, costs of compliance, etc.[10] In addition to suffering from flawed or unrecognized membership dilemmas, WB and EP countries are also occasionally subject toinconsistent conditionality that translates into political and financial support despite the level of reform progress (which Kaca generally groups within the "wrong political calculations").[11]

Linkevičius, referring to Zagorski, pointed out that since the beginning of the ENP, EU-Ukraine strategic cooperation has been marked by misunderstandings stemming from different expectations, with the EU seeking a general approximation, while the Kyiv authorities have higher expectations.[12] The Ukrainian authorities have repeatedly asked to be included in the enlargement domain.[13] The EP was tailored in response to these large political ambitions and in awareness of the excessive heterogeneity of ENP tools and scope.[14] Its creation followed the 2007 enlargement round, coinciding with the crisis which disrupted the monetary, fiscal, and other EU foundations. The crisis was also reflected in the growing concern over the impact of the Eastern enlargement on the labor market, which was severely affected during the financial downturn, thereby fueling Euroscepticism.[15] The appetite for WB enlargement has been additionally affected by concerns over the EU's absorptive capacity and the potential instabilities posed by any new accession.

Meanwhile, within the European Commission, the ENP's status evolved from an external foreign affairs portfolio to a trade domain before being merged with the enlargement domain in 2010. In the WB, only Croatia - which was in the middle of the accession negotiations when the financial crisis escalated - concluded them in 2011, following

---

10 Ibid, p. 815.

11 *Kaca*, Geopolitics and EU democracy promotion in the Eastern Partnership: Lessons learned, in: Deen, Zweers, van Loon (eds.), The Eastern Partnership - Three dilemmas in a time of troubles, Clingendael Report 2021, p. 23.

12 *Linkevičius*, (fn. 8), p. 81.

13 https://tinyurl.com/5n87cs3v (03/01/2022).

14 Joint Declaration of the Prague Eastern Partnership Summit 8435/09 of 7 May 2009, pp. 5-6.

15 *Zahn*, European enlargement and the economic crisis: impact and lasting effects, ETUI 2013, p. 21.

the refocusing of the process on the judiciary and fundamental rights (chapter 23) and justice, freedom and security (chapter 24).[16] Croatia not only negotiated the longest compared to other members but was subjected to the most detailed conditions, which focused on the judiciary, fundamental rights, corruption, and the rule of law.[17] These changes severely affected the pace of accession negotiations with Montenegro (ongoing since 2012) and Serbia (since 2014), which remain the only candidates negotiating (and at an all-time slow pace, with only some of 35 negotiating chapters closed). Nevertheless, strategic acts such as the Brdo Declaration (2021) still refer to the WB's "European perspective", while failing to mention the fundamental notions like "membership" and/or "accession".[18] The EU's reluctance to include the WB in the foreseeable future also contributed to a greater public affinity for other international actors (especially since the beginning of the pandemic), with the Union being perceived as the preferred external partner only in the demographically-minuscule Montenegro.[19] In Serbia, another EU-frontrunner-candidate, Euroscepticism has increased sharply since the opening of accession negotiations, which can be attributed to (1) reduced expectations of the economic benefits of accession and (2) increased national attachment, including concerns over the loss of national sovereignty (both in the sense of supranational decision-making and in literal meaning – over the Kosovo* claim).[20]

Contrastingly, the EP has been developing dynamically. Based on the logic of the enlargement policy, it promoted convergence with EU norms and standards, by providing financial assistance and monitoring reform progress; partners generally agreed to this hierarchical relationship to safeguard ties with the EU, but the lack of membership option, inconsistent conditionality, perception of sunk costs and selective

---

16 *Nozar*, The 100% Union: The rise of Chapters 23 and 24, Clingendael 2012, pp. 3-4.

17 *Šelo Šabić*, (Ir)relevance of Croatian Experience for Further EU Enlargement, Insight Turkey 2019, p. 176.

18 https://www.consilium.europa.eu/media/52280/brdo-declaration-6-october-2021-en.pdf (06/10/2021).

19 *Tzifakis et al*., Geopolitically Irrelevant in its 'inner courtyard'? *BIEPAG* 2021, p. 8.

20 Stanojević, Vujić, Vujović, The causes of the rise of Euroscepticism: a survey of Serbian citizens in 2020, Journal of Contemporary European Studies 2022, p. 15.

approach have challenged the process.[21] The terminology has also evolved, from the "acceleration of political association" in the 2009 Prague Declaration, to the "European aspirations and the European choice", for the purpose of an "ever closer relationship with the EU" in the Warsaw Declaration (2011).[22] The Vilnius Declaration (2013), *inter alia*, underlined the "sovereign right of each partner" to set their own goals regarding relations with the EU.[23] This formulation was likely directed at the previous Ukrainian authorities, who were under geopolitical pressure from both Russia and the EU, which helped escalate the (still ongoing) strategic crisis. While the Vilnius act formally noted the decision of Kyiv to abstain from signing the association and the comprehensive trade agreements (AA/DCFTA, respectively), it highlighted the political aspect: the "unprecedented public support" for Ukraine's "political association and economic integration" with the EU.[24] The Vilnius EP summit produced modest results, such as the initialing of the association agreements and DCFTAs with Moldova and Georgia, commending their "European aspirations/choice".[25] This wording signaled concern about the situation in Ukraine. Its pivotal significance for the EP strategy prompted the EU to politically engage in the "Euromaidan" protests, in order to influence the country's geostrategic orientation. However, the developments were further complicated, resulting in Russian involvement, the loss of several territories, and thousands of lives, not to mention the change of government and its strategic course.

Although the AA and DCFTA were ultimately signed by Ukraine, the events surrounding the geopolitical and territorial conflict in Ukraine demonstrated that the entire process – which was intended as a showcase for the EU's transformative power – was an example of an

---

21 *Kaca*, (fn. 12), pp. 22-23.

22 Joint Declaration of the Prague Eastern Partnership Summit 8435/09 of 7 May 2009, p. 6; Joint Declaration of the Eastern Partnership Summit Warsaw 14983/11 of 29-30 September 2011, p. 1.

23 Joint Declaration of the Eastern Partnership Summit Vilnius 17130/13 of 28-29 November 2013, p. 3.

24 Ibid.

25 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part OJ L 260 of 30/08/2014, p. 5.

inadequately articulated strategy and unintended consequences in the eastern neighborhood.[26] These aspects also signaled what Kapitonenko perceives as the Ep's "recurrent strategic dilemma" in which long-term normative requirements are often sidelined by short-term interests or political interventions of member-states.[27] This dichotomy between strategy, on the one hand, and the need for short-term results, on the other, is, in our view, compromising the effectiveness of both EP and enlargement domains. For example, Bulgaria's veto on membership negotiations with North Macedonia is perceived to be of ethnopolitical, rather than Euro-integration character, and to make matters worse, Albania's EU application was unjustly suspended.[28] Since the onset of the Ukrainian crisis, there have been changes in the ENP. To increase its "attractiveness" to neighbours and encourage local initiatives, the revised ENP established a set of agreements and instruments, decentralizing the concepts of "differentiation" and "flexibility" to better reflect the views of the partners.[29] Meanwhile, the Ukrainian AA envisaged a comprehensive approximation in foreign and security policies (with the aim of contributing to a peaceful environment), progressive adjustments with the CFSP (Common Foreign and Security Policy), development of democratic institutions, rule of law, fundamental freedoms, etc.[30] Interestingly, these aspects largely corresponded to those outlined in the negotiation framework for EU candidate Serbia adopted by the Council in 2013 in the preliminary stages of accession talks.[31] Somewhat surprisingly, the European Commission (EC) President candidate Jean-Claude Juncker while addressing the European Parliament in 2014, stated that it would have been "inconceivable" for Serbia or Montenegro to join the EU within five

---

26 *Kovačević*, Evropska diferencirana unija, 2020, p. 173, referring to Olga Burlyuk (footnote 638) and Jolyon Howorth (footnote 639).

27 https://www.files.ethz.ch/isn/193393/NeighbourhoodPolicyPaper(15).pdf, p. 4, (07/2015).

28 https://tinyurl.com/bdhwcam7 (02/12/2020).

29 https://www.dahrendorf-forum.eu/the-eastern-partnership-3-0-change-or-continuity/ (24/04/2020).

30 OJ L 161 of 29/05/2014, p. 7.

31 General EU position - Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union, CONF-RS 1/14 of 21 January 2014, pp. 9-10.

years.[32] While justified (considering the early phase of talks) this was interpreted as potentially damaging by some.[33]

The distaste for the enlargement agenda was institutionally endorsed by the renaming of the EC portfolio to "European Neighbourhood Policy and Enlargement Negotiations". Not only was the ENP mentioned first (signalling its higher priority), but the focus of the enlargement domain was symbolically narrowed to the negotiating countries whose accession was regarded as "inconceivable"). While a period of increased stagnation ensued in the enlargement domain, a more flexible approach in the EP area resulted in preparations for negotiation of a partnership agreement with Azerbaijan (since 2016) and the signing of the Comprehensive and enhanced partnership act with Armenia (2017). Through these activities, the EU demonstrated a political willingness to alter its approach within the EP and enable a greater degree of differentiation.

C. The Recent Enlargement Policy Alterations

Towards the end of the Juncker EC mandate, a strategic act on the enlargement perspective and enhanced EU engagement with the Western Balkans was adopted (2018), highlighting the necessity for a more credible and efficient process, with a focus on 2025.[34] Its value was two-fold. First, it recognized the need to additionally support transformative efforts in the WB (via the "Six flagships" priorities: strengthening the rule of law, closer cooperation on security and migration, support to socio-economic development, transport, and energy connectivity, digital agenda, and regional cooperation). Second, it allowed for "potential readiness" of (primarily) Montenegro and Serbia for membership by 2025, in case of fulfilling the Copenhagen and regional cooperation criteria, while also highlighting that would be "extremely ambitious".[35] In line with the focus of the accession negotiations portfolio, the act conveyed a positive signal to the front-runners. As for the

---

32 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_567 (15/07/2014).

33 *Gateva*, European Union enlargement conditionality, 2015, p. 177.

34 A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM (2018) 65 of 6.2.2018.

35 Ibid, pp. 2-15.

other WB countries, the proposed target dates were dropped due to objections of some member-states, so the focus remained on the front-runners.[36]

On the diplomatic front, the EU brokered the Prespa Agreement which ended the decades-long Greek-Macedonian dispute; unfortunately, it failed to secure support from other members –France, followed by Bulgaria - towards the long-awaited opening of negotiations with Skopje. Since the EU coupled North Macedonia with Albania, both bids have been suspended ever since.[37] Paradoxically, it was Bulgaria that organized the first EU-WB summit dedicated to the region's European future since the historic Thessaloniki gathering (2003).[38] Although the Sofia Declaration (2018) refers to the WB as "partners" (a neighborhood-sounding-term), it appears that such wording was intended to appease those EU countries that do not recognize Prishtina's act of secession, rather than to draw analogies with the EP.[39] WB authorities continued to be referred to as "partners" in the Zagreb Declaration (2020) and Brdo Declaration (2021), indicating a high level of political interest in the Western Balkans despite their unambitious terminology. However, the von der Leyen Commission did preserve the portfolio name - ENP and Enlargement Negotiations, implicitly signalling that the first policy continues to take precedence over the second (in addition to the enlargement negotiation aspect, which was again highlighted as the most important policy activity). The logic of increased institutional "clustering" also manifested in merging the Serbian and Montenegrin units within the Directorate General for Neighborhood and Enlargement Negotiations, to the dissatisfaction of some in Podgorica.[40] Despite its contribution to the enlargement, the Sofia Declaration should not be overestimated either. During the previous enlargement rounds, the "European conferences" with the candidates took place much more frequently - on an annual basis (which has not been the case with the

---

36 https://tinyurl.com/2p8erf99 (05/02/2018).

37 The non-opening of accession talks with Tirana and Skopje practically leaves Serbia and Montenegro as the sole negotiating candidates. Bosnia-Herzegovina and Kosovo* are still regarded as „potential candidates".

38 https://tinyurl.com/yckpu6pm (14/05/2018).

39 https://tinyurl.com/4e2vu66v 17/05/2018); https://tinyurl.com/yc6m9nrf/ (23/04/2018).

40 https://www.slobodnaevropa.org/a/crna-gora-srbija-eu-pregovori/31618020.html (20/12/2021).

WB until the adoption of the revised methodology).[41] While the Thessaloniki Declaration clearly linked the term "European perspective" to the accession process by referring to the "EU future of the Balkans", and the region's "preparations for integration" and "final membership"(point 2), the Sofia Declaration did not mention these terms. However, that act did so in an implicit manner, by pointing out to the "unequivocal support for the European perspective of the WB", with reference to the Thessaloniki Declaration. Moreover, none of the recent EU-WB declarations mentioned important terms like the "future" (in the context of accession), which reinforces the impression that the political perspective of the process is more uncertain than it initially appears to be. In contrast, the EP acts like the Brussels Declaration (2021), which acknowledges the "European aspirations and the European choice of the partners" with the perspective of deepening "political association and economic integration with the EU" (point 8). This formulation sounds more decisive and clearer concerning the political future of the eastern neighborhood than the declarations of the WB, which do not support the political integration of this region in the foreseeable future.

Following their veto on Skopje and Tirana's accession negotiations, the French authorities proposed a revised enlargement methodology, which was adopted, with certain amendments, before the pandemic crisis.[42] The revised instrument was designed to increase impaired credibility and predictability and bring a new dynamic to the enlargement area. Meanwhile, the l WB summits in Zagreb (2020) and Brdo (2021) have kept the issue of enlargement in the EU's focus. Unfortunately, this opportunity did not translate adequately into the actual political reform process.[43] Even Serbia and Montenegro have reached an impasse, taking only symbolical steps in the past years, marked by the outbreak of the pandemic, in addition to pre-existing issues in the

41 *Kovačević*, (fn. 27), p. 146.

42 https://ec.europa.eu/commission/presscorner/detail/en/IP_20_181 (05/02/2020).

43 *Petrović, Tzifakis*, A geopolitical turn to EU enlargement, or another postponement? An introduction, Journal of Contemporary European Studies 2021, p. 163.

areas of the rule of law, fundamental freedoms, and in the case of Serbia, unresolved relations with Kosovo*.[44]

Notwithstanding the weight of these challenges and the faulty reform processes in both countries, the content of EU declarations has been discouraging. Neither the Zagreb Declaration nor the Brdo Declaration mentioned either "membership" or "accession". Moreover, the Zagreb act did not even mention "enlargement", sticking only to the "European perspective" (three mentions).[45] Despite the statements of the Slovenian Prime Minister that its 2021 presidency succeeded in reintroducing the phrase "membership perspective" into the official EU discourse, the final text of the Brdo Declaration continues to refer solely to the broad "European perspective" (a term also applied for the EP).[46] Apart from only three mentions of the otherwise-broad "European perspective", the term "enlargement" was used once, including a "disclaimer" regarding the EU's own absorption capacities as a prerequisite for any further accessions (point 1).[47] Nevertheless, at the beginning of the French Presidency of the Council (2022), President Macron announced the need to "clarify the European perspective of the Western Balkans" through increased economic and political engagement and differentiation to the EP.[48] This sounds encouraging because: (1) it comes from one of the two most influential EU nations, during its Council presidency; (2) it recognizes the need to separate the political ambitions of the enlargement agenda from those of the EP and (3) it calls for a stronger economic and political approach towards the WB, after a period of strategic inactivity.

---

44 The chief achievements during the past several years have been the opening of the final negotiating chapter by Montenegro in 2020 and of one cluster by Serbia in late 2021, following a two-year pause.

45 Consult footnote 19 for Brdo Declaration; https://www.consilium.europa.eu/media/43776/zagreb-declaration-en-06052020.pdf (06/05/2020).

46 https://www.shorturl.at/msLOR (30/12/2021).

47 Consult footnote 46.

48 https://tinyurl.com/bdf7z3c5 (10/12/2021).

D. Conclusion

The disregard for the boundaries between the enlargement and neighbourhood policies is a result of the EU's diminished political ambitions for further expansion, especially in the Western Balkans. Such an inadequate approach has two main outcomes: (1) the notion of "European perspective" no longer stands exclusively for EU membership, but also for privileged partnership, as seen with the Eastern Partnership; (2) the WB countries and the eastern partners are increasingly being subjected to similar criteria and instruments, with an additional commonality being that EU membership will not soon be an option for either region. This phenomenon not only contradicts the long-recognized EU membership perspective for the region but also creates confusing political expectations in the eastern neighbourhood. These inadequate expectations are largely connected to the EU's own internal incoherence regarding the political future of these two separate regions. This lack of clarity is expressed by pointing to the candidates' 'clear European perspective', while praising the "European choice" and steps toward an "ever closer relationship" with eastern partners like Moldova. These subtle terminological distinctions are intended to encourage pro-European processes in both regions, regardless of their distinctions.

While geopolitical arguments (such as the strategic rivalry with Russia) have increased the importance of the EU's eastern neighbourhood, political integration with the WB has not progressed. While the geopolitical aspect has always constituted an important part of the enlargement logic (exemplified by the Eastern accession rounds 2004-2007), two decades following the Thessaloniki Declaration, the region is still un-integrated, which can also be seen in the light of its own reduced strategic importance, at least compared to the Eastern Partnership. In the meantime, it appears that the EU has largely combined the two regions, despite their political, economic, social, and other peculiarities, in order to transform them by using similar tools. Such an approach is not only unselective and thus insufficiently effective, but also undermines the WB's membership ambitions, which are increasingly fading into the background in its third decade of Europeanization.

Acknowledgment: The paper presents the findings of a study developed as part of the research project entitled "Serbia and challenges in international relations in 2022", financed by the Ministry of Education,

Science, and Technological Development of the Republic of Serbia, and conducted by the Institute of International Politics and Economics, Belgrade.

EU Rule of Law Promotion in the Western Balkans: 'Special(ized) Prosecution Bodies' Conundrum

Leposava Ognjanoska[*]

Abstract

Special(ized) prosecution bodies are becoming a common practice in the process of Europeanization, especially among the countries of the Western Balkans, but there are certain conditions that determine the fulfillment of the given mission, particularly with regard to combating high corruption. This paper examines the extent to which EU-driven reforms of this kind have been successfully implemented to achieve the expected results and provide a (sustainable) solution to the long-lasting challenge of *combatting high corruption. The analysis is framed in the context of the EU conditionality, thus arguing the role of the credibility of the incentives in terms of the EU integration process in correlation with other more 'internal' factors that impact the effectiveness of these reforms. Through the study of these aspects of the reform, the paper strives to respond to some of the questions raised in this framework, such as whether these special bodies have created more concerns than effective solutions.*

A. Introduction

Corruption has consistently been one of the European Union's (EU) major concerns in candidate countries since its first assessment in the "Agenda 2000" Report on the membership applications of the Central and Eastern European (CEE) countries in 1997.[1] In each of the areas covered under the Copenhagen criteria, corruption has been given great importance as it jeopardizes democracy and the rule of law, implementation and enforcement of rules (and therefore of the *acquis*), but also undermines the economic development and the proper functioning of markets. Hence, anti-corruption goals have beenintegrated

---

[*] Leposava Ognjanoska, LL.M, is PhD student at the Faculty of Law "Iustinianus Primus" Skopje – Ss. Cyril and Methodius University in Skopje, in the field of Law of the European Union and European Integration.

[1] European Commission, Composite Paper: Reports on Progress towards Accession by Each of the Candidate Countries, November 1998, p. 6.

into the pre-accession framework and have become a crucial pillar in the EU enlargement policy.

However, the primary focus of accession negotiations on harmonization and implementation of the Union *acquis* limits the scope for the inclusion of anti-corruption policies given the lack of a clear EU framework in this area. In the absence of an explicit anti-corruption *acquis,* the EU approach was established because of a joint effort of both the Council of Europe through the Group of States against Corruption (GRECO)[2] and the EU. In that context, the Council of Europe's "Twenty Guiding Principles for the Fight Against Corruption"[3] served as a framework for developing anti-corruption strategies in the broadest sense, encompassing not only anti-corruption legislation but also measures to prevent and fight corruption, including independence of the prosecution and judiciary.

On the other hand, while the dividing line between candidate countries and member states in terms of levels of corruption is not as clear-cut as is often implied, both the legacy of the previous system and the nature of the transition can be considered as risk factors that provide strong reasons why corruption is likely to be a bigger problem in candidate countries from the fifth enlargement with CEECs and onwards.[4] Furthermore, it is recognized that the state of play in the candidate countries, particularly with regard to the Western Balkans, contains clear elements of state capture as a form of corruption, which according to the World Bank can be understood as "illicit provision ofgains to

---

[2] The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organization's anti-corruption standards. GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption. Later on, GRECO has become the first organization to systematically evaluate both candidate and member States.

[3] Council of Europe Committee of Ministers, Resolution 24 (1997) On the Twenty Guiding Principles for the Fight Against Corruption.

[4] *Open Society Institute*, Monitoring the EU Accession Process: Corruption and Anti-corruption Policy, 2002, p.43, available at https://www.esiweb.org/pdf/bulgaria_OSI-EU-MAP-corruption-CEE-2002.pdf.

public officials to influence the formation of laws, regulations, decrees and other Government policies"[5].

Under the aegis of the EU, new mechanisms and institutions have been set up concerning both the judiciary and prosecution offices. The 'European model' for the Western Balkans seems to promote the establishment of special bodies for the investigation and prosecution of high-level corruption cases. The first of this kind was the Romanian Anti-Corruption Directorate (DNA), which attracted a lot of attention in the pre-accession phase but also in the post-accession conditionality, and the Croatian USKOK (Office for Combating Corruption and Organized Crime) whose work and results were considered as one of the main benchmarks in Chapter 23 of the EU acquis. Special bodies have become a template in the process of Europeanization in the Western Balkans countries, as one of the most important methods and measures of progress. However, despite the centrality of these 'innovations' as key segments in promoting the rule of law in the EU, there is a distinct lack of both theoretical and empirical accounts of their impact.

This paper examines the extent to which EU-driven reforms of this kind have been successfully operationalized to deliver the anticipated results and create a (sustainable) solution to the long-lasting conundrum of the system's strength to combat high corruption. The analysis is framed in the context of the EU rule of law conditionality and anti-corruption as a pre-accession condition, thus arguing the role of the credibility of the incentive in correlation with other more 'internal' factors that impact the effectiveness of these reforms. By examining these aspects of the reform, the paper attempts to answer some of the questions raised in this framework, whether these particular bodies have created more concerns than effective solutions.

B. Theoretical Framework: Special(ized) bodies in the Europeanization context

In the literature on European integration produced the term 'Europeanization' has been coined to explain the process of 'downloading' EU legislation and policies into the national polity, and sometimes also

[5] *World Bank*, Anti-corruption in Transition: A Contribution to the Policy Debate, 2000, p. 3.

'uploading' national preferences to the EU level.[6] In contrast to the two-way street of the member states, Europeanization in the accession process narrowed into a one-way street for downloading EU requirements.[7] The discussion is predominantly framed in the rationalist logic of consequences and its counterpart - constructivist 'logic of appropriateness'.[8] The 'rationalist' approaches assume that decision-making is driven by the pursuit of material interests by strategic actors, while the constructivist approaches emphasize more strongly the influence of norms, ideas, and principles in the process of integration.[9]

According to the 'logic of consequences', accommodation to the requirements in the accession process is led by the EU through a strategy of conditionality, in which the EU sets its rules as conditions that candidate countries have to fulfill in order to receive certain rewards that exceed the domestic adoption costs.[10] Hence, external incentives are the main drivers of compliance with pre-accession conditions especially in the case of rule of law,[11] whereby the rational cost-benefit balance depends on (i) the determinacy of conditions, (ii) the size and speed of rewards, (iii) the credibility of threats and promises, and (iv) the size of adoption costs. On the other hand, constructivist 'logic of appropriateness' suggests that domestic actors accept and internalize EU standards and requirements through persuasion based on their legitimacy, as well as identity and resonance[12] - in other words, the adoption of EU rules is not a product of proactive EU promotion but induced by domestic factors. Legitimacy refers to the quality of the EU rules, the rule-making process, and the process of rule transfer. In this

---

6 *Börzel*, Institutional Adaptation to Europeanization in Germany and Spain, Journal of Common Market Studies 37(4) , 1999, p.573.

7 *Schimmelfennig/Sedelmeier*, The Europeanization of Eastern Europe: The External Incentives Model, JMF@25 conference, EUI, 22-23 June 2017, p.1.

8 *Preshova et al.,* The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms, CLEER Papers 2017/1, p.8.

9 *Craig/de Burca*, EU Law: Text, Cases, Materials, 7th ed., Oxford University Press, 2020.

10 *Schimmelfennig/Sedelmeier*, Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe, Journal of European Public Policy 11(4), 2004, p.671.

11 *Preshova et al.,* (fn. 8), p.8.

12 *Schimmelfennig/Sedelmeier,* (fn.10), p.676.

perspective, the legitimacy of EU rules and, as a result, the likelihood of rule adoption, increases if rules are formal, member states are subject to them as well, and if the process of rule transfer fulfills basic standards of deliberation.[13]

Regarding the special bodies to investigate and prosecute high-level corruption cases, the rationalist model offers a more coherent and explanatory framework for compliance with EU rules. This is due to the EU`s lack of comprehensive institutional templates necessary for the creation of such institutions in the candidate countries and thus, the anti-corruption *acquis* is limited in the overall context of Europeanization mechanisms introduced by the EU. Therefore, in order to test this theory with regard to the special anti-corruption bodies, the intervening factors should be taken into consideration and analyzed.

Determinacy refers both to the EU's conditionality on the one hand and the rules on the other hand, in a way that the effectiveness of rule transfer increases if rules are set as conditions for rewards. In that manner, the Croatian special prosecution service called USKOK[14] and the Romanian National Anticorruption Directorate[15] were created in direct response to the EU's demand for real progress in tackling corruption and played a crucial role in Croatia and Romania obtaining EU membership. Hence, reforms led by Romanian Anti-Corruption Directorate (DNA) were emphasized in the Commission's Report on the state of preparedness for EU membership on the basis of which the accession date was decided[16], Moreover, these reforms remained under continuous scrutiny after the accession date within the Cooperation and Verification Mechanism (CVM)[17]. In that manner, in case of Croatia

---

13 *Ibid*.

14 USKOK was established in 2001 by the Act on the Office for the Suppression of Corruption and Organized Crime. The Act entered into force on 19 October 2001, and the Office began to work on 3 December 2001. More information is available at https://uskok.hr/en/about-uskok. (04/04/2022)

15 Government Emergency Ordinance no. 43/2002 on the National Anticorruption Directorate.

16 Commission, Communication - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania COM(2006) 214 final, Brussels, 16 May 2006.

17 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C(2006) 6569, OJ L 354 of 14/12/2006, p. 56–57.

further reinforcement of the operational capacity of USKOK was a sub-benchmark within the Chapter 23 closing benchmarks regarding anti-corruption[18]. In the case of Montenegro, "establishing a new special prosecution office which should lead to better priority setting in dealing with serious criminal cases" represents an interim benchmark in the fight against corruption.[19]

Nevertheless, when it comes to the clarity and formality of a rule, EU criteria are not sufficiently precise or consistent as there is no clear European model on the special bodies. The Croatian USKOK, for example, was designed taking into account Hong Kong's Independent Commission Against Corruption among others.[20] In addition, more stringent requirements are placed on candidates from the Western Balkans, as a result of the work of these bodies and more tangible track record, as the conditions for accession have evolved over time, which is reflected in the 'new approach' of the EU enlargement strategy.[21]

The rewards hypothesis can be applied in the specific case in a way that the effectiveness of the special bodies increases if, or when, the EU membership is certain and near - the closer the date, the stronger the compliance pull that offsets the costs. The impact of this factor can be observed in the USKOK's most important high-profile case against Prime Minister Sanader which was finalized in December 2010 and ended with a conviction (pending appeal) in November 2012, while accession negotiations with Croatia were finalized in June 2011 and the country became the newest EU member on 1 July 2013. For the other countries of the Western Balkans, even those already in the negotiations phase, the prospect of membership still seems distant and uncertain and for some, for example North Macedonia the size of the reward is currently still set as opening accession negotiations.

On the other hand, combating high corruption is extremely costly considering that this process weakens the power of political elites – otherwise it would have taken place even without conditionality.

---

18 *Lukic*, Analysis of Benchmarks for Montenegro through Comparison with Croatia and Serbia, 2018, p.99.

19 *Ibid,* p.91.

20 *Kuris,* Cleaning House: Croatia Mops Up High-Level Corruption 2005–2012, 2013, p.4-5.

21 *Ognjanoska*, Promoting the Rule of Law in the EU Enlargement Policy: A Twofold Challenge, CYELP 17, 2021, p.255.

Therefore, the costs factor can be managed through the competence and other elements that determine the independence and overall strength of these prosecution bodies to combat high-corruption cases, which usually involve powerful domestic actors who are also expected to be in the driving seat. Progress on the CVM in Romania, introduced as a post-accession conditionality mechanism, has been highly dependent on the political cycle, with reforms stalling or even being reversed in periods close to the electoral cycle, justified by the political instability in 2008 and 2012.[22] In that context, the effectiveness depends on the preferences of the government, but also creates a circle in which actors on the EU side have a certain power in supporting domestic actors.

Finally, credibility is the core resource of both pre-accession but also post-accession compliance. It refers to the EU's readiness to withhold the reward if conditions are not met, but also to deliver on the promise once they are met. This incentive-based model does not contain guarantees for compliance in the post-accession period due to the weak EU sanctioning power once the reward has been granted. However, contrary to the monitoring finding,[23] the Commission has not invoked any of the sanctions included in the safeguard provisions in this context, nor has it established new sanctions in the framework of the CVM, although both were introduced as mechanisms of post-accession conditionality. This situation led to a tightening of pre-accession conditionality towards the Western Balkans but without enhancing or even reducing credibility of the promise to grant membership to compliant candidates compared to the previous circles of enlargement. This problem was most evident in the case of North Macedonia where the overall compliance with the accession criteria and the concrete achievements in combating high corruption mainly through the work

22 *World Bank Group/Radwan et,* Anti-Corruption in Romania -The Way Forward, 2017, p. 31.

23 Commission, Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism COM (2010) 400; Commission, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism COM (2010) 401.

of the SPO, were not met with the opening of the accession negotiations, which may have affected the outcome of its work.[24]

In summary, the effectiveness of the special bodies for investigating and prosecuting high corruption cases introduced in the context of accession depends on different variables that are characteristic of the process and that must be considered to ensure that this 'externally induced process of Europeanization does not to end up as 'simulated change'.[25]

C. European Model(s) of Special(ized) Prosecution Bodies: Perplexed or Streamlined Mechanisms

The method used to create the special(ized) prosecution bodies and employ an actual 'European model' is based on exchange of information, questionnaires, recommendations by specialists/experts, peer review missions, European Commission opinions and annual progress reports, as well as lessons learnt from previous enlargement rounds and Europeanization processes, in order to identify common denominators.[26] Hence, international and European standards, beyond those developed within the Council of Europe play an important role in shaping and structuring the EU approach.

According to Article 36 of UN Convention against Corruption[27] each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of bodies or persons specialized in combating corruption through law enforcement that shall be granted the necessary independence to be able to carry out their functions effectively and without any undue influence. A similar provision is contained in Article 20 of the Council of Europe's Criminal Law

---

24 SPO ceased to exist in 2020, its mandate was not prolonged and was not incorporated in the 'regular' prosecution system, although its cases were not finalized.

25 *Preshova et al.,* (fn. 8), p.13.

26 *Ibid*, p.14.

27 UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, available at: https://www.refworld.org/docid/4374b9524.html [accessed 29/04/2022].

Convention[28] and Article 5 of the OECD (Organization for Economic Co-operation and Development) Convention on Combating Bribery of Foreign Public Officials in International Business[29]. The Council of Europe's guiding principles on combating corruption provide that states should ensure that those responsible for preventing, investigating, prosecuting, and adjudicating corruption offenses enjoy the independence and autonomy appropriate to their functions, are free from improper influence, and have effective means of gathering evidence, protecting persons assisting the authorities in combating corruption and preserving the confidentiality of investigations; and to promote the specialization of persons or bodies in charge of fighting corruption and provide them with appropriate means and training to perform their tasks.[30]

Although not proposing or advocating a unique or universal model, the above international instruments clearly define an international obligation for states to ensure institutional specialization in the sphere of anti-corruption policy. Hence, the first conundrum is whether these prosecution bodies are special or specialized. This means that it is not only about their competence, but also about other elements that determine their status in the system such as certain conditions for ensuring the appropriate level of independence and autonomy and adequate resources and powers in order to provide effectiveness in their work. In its opinions, the Venice Commission has advocated the establishment of specialized anticorruption investigation/prosecution units that enjoy a certain autonomy from the general prosecution system.[31] In some cases, the special prosecutor's office formally remains part of the general prosecution structure, but as an autonomous unit so that it cannot be instructed by other, more senior prosecutors or by the

---

28 Council of Europe Group of States against Corruption, Criminal Law Convention on Corruption, Council of Europe Treaty Series 173, Strasbourg, 1999.

29 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.

30 Principles 3 and 7 of Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption adopted on 6 November 1997 at the 101st session.

31 European Commission for Democracy through Law (Venice Commission), Final Opinion on the revised draft constitutional amendments on the Judiciary (of 15 January 2016) of Albania, CDL-AD(2016)009, §§46 and 47.

government, while in other cases a completely independent office has been established.

On a level of policy options, the sub-models can be divided into several groups: reforming existing institutions by introducing special units, creating new institutions, and transitional institutions for reform purposes. Some of these, besides prosecution of (high) corruption offenses, are also empowered to deal with organized crime, economic, financial, and other serious offenses. In Romania, the DNA is headed by the Prosecutor General through the Chief Prosecutor, who has the rank of First Deputy Prosecutor General, while the Minister of Justice is involved in the procedure of the appointment of the Prosecutor General, of the Chief Prosecutors of the specialized prosecution offices, including the DNA, their deputies and the heads of departments of these prosecution offices.[32] This type of organization provides oversight and reporting mechanisms as a means of securing independence and effectiveness, while financial independence is ensured through the funds from the state budget and are distinctively earmarked within the budget of the Prosecutor's Office.

On the other hand, the Special Prosecutor's Office in North Macedonia was established as a separate body with core functions of investigation and prosecution but autonomous from the 'ordinary' prosecution system. This solution was necessary because there was suspicion that the state had captured the judiciary and public prosecutor's office, as the intercepted materials showed. Although the SPO was initially created as a new institution, it ultimately proved to be a transitional institution for reform purposes, as its jurisdiction was limited to the prosecution of offences related to and arising from the content of the illegal wiretappings and its mandate was limited to five years without follow-up. In the end, all the cases of the SPO were returned to the 'ordinary' prosecution, proving this institution to be an ineffective office and there was no attempt made to properly and sufficiently reform and strengthen it. It is also worth mentioning that this prosecution body was introduced without being accompanied by an appropriate judicial counterpart, given that the SPO was performing its tasks before the existing courts. Therefore, obstacles were identified, which further

[32] *OECD*, The Independence of Prosecutors in Eastern Europe, Central Asia and Asia Pacific, 2020, p.190.

demonstrated the need to effectively address the lack of independence of the judiciary in order to prevent selective justice.[33]

These lessons learned were probably considered when the specialized structure for investigation, prosecution, and adjudication of corruption and organized crime cases was established in Albania (SPAK - from its Albanian acronym). This structure comprising the National Bureau of Investigation, the Special Prosecution, together with Special Courts was established as part of a separate structure and was created by a constitutional reform package in 2016 but its success is linked to the progress of the comprehensive justice reforms.[34]

Anti-corruption specialization in Serbia was carried out within the system by creating public prosecutor's offices with special jurisdiction that exercise the prosecution function in both first instance and before the appellate courts. This solution is complemented by the Anti-Corruption Department of the Public Prosecutor' Office which monitors the work of specialized public prosecutor's offices in the proceedings regarding cases involving the criminal offence of corruption.

The Montenegrin Special State Prosecutor's Office (SSPO) from 2015 is part of the general prosecution service but enjoys a certain autonomy. The Special State Prosecutor (the SSP) is elected by the Prosecutorial Council, upon proposal of the Prosecutor General as the head of the prosecution service, for a five-years term. Following the creation of SSPO, Montenegro achieved some progress in the fight against organized crime and corruption but the overall progress in thisfield has recently been assessed by the EU as "limited"[35] , in view of political control over the prosecution. Only a few years later, in 2021, there was a call for a comprehensive reform of the prosecution service to mitigate the risk of politicization and conflict of interests within the Prosecutorial Council through new ineligibility criteria for its members. However, it resulted in legal amendments that failed to fully address the Venice Commission's recommendations concerning risks, even though during the process of preparation of the amendments, the Government

[33] European Commission, The former Yugoslav Republic of Macedonia 2016 Report, SWD(2016) 362 final, p.5.

[34] European Commission, Albania 2021 Report, SWD(2021) 289 final, p18.

[35] See European Commission, Montenegro 2020 Report, SWD(2020) 353 final.

requested the Venice Commission's opinion twice.[36] Another conundrum refers to the pre-conditions that ensure the independence of the overall justice system. In case of state capture and similar forms of corruption, despite all the mechanisms to ensure independence and accountability through different criteria and procedures for appointment and dismissal, practice can (again) prove the opposite because personnel solutions are (again) reduced or limited to individuals from the same captured system, creating a vicious circle.

Different policy options and institutional frameworks are also replicated at the level of legal framework from a formal and substantive point of view. In Romania, the legal framework of the DNA is provided by government ordinance, which was later approved by law and subsequently amended. In Albania, this matter is constitutionally regulated and accompanied by a special law, while in Serbia the respective regulations are included in the legislation on suppressing organized crime, terrorism and corruption and organization of the prosecution service. However, these bodies cannot be introduced simply by adoption of a certain regulation and continue to operate with the existing legal framework, but a broader adaptation of the overall legal environment is needed. Therefore, substantive criminal law and criminal procedural law should provide certain conditions for these bodies to fulfill their tasks efficiently, having in mind that investigations in cases of large-scale corruption are more complex and require the application of special methods. Moreover, effective prosecution of these cases requires the existence of specific legal institutes such as freezing assets and confiscation of illegal gains, as well as cooperation and coordination with the police structures but also international cooperation, and joint investigations. Thus, this endeavor requires 'special skills' which are to be obtained and further strengthened through specific training as well as 'special conditions' and resources that in turn emphasize the need for EU political and technical support in that context.

D. Conclusion

Special(ized) prosecution bodies are becoming a common practice in the process of Europeanization, especially in the countries of the Western Balkans, but there are certain conditions that determine their

[36] European Commission, Montenegro 2021 Report, SWD(2021) 293 final/2, p.18.

results and fulfillment of the given mission. The underlying rationale for establishing a new anti-corruption institution is based on the expectation that, unlike existing state institutions, the new institution 'will not itself be tainted by corruption or political intrusion'. Thus, the main expected outcome of an anti-corruption institution should be an overall improvement in the performance of anti-corruption functions.[37]

The findings of this paper confirm the strong impact of imposed EU conditionality in developing a strong anti-corruption track record through these bodies. Thus, if introduced in the framework of the accession process, their performance will also depend on the variables of that process, in particular the credibility of the EU promise, which undermines the rule of law pre-accession conditionality towards the Western Balkans in general. The EU accession process is the only tool for the Western Balkans to become 'European' in terms of values and standards, including the rule of law, and that also means anti-corruption. If the accession process as a framework is not delivering, then other solutions should be introduced. However, anti-corruption reforms are extremely costly for the domestic actors; otherwise, the process would have taken place in the absence of conditionality.

Specialization of the law enforcement bodies is the prevalent idea of this model 'sponsored' by the EU, but its 'special kind' also refers to the capacities and conditions that are needed to create an enabling environment for their functioning and prevent undue influence. Hence, special(ized) prosecution bodies cannot serve as isolated or temporary solutions but must be seen as key elements of a more comprehensive justice system reform process. One of the primary causes for trivial or limited success of this model has been the premature establishment of all-powerful bodies without taking into consideration the specific culture and the context in which this branch functions in practice. Respectably, this conclusion is supported by the examined case of North Macedonia.

Anti-corruption investigators and prosecutors must be provided with stronger guarantees of independence through organizational, structural, and financial autonomy along with better resources that

---

[37] *OECD/Klemenčič et al.,* Specialised Anti-Corruption Institutions - Review of Models, Anti-Corruption Network for Eastern Europe and Central Asia, 2008, p.35, available at https://www.oecd.org/corruption/acn/39971975.pdf.

serve as both protection and motivation that adequately reflect the nature and specificities of their work. Apart from all other factors, personnel solutions play an important role, especially in candidate countries where state capture is observed, because no matter how special these bodies may be, the people who embody them can prove to be 'ordinary', meaning that they are not immune to political interferences. Their appointment and removal from office should be appropriately regulated and provide the necessary transparency and safeguards.

If all these factors are considered, the imposed conditionality by the EU of introducing special(ized) law enforcement bodies can create effective solutions rather than more concerns. Although a universal European model of specialized anti-corruption bodies that could serve as a template has not yet been created, it can certainly produce results if there is a clear commitment from both sides – the EU and the candidate countries of the Western Balkans.

You Shall (Not) Pass: About the Constitutional Amendments in Serbia – The Position of the Public Prosecutor's Office

Aleksa Nikolić[*]
Ivana Radisavljević[**]

"A re-touched portrait is seldom a satisfactory production".

(Sidney Low)[1]

Abstract

Legal norms on the organization of judiciary are one of the most important segments of materia constitutionis. Their constitutional guarantee is a significant step towards ensuring an independent judiciary separate from the so-called "political authorities" – legislative and executive. The subject of this paper is the analysis of the position of the public prosecutor's office as a branch of the judiciary. In this context, the current constitutional norms as well as the recently adopted constitutional amendments on this subject are analysed. Finally, the authors present their opinion on whether the constitutional amendments indeed improved the position of the public prosecutor's office

---

[*] Aleksa Nikolić is a Lecturer at the University of Belgrade Faculty of Law, teaching Constitutional Law in the first year of undergraduate studies. He is currently a PhD student at University of Belgrade Faculty of Law. His core academic areas are theory of federalism and human rights.

[**] Ivana Radisavljević is a Lecturer at University of Belgrade Faculty of Law, pursuing her PhD at the same University. Her field of research is Criminal and Misdemeanor Law, with focus on the criminal liability of legal entities.

This paper is a result of authors' work on the project "Contemporary problems of legal system of Republic of Serbia" (Savremeni problemi pravnog sistema Srbije), funded by The University of Belgrade Faculty of Law.

[1] *Low*, The Governance of England, 1914, p. vii.

A. Introduction – A few comments on the current constitutional situation in Serbia

The independence of the judiciary is a basic requirement for a well-organized state and a free society. It can only be guaranteed by the Constitution to ensure that it is free from the influence of the legislative and executive branches of government. However, the drafter of the 2006 Constitution left too much room to be filled, thereby allowing the legislature to influence the position of the judiciary through laws. The European Commission therefore pointed out the need for a reform in this field, since, *inter alia*, "Serbia does not provide sufficient guarantees against potential political influence over the judiciary".[2]

The subject of this paper is the analysis of the constitutional position of the Public Prosecutor's Office in the current Serbian Constitution of 2006, as well as in the proposed constitutional amendments. The position of the Public Prosecutor's Office is an extremely complex issue arising from its specific function, which is to enable the Prosecutor's Office, on the one hand, to perform its duties professionally within the scope of its competence, but also, on the other hand, to remain functional and comply with the principle of separation of powers in those States that adhere to and strive for this principle. Historically, the prosecution has emerged as a branch of government directly subordinate to the ruler. Unlike the judiciary, which today is characterized by a strict separation of the legislative and the executive branches, the prosecution remained relatively close to the executive in some countries. A comparative analysis of the regulations on prosecutors within the European framework shows that there are various solutions regulating the position of the prosecutor's office and its relations with other state authorities.[3] While some countries have opted for the subordination of the prosecution to the executive, others have positioned the prosecution as independent and autonomous from the other organs of government. However, when analyzing comparable solutions, we must take into account the level of developmental democracy in these

---

2 https://ec.europa.eu/neighbourhood-enlargement/serbia-report-2021_en (12/01/2022).

3 *OECD*, The Independence of Prosecutors in Eastern Europe, Central Asia and Asia Pacific, 2020, p. 20-27, https://www.oecd.org/corruption/The-Independence-of-Prosecutors-in-Eastern-Europe-Central-Asia-and-Asia-Pacific.pdf (05/05/2022).

countries, the exercise of fundamental human rights and the level of their protection, and within that, the position and role of public prosecutors. As Alan Watson once pointed out, "law is different from bread because in all its manifestations it is an element of the state – and hence, the transplanted rule is not the same thing as it was in previous home".[4]

The authors deal in particular with the position of the Public Prosecutor's Office in the Republic of Serbia, i.e., with the analysis of the principles of separation of powers, the manner of electing prosecutors, the procedure of their election, and the composition and importance of the High Prosecutorial Council. The main part of the paper is dedicated to the (normative) analysis of the constitutional norms regulating the position of public prosecutor's office – namely in Arts. 159–166 of the Constitution, as well as the proposed constitutional amendments No. XVII–XXIX. Finally, we will make a final assessment of whether, the revision of the Serbian Constitution has succeeded in fulfilling its purpose in normative terms and in deviating from the politicization of the public prosecutors' office.

B. Constitution of Serbia (2006) – The starting position

The current Constitution of the Republic of Serbia, like its predecessor, establishes the principle of separation of powers.[5] In contrast to the 1990 Constitution, which is characterized by a clear and precise formulation of this principle, the redrafting of Art. 4 of the Serbian Constitution can be seen as rather clumsy. Namely, in Art. 4. para. 2. it is prescribed that "the government system shall be based on the division of power into legislative, executive and judicial", and that, as stated in para. 3, the "relation between three branches of power shall be based on balance and mutual control". Finally, in para. 4. it is pointed out that "judicial power shall be independent". The obvious contradictions made by the constitution-maker here are apparent even to the first-year law students. According to Nikolic "the independence of the judiciary should represent its separation from the other authorities, hence

4 *Watson*, Law out of context, 2000, p. 1.

5 Constitution of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006.

the phrase 'mutual control' must not refer to it in any way".[6] Furthermore, Petrov also pointed out that "the principle of checks and balances is a feature of the presidential system, and the system of government, according to the Constitution of Serbia from 2006 is, in essence – parliamentary".[7] Therefore, it seems to us that in order to start a fundamental and comprehensive reform of the judiciary, it is necessary to change Art. 4. para. 3. of the Constitution as follows: "the relationship between the legislature and the executive shall be based on balance and mutual control".[8]

The manner of election or appointment of public prosecutors is the "foundation" for prosecutorial independence. In order to ensure greater autonomy and depoliticisation of the election process, most comparable constitutional solutions provide for a specialized body (prosecutorial council) to participate in the election of public prosecutors, according to the principle of professional competence. Unfortunately, the constitutional norms provided for in the current constitutional solution failed to satisfy the elementary requirements of at least an apparent normative depoliticization of the judiciary.[9] Indeed, the Serbian Constitution provides in Art. 159 para 2–3 that the Public Prosecutor shall be elected by the National Assembly, on the Government proposal. The prosecutor's term of office is six years and he/she can be re-elected. In addition, the National Assembly, on the proposal of the State Prosecutors Council (SPO), elects the person who is voted into this position for the time as Deputy Public Prosecutor. The term of office of a Deputy Public Prosecutor who is elected to this position for the first time is three years (Art. 159 para. 5-6). However, Vesna Rakić-Vodinelić pointed out that „despite the fact that public prosecutors now have more power than ever before, the method of their appointment is even more subject to the influence of the legislative and the

---

6 *Nikolić*, Prilog raspravi o (ne)zavisnosti sudstva u Republici Srbiji, Hereticus 2021, p. 120.

7 *Petrov*, Izbor sudija uporedno i u Republici Srbiji – predlozi za promenu Ustava. in: Šarčević, Petrov (eds.), Sudije u pravnom sistemu, 2013, p. 59.

8 *Ibid*. For a similar view see. *Pajvančić*, Commentary of Serbian Constitution, 2009, p. 16-17.

9 Tanasije Marinković pointed out that, „although the substantive and structural independence are guaranteed in a complete and modern way, there are certain normative incoherencies which may pose a threat to the judicial independence". For details see. Marinković, *Serbia – International Encyclopaedia of Constitutional Law*, 2019, p. 138.

executive powers compared to the autocratic Milošević's times".[10] Ratko Marković agrees with this statement, noting that for "so-called new democracies [...] one of the non-negotiable conditions for their accession to the alliance of European countries has been the removal of space for the influence of political parties on the judiciary".[11] However, ignoring the SPO in the selection of prosecutors is also an inadequate solution. Therefore, it is necessary to change the constitutional decision on the election of public prosecutors and deputy public prosecutors, but also to reform the composition of the SPO in order to prevent normative manipulation and politicization of the judiciary.

The above-mentioned State Prosecutors' Office should be an important guarantor of the independence and autonomy of the prosecuting authorities. Its establishment as a constitutional category represents a good first impulse by the constitution-maker. Unfortunately, the election process for its members, as well as its role reflect all the uncertainty and ineptitude of the creator of the current constitution. Indeed, Art. 164. provides that the SPO shall be composed of 11 members, three of whom shall be *ex officio* (Public Prosecutor of the Republic, the Minister of Justice and the President of the portfolio committee of the National Assembly) and eight of whom shall be appointed by the National Assembly (six public prosecutors or deputy public prosecutors with permanent tenures, one of which shall be from the territory of autonomous provinces, and two distinguished and prominent lawyers with at least fifteen years of professional experience, one of whom shall be an attorney-at-law, and the other a professor of a Faculty of Law).

The aforementioned constitutional provision has loopholes. First, the composition of two of the three members per position is controversial. As an independent and autonomous body, the SPO should be free from political factors, i.e. political officials. Although in other countries and political systems there are representatives of the executive in judicial councils, it seems that in our case the membership of the Minister of Justice and the President of the competent committee of the

---

[10] *Rakić-Vodinelić/Knežević Bojović/Reljanović*, Judicial Reform in Serbia 2008-2012, 2012, p. 70.

[11] *Marković*, May Judges and Prosecutors think with their own heads?, in: Boljević (ed.), Testimony – Preparation for the Changes to the 2006 Constitution and the Legal Profession, 2018, p. 213.

National Assembly in this body is superfluous, especially if we take into account the "experience with judicial reform in the previous period".[12] Second, it is unclear why the constitution-maker envisages that one of the six prosecutors/deputy public prosecutors should be from the territory of the autonomous provinces, as such a "geographical" and not professional (merit-based) selection method is usually associated with the federal state, which the Republic of Serbia certainly is not. In addition, it is worth mentioning the phrase "respected and prominent lawyers", which is defined in one way when talking about election of members of High Judicial Council (HJC) and the SPO, but in a completely different way when it comes to the composition of judges of the Constitutional Court.[13] Ultimately, it appears that the drafter of the constitution unjustifiably strengthened the position of lawyers (who, along with law professors, are a constitutional condition for the election of "respected and prominent lawyers"). According to Slobodan Orlović, "the Constitution explicitly stipulates that holders of lucrative activity, lawyers, should be holders of office, unlike other prominent and reputable lawyers who have passed the bar exam, who are therefore discriminated and who are not lawyers", which is "completely unjustified".[14] Third, the SPO appears to be a body without "real content", as it has neither the formal nor the *de facto* power to elect prosecutors. Therefore, Goran Ilić concludes that "the constitutional definition of the public prosecutors' office testifies to the uninterrupted continuity of the influence of political power on the public prosecutor's office".[15] Apart from being sharply criticized by the domestic public opinion, the constitutional norms on the public prosecutors' office were assessed very unfavorably in the documents of international actors. With regard to the provision in the Serbian Constitution that provides for the election of public prosecutors on the proposal of the government and deputies on the recommendation of the SPO in the National Assembly,

---

12 *Marković*, Sa ustavne osmatračnice, Beograd, 2017, p. 210.

13 For more details about this topic see. *Petrov*, Istaknuti pravnik – poseban uslov za izbor sudija Ustavnog suda ili prazna ustavna norma?, NBP 2013, p. 49 et seqq.

14 *Orlović*, Stalnost sudijske funkcije vs. opšti reizbor sudija u Republici Srbiji, Annals FLB – Belgrade Law Review 2010, p. 183.

15 *Ilić/Matić Bošković*, Javno tužilaštvo u Srbiji – Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva, 2019, p. 146.

theVenice Commission points out that the model of parliamentary elections bears the risk of an "unjustified politicization of appointment".[16]

C. The constitutional amendments (2022) – The (unfortunate) ending point

Frequent criticism of the "political manipulation" of judiciary led state authorities to consider a further reform of the judiciary shortly after the adoption of the Constitution.[17] The National Assembly, on the basis of Art. 8. para. 1. of the Law on the National Assembly,[18] at its session held on July 1 2013 adopted the National Judicial Strategy, which emphasizes that judicial reform remains an important priority of the Republic of Serbia in order to improve the independence of the judiciary, the impartiality and quality of the judiciary, the professionalism, responsibility and efficiency of judiciary.[19] The main objective was to improve the quality and efficiency of the judiciary, to strengthen the independence and accountability of the judiciary in order to reinforce the rule of law, democracy and legal security, to bring the judiciary closer to the citizens and to restore trust in the judicial system. However, the first concrete steps towards creating an independent judiciary was an (unsuccessful) debate on constitutional amendments to the judiciary that took place in 2018.[20] The debate was resumed in 2021, after the members of Serbian parliament decided in June to adopt a proposal to amend the Constitution, and then passed the Law on Constitutional Amendment in November 2021.

---

16 Opinion on Venice Commission on the Constitution of Serbia, case 405/2006, CDL-AD (2007) 004, para. 77.

17 See. *Beširević*, "Governing without judges": The politics of the Constitutional Court of Serbia, International Journal of Constitutional Law 2014, p. 970.

18 Law on the National Assembly, Official Gazette of the Republic of Serbia, No. 9/2010.

19 http://www.parlament.gov.rs/upload/archive/files/lat/pdf/ostala_akta/2013/RS42-13Lat.pdf (13/01/2022).

20 For more details see. Boljević (ed.), Testimony – Preparation for the Changes to the 2006 Constitution and the Legal Profession, 2018.

The referendum was held on January, 16, 2022, and a narrow majority of 59,62% voted in favor of the proposed constitutional changes. However, in relation to the total number of voters, the percentage of those who voted 'yes" is much lower (about 18%). Therefore, we will refer to the analysis of constitutional amendments in relation to the public prosecutor's office, in order to discuss their normative quality.

The first amendment corrects the root of the problem of (in)dependence of the judiciary, the principle of separation of powers. Art. 4 para. 3. states that "the relationship between three branches of government shall be based on balance and mutual control", while the next paragraph, guarantees the independence of the judiciary. Although the new solution implies that the judiciary is no longer "controlled" by the other branches of power, we believe that a more appropriate solution would be to remove it completely from the equation and to rewrite the aforementioned paragraph as follows: "the relationship between legislature and the executive shall be based on balance and mutual control".[21] This would not fundamentally violate the spirit of the Constitution and would eliminate the inconsistency of Art. 4. para. 3. of the Serbian Constitution.

Art. 188. and Art. 159. of the Serbian Constitution are replaced by Amendments No. XX and XXI which regulate the manner of election of public prosecutors, as well as the Supreme Public Prosecutor. Indeed, the drafter of the constitution made a small step forward by changing the norm according to which prosecutors were elected by the National Assembly. Public prosecutors are now elected by the former State Prosecutors' Office (SPO), which has been renamed to High Prosecution Council (HPC). Another improvement is the abolition of the function of deputy public prosecutors. However, when it comes to the Supreme Public Prosecutor, apart from the stylistic change of name (formerly called the Public Prosecutor of the Republic), nothing significant has been done. The constitutional amendments also provide that the Supreme Public Prosecutor be elected by the National Assembly, but upon the proposal of the High Prosecutorial Council, which was not the case before.

It seems important to mention Amendments No. XXIV and No. XXV. In the first case, the name of the former SPO is changed; in the second

[21] *Nikolić*, (fn. 5), p. 123.

case, its composition is completely redefined. The new constitutional solution provides that the role of the High Prosecution Council (HPC) is to elect public prosecutors and chief public prosecutors, to terminate the function of public prosecutor and to propose the Supreme Public Prosecutor to the National Assembly. As far as the composition of the HPC is concerned, at first glance everything looks the same as in the Constitution of Serbia of 2006 – there are still 11 members in this body. However, their function, i.e. legal nature, is completely different. The HPC now consists of five public prosecutors elected by the chief public prosecutors and prosecutors, four respected and prominent lawyers elected by the National Assembly, as well as the Supreme Public Prosecutor and the Minister of Justice. This is essentially a big step backwards in building an independent Public Prosecutors' Office. Indeed, we can justifiably ask the following questions: How does the HPC make its decisions? In what way? By what majority? We believe that the biggest trap for the possible politicization may lie in these questions. What if prosecutors are outvoted by respected and prominent lawyers and others? Does this norm only conceal a facade democracy, in which everything is seemingly transparent and essentially everything is already known? The drafter of the Constitution should have simply recognized the importance of these issues and placed them in *materia constitutionis*, rather than leaving the elaboration and specification to some future Law on Public Prosecutor's Office. In addition, the Venice Commission, in its latest opinion, expressed concern over the selection of HPC members. The Venice Commission states that "a majority in the HPC will act under the hierarchical control of the Supreme Public Prosecutor, who will also sit on the HPC. Equally, six out of 11 members of the HPC will be political appointees: four would be elected by the National Assembly, the Supreme Public Prosecutor is elected by the National Assembly (even if by qualified majority), and the Minister of Justice is a political figure".[22] The Commission notes that *ex officio* members should be removed from the HCP, in order to reduce the influence of politics on this body.[23]

[22] Urgent opinion on revised draft constitutional amendments on the judiciary, Venice Commission, No. 1027/2021, 1067/2021, CDL-PI (2021) 019, para. 28.

[23] *Ibid.*

D. Conclusion

Although the constitutional amendments may seem like a small step towards depolarizing of the public prosecution, a closer analysis shows that not much has been done to essentially establish this organ as an independent body. Despite the fact that prosecutors will now be appointed by a professional body, and not by the National Assembly, the composition of the HPC reveals that this organ is still vulnerable to political influence.[24] The majority of the members (six out of eleven) are, in essence, chosen by the parliament (respected and prominent lawyers and the Supreme Public Prosecutor directly, and the Minister of Justice indirectly). This shows that prosecutors are still essentially elected by a state body with a predominantly political nature.

Furthermore, the Supreme Public Prosecutor, elected by the National Assembly, can issue a binding instruction to other public prosecutors, which makes it possible to legally impose the potentially political will also on those prosecutors who have not been elected (at least declaratively) by a political body and whose work should be removed from political influence.

From all this, it can be concluded that the constitutional amendments in the domain of public prosecutor's offices, whether intentionally or not, remain a missed opportunity to improve upon its legal position. The public debate on constitutional amendments revolved mainly around the position of the judiciary, while warnings and constructive proposals heard from experts in the field of constitutional law were overlooked. A beacon of hope could be seen in the future Law on Public Prosecution, but given the experience with previous reforms, there is not much reason to expect that the situation of the public prosecution will improve in the near future.

[24] https://verfassungsblog.de/paper-constitutionalism (14/02/2022).

Artificial Intelligence Administrative Systems Effect on Good Governance and Human Rights in the Western Balkan Countries

Erlir Puto[*]

Abstract

Artificial Intelligence (AI) is producing different administrative systems substituting human activity until the point of automated decision-making (ADM).[1] *Serious problems can be encountered in case such software is directly or indirectly involved in producing administrative decisions. Automated decision-making systems remain a concern in many European Union (EU) countries* with regard *to their impact on good governance and human rights protection.*[2] *Artificial Intelligence can easily spread into the administrative systems of every country. At the same time, risks to good governance and human rights protection will rise especially in those countries where good administration and human rights remain a challenge. Software systems replacing human activity in public administrations of Southeast Europe (SEE) countries have already been used with great enthusiasm as effective anticorruption tools. The way such software is able to auto-correct itself in case of an unexpected situation remains emblematic.*

---

[*] Erlir Puto is a professor in charge of Administrative Law at the Faculty of Law, Tirana University with the main research focus on Administrative Procedures, Public Institutions, and Administrative Judiciary.

[1] Definition of ADM - Automated decision-making concerns decision-making by purely technological means without human involvement. - James Larus, Chris Hankin, Siri Granum Carson, Markus Christen, Silvia Crafa, Oliver Grau, Claude Kirchner, Bran Knowles, Andrew McGettrick, Damian Andrew Tamburri, and Hannes Werthner. 2018. When Computers Decide: European Recommendations on Machine-Learned Automated Decision Making. Technical Report. Association for Computing Machinery, New York, NY, USA, pg. 4.

[2] Algorithm Watch - Automating Society 2020 reports – Country issues Germany, France, Italy, Switzerland & Spain. https://algorithmwatch.org/en/automating-society-2020-country-issues/ pg. 168.

A. Introduction

In modern states, public administration is organised in a system of institutions based on a horizontal hierarchy that extends vertically over the entire territory of a country and serves the entire population. This institutional public system should constantly provide a large number of public services, most of which are repetitive and standardized over the years. Such a large-scale activity generates a large amount of data that affects the lives of individual persons. New systems for automated public decision-making are evolving in many ways, from simple self-service information systems to more advanced decision-making systems.[3]

If some of these processes would become automated, there would be a lot to gain in terms of time, costs, and efficiency. Properly connected to these interests and benefits, Artificial Intelligence (AI) is producing various administrative systems that replace human activity until the point of Automated Decision Making.

Certainly, the software can be very helpful in public administrative activity. On the other hand, we can come across serious problems when such software is directly or indirectly involved in producing administrative decisions without a case-by-case human evaluation.

These systems use algorithms, which are processes that set rules to be followed in calculations or other problem-solving operations.[4] By using algorithms, a computer can process big amounts of data in less time and at less cost than a human can. Such activity can remain at the level of supporting human decision-making or even go beyond this. The increased availability of information, and advanced computation power to process such information, produce benefits for decision-making. However, integrating technological solutions into decision

---

3 Annika Andersson, Karin Hedström, Elin Wihlborg, in Automated Decision-Making and Legitimacy in Public Administration Work in Progress J Presented at Scandinavian Workshop on Electronic Government (SWEG 2018), Copenhagen, Denmark, Jan. 31-Feb. 1, 2018.

4 Oxford Language English Dictionary definition for 'algorithm'.

making procedures risks introducing potential dysfunctions, diminishing individual rights, and reducing accountability.[5]

However, it must be emphasized, that AI should only be a tool supporting decision-making, and should never replace humans or relieve them of responsibility and accountability for the decisions they make. Responsibility and accountability remain fundamental principles of administrative law and are crucial factors in ensuring human rights and good governance. All AI-based decision-making processes require comprehensive legal regulation and preventive safeguards in the form of provisions permitting the use of automated decision-making.[6]

The increasing use of automated systems for decision-making and decision support in public administration is therefore leading to new practices and challenging public values in new ways.

B. Reasons and Aims of the EU Normative Intervention

There are various definitions of Artificial Intelligence based on research at the European or international level. The European Commission (EC) in its Communication on AI for Europe[7] provided the first definition of AI:

"Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g., voice assistants, image analysis software, search engines, speech, and face recognition systems) or AI can be embedded in hardware devices (e.g., advanced robots, autonomous cars, drones or Internet of Things applications)".

---

5 Herwig C.H. Hofmann, "An Introduction to Automated Decision-Making (ADM) and Cyber-Delegation in the Scope of EU Public Law INDIGO Project - 1st scientific workshop 4 June 2021 Working paper.

6 Aleksandra Monarcha - Matlak, Automated decision-making in public administration, Procedia Computer Science, Volume 192, 2021, Pages 2077-2084.

7 Communication of the Commission on AI for Europe, COM (2018), pg. 237 final, p. 1.

This definition was further developed by the High-Level Expert Group in its publication Ethic Guidelines on Trustworthy AI[8] which stated that:

"Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data, and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions".

Automated decision-making systems remain a concern for public authorities in terms of their impact on good governance and human rights protection. Specific legal requirements are necessary for programming such an automated system. Various EU member states have already defined certain legal criteria for the use of AI in their internal systems. From the perspective of the EU Institutions, there are several legal documents dealing with this new technology. In February 2020, for example, the "White Paper on AI – A European approach on excellence and trust" was issued. According to this document, "… AI can have a major impact on our society and the need to build trust, so it is vital that European AI is grounded in our values and fundamental rights such as human dignity and privacy protection".[9]

Additionally, the documents state that the EU Commission supports a regulatory and investment-oriented approach, with the twin objective of promoting the adoption of AI and addressing the risks associated with certain applications of this new technology. The White Paper aims to identify policy options to achieve these objectives. The Commission invites the Member States, other European institutions, and all stakeholders, including industry, social partners, civil society organisations, researchers, the public in general, and all interested parties, to contribute to the Commission's future decision-making in this area.[10]

---

8 High Level Expert Group, in the Glossary of the Ethic Guidelines on Trustworthy AI.

9 White Paper on Artificial Intelligence - A European approach to excellence and trust paragraph 4 of the Introduction Chapter. Brussels COM (2020), pg. 65.

10 *Ibid.,* paragraph 5, Paper Entry.

It was not until April 2021 that the European Commission published a proposal for a Regulation establishing harmonised rules on Artificial Intelligence (Artificial Intelligence Act).[11] The rationale and objectives of this proposal remain focused on the technological benefits of new technologies developed and operating in accordance with the values, fundamental rights, and principles of the European Union.[12]

The key element of a future regulatory framework for AI in Europe will be the creation of a unique 'ecosystem of trust'.[13] To do so, it must ensure that EU rules, including those protecting fundamental rights and consumer rights, are respected for AI systems that pose a high risk. Building an ecosystem of trust is a policy objective in itself and should give citizens the confidence to use AI applications and give companies and public organisations the legal certainty to innovate using AI.[14]

C. EU General Data Protection Regulation

The EU General Data Protection Regulation 2016/679 (GDPR) remains the most prominent legal act dealing with AI usage at a European level. It refers to the Automatic Decision-Making legal effects by specifying in Article 22 (1) that "the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her". This provision essentially states that ADM is not permitted, or at least it cannot have any legal effect on third parties.–On the other hand, the same article in point 2 recognises some effects to the ADM in three specific cases:

a. the decision "is necessary for entering into, or performance of, a contract between the data subject and a data controller";

b. "is authorised by the Union or Member State law to which the controller is subject, and which also lays down suitable measures to

---

11 EU Commission Proposal of, 21.4.2021 for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts.

12 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206

13 White Paper (Fn. 9), paragraph 9, Introduction Chapter.

14 *Ibid.,* paragraph 9, Introduction Chapter.

safeguard the data subject's rights and freedoms and legitimate interests"; or

c. "is based on the data subject's explicit consent"

Therefore, in principle, we can join Malgieri[15] in stating that in the case of a "decision based solely on automated processing, including profiling, individuals enjoy two distinct sets of protection:

1. The right to know the existence of such processing and to obtain meaningful information about its logic, significance, and consequences.

2. The right not to be subject to such processing, except in specific cases (pre-contractual or contractual context, explicit consent of data subjects, Member States or EU law exemptions) where other appropriate safeguards must be provided, such as (at least):

i. the right to obtain human intervention from the controller;

ii. the right to express his or her point of view;

iii. the right to contest the decision;

iv. eventually, the right to "obtain an explanation of the decision reached after such assessment".

D. National Normative Toward Artificial Intelligence

The use of AI in the public administration of individual countries and the resulting probable impact on the creation of ADM on behalf of public authorities is prevalent worldwide and is very common in well-developed countries. Due to their economic and technological advancement, EU member states are at the top of the list where the use of AI in public administration is concentrated.

Being predominantly substantive rather than procedural, EU law has been much less concerned with regulating the impact of AI on administrative activities. It differs from its Member States' legislation, which provides specific legal provisions on how their public authorities

[15] Gianclaudio Malgieri, "Automated decision-making in the EU Member States: The right to explanation and other "suitable safeguards" in the national legislations", in Computer Law & Security Review, Volume 35, Issue 5, October 2019, Vrije Universiteit Brussel, Pleinlaan 2, 1020 Brussels, Belgium, pg. 2.

should be organised and deal with algorithmically automated processes during their administrative activity.

At this point, we must distinguish that the regulatory activity of the EU is inspired by different goals and means than those of its Member States. The EU's legislative activity focuses on issues such as the achievement of a single free market and related issues, while its member states are interested in the efficiency of public administration and political support. This is why many more legal provisions dealing with AI systems can be found in the internal law of EU member states than in EU law.

On a Member States level, administrative decision-making is closely linked to the general administrative provision of the exercise of power. As a general ruling principle of administrative law, a legitimate exercise of power may be realised only by clearly identified representatives of the public authority. Being a representative of the public authority means that the law should grant such a role to a person (a public official or similar) acting on behalf of such a power. The law cannot authorise a computer to exercise public power. If nowadays humans cannot work without an algorithm, the algorithm cannot work without a human either.[16]

The law may therefore need to develop some procedures to ensure that designated decision-makers can demonstrate that they have not simply given effect to an automated system's decision without the appropriate level of human intervention. Where a decision-maker has discretionary authority, they should consider individual circumstances when exercising discretion, make each decision based on its merits rather than adopting a one-size-fits-all approach, and be prepared to deviate from policies or guidelines where appropriate. Otherwise, they may have acted unlawfully by limiting their discretion.[17]

---

[16] Domenico Dalfino; Decisione amministrativa robotica ed effetto performativo. Un beffardo algoritmo per una "buona scuola" published in: Questione Giustizia - https://www.questionegiustizia.it/articolo/decisione-amministrativa-robotica-ed-effetto-performativo-un-beffardo-algoritmo-per-una-buona-scuola_13-01-2020.php

[17] Jennifer Cobbe, - "Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making, by Published 1 December 2019, Political Science, Legal Studies, pg. 19.

With respect to the above-mentioned issues, we can state that the issue of ADMs is essentially based on general administrative law provisions in countries like Germany, Italy, Poland, etc. On the other hand, countries such as France and Spain have begun to enact specific legal requirements for ADM control.

In Germany[18] and Italy, there is no specific regulation and no formal definition for ADM in service of public administration or for the private use of ADM.[19] In any case, various court decisions have dealt with similar problems. According to the Courts, it is essential to point out the need for various criteria to be applied in the designation of software and, in particular, the need for human decision-making in connection with the principle of responsibility.[20]

In Poland, analysis of the Policy for Development of Artificial Intelligence shows that automated-decision making has been treated rather superficially. It can be concluded from this that, despite the use of AI in public administration, there is still a lack of recognised standards and appropriate regulations.[21]

In France, the Law "On a Digital Republic" [22] of 2016 provides that any citizen can request to see the underlying rules of an algorithm used to create administrative decisions. However, since the law came into force in 2017, only a minority of algorithms have been made public. Although results have been limited, administrators are confident that transparency will be enforced. In the meantime, the situation has changed with regard to the same legal provisions. As of July 1, 2020, any decision made under a closed, non-transparent algorithm will be considered null and void.[23]

---

18 https://ai-watch.ec.europa.eu/countries/germany/germany-ai-strategy-report_en#ecl-inpage-275

19 Algorithm watch report on Italy - Automating Society 2020 – Country issues Germany, France, Italy, Switzerland & Spain

20 For specific details please refer to the Italian Council of State (Supreme Administrative Court in Italy), section. VI, 13 December 2019, no. 8472, and Decision of Council of State, section. VI, 8 April 2019, n. 2270.

21 Aleksandra Monarcha-Matlak, (Fn. 6), pg. 2077-2084.

22 Law n° 2016-1321 of 7 October 2016 "Pour une République numérique".

23 https://automatingsociety.algorithmwatch.org/wp-content/uploads/2021/02/Automating-Society-Report-2020-Edition-francaise-Feb-2021.pdf

In Spain, automated administrative action has been defined and regulated by law,[24] with specific obligations related to monitoring and quality control, including the audit of the IT system and the code generated by such software. Spain also has a law on access to information.[25] However, such laws aside, there is only a very limited amount of detailed information about their ADM systems.[26]

In taking a different approach, the Swedish National Audit Office in a report entitled "Automated decision-making in public administration – effective and efficient, but inadequate control and follow-up Summary and recommendations",[27] shows that it is common for official decisions to be made by computers. In most cases, this leads to increased efficiency and legal certainty, but not always. Errors that occur can have significant consequences for individuals and weaken the trust in public administration. The general conclusion is that automated decision-making by public authorities has led to greater effectiveness and efficiency, and that fundamental aspects of legal certainty have been improved to some extent. However, agencies demonstrate deficiencies in processing cases with a high risk of fraud and error. In addition, there is far too little control over the correctness of automated decisions. There is therefore a risk that resources for manual control and follow-up are too often underestimated. There are also shortcomings in the division of responsibilities for automated decision-making processes, and a lack of clear and readable documentation of the automated process.[28]

E. Artificial Intelligence in Hybrid Democracies

Artificial Intelligence can easily spread into the administrative systems of every country. At the same time the risk to good governance and the protection of human rights increases. In the EU member

---

24 Law 40/2015, of 1st of October, "Régimen Jurídico del Sector Público".

25 Law 19/2013, of 9 December, "De transparencia, acceso a la información pública y buen gobierno".

26 https://automatingsociety.algorithmwatch.org/wp-content/uploads/2021/02/Automating-Society-Report-2020-Edicion-en-espanol-Feb-2021.pdf

27 https://www.riksrevisionen.se/download/18.78abb6c61764bda823b5a3a1/1608291082190/RiR_2020_22_en-GB.pdf

28 Ibid

states, it is perceived that AI can pose a real risk for human rights abuses. The same risk is considered much more problematic in countries where good governance and protection of human rights continue to be a challenge.

AI can spread much faster than democracy and good governance principles. A potentially abusive instrument for human rights is adopted in countries where human rights are not effectively protected.

In February 2017 "Scientific American" Review published a special issue, which revolved around the question: 'will democracy survive big data and artificial intelligence'.[29] According to the issue, humanity is undergoing a profound technological transformation, and the advent of large-scale social and behavioural automation will transform how human societies will be organized and managed.[30]

Modern bureaucracy, at least as defined by Max Weber, is the ideal candidate for an algorithm-based, automated habitus:[31] "Bureaucracy is an organisational structure that is characterised by many rules, standardised processes, procedures and requirements, number of desks, meticulous division of labor and responsibility, clear hierarchies and professional, almost impersonal interactions between employees".[32]

Indeed, AI can solve some of the most chronic dysfunctions of the state, such as corruption, inefficiency, and ego politics. It can offer an efficient centralized response to a multitude of citizen requests. With such a significant source of automated power and minimized human influence, some states could use AI as a guardian of increased totalitarianism. Moreover, already pre-existing problems with AI transparency and code accountability will be even more relevant through ADM processes, as biases in programming will have a disproportionate

[29] Dirk Helbing, et al., Will democracy survive big data and artificial intelligence, Scientific American 25 (2017).

[30] H. Akın Ünver, Artificial Intelligence, Authoritarianism, and the Future of Political Systems Author(s): Centre for Economics and Foreign Policy Studies (2018), pg. 5.

[31] Ibid.

[32] Max Weber, The Vocation Lectures, ed. David Owen and Tracy B. Strong, trans. Rodney Livingstone Indianapolis: Hackett Publishing Company, Inc., 2004, pg. 179.

effect on administration as errors are amplified by the sheer volume and size capacities of algorithmic decision-making.[33]

In countries such as those in the Western Balkans, which are characterised by forms of hybrid democracy[34], the main democratic issue is not the existence of a multiparty system, general freedom of the press, freedom of speech and thought, or even the transfer of power between different political groups. The most common–democratic problems in the Western Balkans are weak rule of law, corruption, lack of independent judiciary and institutional transparency, and inefficient public administration.[35] Myriads of simple life experiences remain, including a large number of systematic 'small' abuses in the administration, that create a greater lack of trust in the institutions and the democratic system as a whole.[36]

Software systems that replace human activity in the public administrations of Southeast Europe countries have already been used with great enthusiasm as effective anti-corruption tools.[37] According to this anti-corruption logic, human civil servants would have no possibility to interfere with software activity, preventing them from abusing it with their corrupt intentions". Despite serious doubts about their anti-corruption effects, the way in which such software would be able to-correct itself in the event of an error or an unexpected situation remains emblematic. The same autocorrection would have been much easier in the case of human activity and direct decision-making by humans.

The development of E-government was further incentivized by COVID-19, and many agree that this global disaster has positively

---

33 H. Akın Ünver, (Fn. 30).

34 Freedom House Report for 2022 https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule and for 2021 https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege.

35 General Secretariat of Council of the EU, Joint Conclusions of the Economic and Financial Dialogue Between the EU and the Western Balkans and Turkey, Brussels, 2016.

36 Bieber, F. (2020). Challenges of Democratic Consolidation. In: The Rise of Authoritarianism in the Western Balkans. New Perspectives on South-East Europe. Palgrave Pivot, Cham. https://doi.org/10.1007/978-3-030-22149-2_2.

37 Muçollari, Oriona, Anti-corruption strategies versus public services and good governance in Albania. Jindal Global Law Review 9, 93–107 (2018), pg. 95.

stimulated digitalization like nothing before it.[38] Each country in the region has established an e-government portal where they display their services.

While these services are important, the crucial factor in the digitalization of government services is that other ministries, departments, and agencies contribute to and digitize services specific to their mandates, which underscores their strategic focus on digital transformation.

E-services developed in the Western Balkans are regularly included in the EU e-government benchmark reports,[39] since their participation in the survey in 2018. The reports assess e-government by four key dimensions: User Centricity, Transparency, Key Enablers, and Cross-Border Service.

The Western Balkan countries offer almost the worst e-government services in Europe, according to the EU benchmark reports.[40] There is a big gap between the four Western Balkan countries[41] which scored 43% on average and the rest of Europe which scored 71%.

From the user-centricity aspect, i.e., the extent to which the government provides and designs services with user needs in mind, the Western Balkan countries score significantly better, with an average score of 70%. However, other countries are also performing better in this aspect[42].

The gap between Western Balkan countries and the rest of the EU is even wider when compared to other benchmark aspects: they scored only 40% on the transparency of services. Regarding the key aspect related to authenticity, the region is even worse with 35%, while

---

38 Nikola Babic, Helvetas Mosaic winter 2021 – 2022. Is the Digital Revolution the Balkans Big Chance?.

39 https://op.europa.eu/en/publication-detail/-/publication/333fe21f-4372-11ec-89db-01aa75ed71a1/language-en /format-PDF/source-258982862.

40 Nikola Babic, (Fn. 38).

41 Albania, Montenegro, North Macedonia, Serbia.

42 European Commission, Directorate-General for Communications Networks, Content and Technology, eGovernment benchmark 2021: entering a new digital government era: country factsheets, Publications Office, 2021, https://data.europa.eu/doi/10.2759/485079.

the average is 65%. The cross-border availability of services in the region is the worst aspect, with only 22%[43].

Regarding the abovementioned data, there is a strong difference between Southeast European countries and the EU member states. In a hybrid democratic State, the focus of the government is not on human rights and public services efficiency. What is missing from the ideal concept of democracy in this type of country is the absence of an effective legal remedy.[44] These structural problems, if combined with limited capacity in software programming, and a continuous endemic structural incapacity of Institutional systems to provide solutions (they do not have an institutional solution on how to provide solutions), can sometimes be very problematic. How can an average person identify and explain (for example to a judge) abuse of his rights inside a software? Who will be able to give him a remedy? How can a judge identify abuses from software? Despite the case of an internal effective system of software self-correction initiatives within the public administration, no one else can be able to identify and claim the imperfections of software.

This brings us to another issue. How interested can an employee in public administration be in identifying the problem or the ADM abuses? The computer says no![45] That's the only solution they have. These kinds of situations may become much more problematic if there is a lack of an effective remedy for administrative complaints and the judiciary does not intervene quickly.[46]

As mentioned above, according to EU institutions, "the most commonly shared issues within the Western Balkans are weak rule of law, corruption, lack of independent judiciary and institutional

---

43 Nikola Babic, (Fn. 38).

44 Aurela Anastasi, Reforming the Justice System in the Western Balkans. Constitutional Concerns and Guarantees Workshop No. 18, of the 10th World Congress of Constitutional Law (IACL-AIDC); 2018 SEOUL 18-22 June 2018, pg. 5.

45 The UK Comics series Little Britain, has produced a funny sketch describing the comic result of such a situation, called "The computer says no", https://www.youtube.com/watch?v=0n_Ty_72Qds.

46 In a continuous multi-year reform of the Albanian Judiciary, there is a systematic lack of judges for around 5 years. As the main focus is given to criminal cases and their related limited time to be judged, the lack of civil and administrative judges has produced a big number of unjudged cases. What would be the fate of those lack of programming little abuses, can be easily imagined.

transparency, and inefficient public administration".[47] Referring to the previously posed questions, we cannot be optimistic if the guarantee of protection against ADM abuse is the public institutions that suffer from "... a weak rule of law, corruption, lack of independent judiciary and institutional transparency, and inefficient public administration". The real concern is that such a problematic institutional framework combined with automated decision-making provides the basis for systematic voluntary or involuntary abuse, which can constantly happen to large numbers of people in secret ways or at least hidden in mostly indecipherable algorithmic formulas.

The result of all this leads us to the conclusion that AI is not the problem in itself. It is not the cause of the problems outlined above, but it may be the mean by which the structural problems of the entire system can be abused.

F. Conclusions

Artificial Intelligence has produced huge benefits to humanity in a lot of fields. There is no other period in world history that can be compared to the progress of the modern era. The list of sectors where electronic technology has led to a much better level of service would be long indeed. We would never be able to produce such an exhaustive list.

On the other hand, not everything can be replaced by a computer. There are many areas where humans have more advantages than computers. For example, it would be more attractive to watch Champions League football match than to play it on a computer. In other words, according to Unver's conclusion, "The biggest trap in techno-optimism is the mistaken belief that all forms of expertise can be translated into other domains; that a skilled engineer can perfectly transfer its set of skills into non-engineering domains. This is the pitfall that most computer scientists fall into when devising algorithms for social purposes: human behaviour can be quantifiable, details of human actions can be measured through proxy data and human customs,

47 General Secretariat of Council of the EU (Fn. 35).

protocols, and procedures that were shaped across centuries are inherently inferior, or irrelevant to the power of technological progress."[48]

When we were discussing at the beginning of this article, the definition given to Artificial Intelligence by the European Commission papers, there were some problematic concepts connecting AI to the public administration. We can identify some rather dubious relative terms, associated with a likely process of administrative procedure or administrative decision-making. Terms like 'intelligent behaviour, which is analysing their environment and taking actions with some degree of autonomy…'; "purely software systems acting in the virtual world…!!!". Administrative activity is certainly not a virtual activity. It cannot take decisions based on a virtual world.

If the foundations of constitutional and administrative law are the foundations of their entire system of public institutions, AI and its software are far from replacing them. Human history, human values, and human reasoning in every single case cannot be replaced by robots.

From a more juridical point of view, decisions taken by electronic systems should be considered as taken by a non-identified public authority. The lack of public authority in producing a decision makes such a decision *null* and *void*. Administrative decisions are taken only by an administrative authority represented by a single person or a group of persons (collegial body). A computer cannot express the public will under public authority. Each electronic system should be properly developed with effective autocorrection tools to avoid long-term electronic abusive activity. The benefits of using AI can easily turn into the opposite for those who use it inappropriately.

As we noticed above, real problems with ADM systems in public administrations have been raised in very developed and democratic countries like Sweden, Spain, France, etc. On the other hand, countries with active problematic issues in democratic institutions, are more exposed to negative consequences during the application of AI systems. This new problem should not be ignored. A problematic algorithm is much easier to hide, and on the other hand, it forms the perfect basis for massive human rights violations. In order to control such abuses, it is necessary to have a structural institutional system of software

[48] H. Akın Ünver, (Fn. 30), pg. 7.

supervising, professional public employees with a specific devotion to good governance and human rights protection. In fact, this idealistic institutional system is not the case in Western Balkan countries. ADM systems in hybrid democracies can easily be compromised by abusive instruments. What was intended to be a positive outcome of public management activity may in fact have the opposite effect.

ADM activity, transparency, and its impact should be constantly monitored and considered as a reference for evaluating democratic institutions. In Southeast European countries, concrete monitoring of ADM activities should be considered one of the key points in the EU Commission's annual progress reports on these countries Democracy hides in the secret spheres of algorithms.

Serbia's Corporate Law Integration with the EU: A Comparative Analysis with Luxembourg

Isidora Mitić[*]

Abstract

This paper presents a result of the comparative analysis of lex generalis which is regulating Company Law of the Grand Duchy of Luxembourg (in practice better known as the 1915 Law) and the Republic of Serbia (Company Act RS). The main task of this paper is to compare a specific set of legal provisions regulating Partnership as a legal form in both countries, the effect of this entity type, and its provisions on the national financial markets. This paper will contain legal standards set up by both countries and present the most common examples of a set-up of corporate structures seen in practice. The goal of this paper is to furthermore determine if the legal provisions of the Company Act of RS should provide specific attention to this legal form and if it could reflect a certain level of benefits to the financial market of the Republic of Serbia. Additional arguments will be raised on the topic of whether the legal provisions should be more flexible or not.

A. Introduction

Company Act[1] in the Republic of Serbia amended and restated its legal provisions most recently in 2022. In a way it had adopted some EU legislative frameworks as Serbia is on its journey of becoming a suitable candidate for EU membership. In the Company Act of RS, the

[*] Isidora Mitić, LL.M. is a Ph.D. candidate in her final year of studies at the Faculty of Law, University of Niš (Serbia), and a qualified lawyer with a Bar and Attorney exam in the Republic of Serbia. Since 2020 she is working in Luxembourg as a Legal Officer specialising in the establishment and maintenance of SIFs, RAIFs, and AIFs in the Grand Duchy of Luxembourg.

[1] Zakon o privrednim društvima ("Sl. glasnik RS", br. 36/2011, 99/2011, 83/2014 - dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019 i 109/2021).

Partnership (*sr. komanditno društvo* – k.d.[2]) as a legal form has been regulated. The provisions regulating Partnership are determined in the way that articles regulating the legal form of limited liability company – LLP (*sr. društvo s ograničenom odgovornošću* – d.o.o.[3]) shall apply to Partnership. There are some specific exceptions that are mainly linked to the partners and those specific provisions are applicable exclusively to this legal form.

On the other side, the Anglo-Saxon limited partnerships have been the "*go-to*" vehicle for the asset management industry, especially in the field of private equity (company ownership), real estate (loans), and debt (corporate bonds)[4].[5] The reasons behind this are: First, advantages of investor familiarity. Second, flexible vehicles free from corporate law overrides. Third, the maintenance of limited liability for investors. And finally, because of generally being treated as tax transparent so there is no tax leakage at the level of the fund.[6]

Influenced by the regulations prescribed in Belgian and French Company laws, the Luxembourg law of 10 August 1915 on Commercial Companies (*fr. loi du 10 août 1915 concernant sociétés commerciales,* going forward the 1915 Law) was drafted by a Belgian Professor. The initial version of the law was lacking provisions with a certain level of flexibility in their governing documents, as they had quite a vogue set of mandatory provisions.[7] A set of more flexible provisions was needed in order to enable Partnerships formed under the Law of Luxembourg to be equally attractive competitors to invest in other jurisdictions.

---

2 Art. 125 Company Law 109/2021.

3 Art. 139 Company Law 109/2021.

4 Elvinger Hoss Prussen, Legislation relating to commercial companies, Luxembourg, 2020, page 5.

5 Elvinger Hoss Prussen, Legislation relating to commercial companies, Luxembourg, 2020, page 5.

6 Inga Hardeck and Patrick U. Wittenstein, Assessing the tax benefits of Hybrid Arrangements — Evidence from the Luxembourg Leaks, National Tax Journal, June 2018, 71 (2), 296.

7 Adolfo Costantini, The cooperation between enterprises in the Italian legal system: a comparative analysis with the corporate forms provided by Luxembourg and France, dipartimento di giurisprudenza Cattedra di Diritto Privato Comparato, 2017, 85.

In 2013 Luxembourg used the opportunity to make provisions more flexible when implementing the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative InvestmentFund Managers (going forward AIFMD[8]) in its national jurisdiction. This Directive set a milestone and was the main initiator for all changes which followed this crucial change in the Fund sector. Thus, by implementing the national Law of 12 July 2013 on alternative investment fund managers ("going forward AIFM Law"[9]) Luxembourg has amended many key elements to make its corporate structures more attractive for future international businesses. Those changes and amendments had a snowball effect and were constantly followed by additional revisions of the 1915 Law in 2016, and 2020 and minor ones in 2022. Currently, they contain provisions that are expanding the structuring possibilities for businesses and investors to set the constitutional rules of their corporate structures established and governed under Luxembourg's 1915 Law.[10]

B. Basic principles of Partnerships in the two Commercial Codes

The standard of reciprocal trust (*intuitu personae*) between partners is the main base for the formation of partnerships (*fr. sociétés de personnes*), for a limited (*fr. Momentanée, de. Momentan)* or unlimited (*fr. Illimité, de. Unbegrenzt*) period of time.[11] This is also the reason behind

8 See at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0061.

9 Currently in the EU, more precisely as of the 2nd of August 2021 a new EU Directive (Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings) and Regulation (Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014) on the cross-border distribution of collective investment funds (the CBDF Directive and CBDF Regulation) are required to be implemented in EU Member States. Among other things, the new rules amend the existing EU Alternative Investment Fund Managers Directive (AIFMD) with the objective of harmonising the ability for EU alternative investment fund managers (AIFMs) to distribute alternative investment funds (AIFs) across the EU, including by introducing a new regime for "pre-marketing."

10 Eliane Theissen, Specificities of Luxembourg's private equity business, Louvain School of Management, Université catholique de Louvain, 2017, 8.

11 Art 310-1 of the Law of August 2016.

the strictly regulated (by the Law or/ and the articles of association) sale of shares to third parties, in order to avoid any unwanted new partner.[12] Both in Luxembourg's and Serbia's Commercial Codes a partner's death, withdrawal, removal, expulsion, dissolution, insolvency, or bankruptcy in principle results in the dissolution or liquidation of the Partnership as a corporate entity, unless otherwise stipulated in the LPA[13]. Therefore, it can be concluded that the trust between partners is built on their respect, which is in practice shown in a way that there can be no acceptance of a new partner or interest-holder (by paying preferred commitments/ capital commitments) without the provided consent (most commonly via Written Resolution/ Circular Resolution[14]) by the managers of the Partnership.

The Partnership is established with the incorporation deed which is in Luxembourg either Articles of Association (AoA) or Limited Partnership Agreement (LPA) which can be executed by private deed or the public in front of the notary, depending on the legal form. Under the Company Law of RS, Partnerships are established by the partnership agreement (*sr. osnivački akt*[15]) which is the equivalent of LPA or AoA of a Partnership in Luxembourg's 1915 Law. In both countries after the incorporation is finalized, the Partnership must be registered in the national Company Register, which is in Serbia Agency for Business Registers (*sr. Agencija za privredne registre* - APR[16]), and in Luxembourg, is the so-called Trade and Company Register (*fr. Registre de commerce et des sociétés* – RCS[17]). Thus, the incorporation process from the technical point is quite similarly regulated in both Countries.

---

12 Art 310-2 of the Law of the 10th August 2016.

13 Art. 600 – 10 of the law of 12 July 2013;

14 The name Circular Resolution came from the explanation of how it is performed in practice, as there is no meeting held, and the resolution is just being circulated between Managers in order to sign it.

15 Art 127 of the Company Law 109/2021.

16 See more on the website: https://www.apr.gov.rs/%d0%bf%d0%be%d1%87%d0%b5%d1%82%d0%bd%d0%b0.3.html.

17 https://www.lbr.lu/mjrcs-lbr/jsp/IndexActionNotSecured.action?time=1641734301547&loop=3 See more on the website: https://www.lbr.lu/mjrcs/jsp/webapp/static/mjrcs/en/mjrcs/legal.html?pageTitle=footer.legalaspect.

The main principles of Partnerships are common for both legislative acts, but there are plenty of differences between them. For example, in the recognition of different types and their benefits in the corporate structures, which are as a result limiting potential attractiveness to investors and businesses which could have a positive effect on Serbia's national financial market.

C. Legal forms of partnerships in Corporate Structures of Luxembourg and Serbia

In Luxembourg's Law of 1915, the Partnership or General Corporate Partnership **(***fr. société en nom collectif, de. offene handelsgesellschaft* – SENC*[18]*) is a commercial company that is an unlimited company (*fr. societe illimité*)[19] characterised mainly by the fact that the partners are jointly (*fr. solidairement responsible, de. gemeinsam verantwortlich*) and severally liable (*fr. solidairement responsible, de. gemeinsam verantwortlich),* to an unlimited extent, for all the company's commitments. This is the reason why the aforementioned trust among partners is crucial.[20] As defined by the law, to incorporate and establish a Partnership, one mandatory condition must be fulfilled, which is that it must be established by at least one Limited Partner (going forward LP) and one Unlimited Partner (which is also known in practice as a General Partner, going forward GP). They are both obliged to make contributions which can be made in cash, kind, or industry (sweat equity contributions)[21], that are made to admit the limited partner in the Partnership, in accordance with the terms and conditions set out in the incorporation act (AoA /LPA)[22]. An LP contributes a specific contribution amount constituting partnership interests which in turn correspond to the maximum amount of his liability. The liability of the GP on the other side is unlimited, joint, and several for all the obligations of the

---

18 Title II, Art 200 - 1 of the Law of the 10th August 2016, some articles are amended by the Law of the 5th December 2017.

19 Unlimited partnerships are governed by Article 200-1 (formerly article 14) of the Law, as well as by Articles 1832 and following of the Civil Code.

20 Art 100 – 8 point 1, Art 100 – 9, Art. 310 – 3, 320 - 4 of the Law of the 12th July 2013, Art 200 - 1 of the Law of the 10th August 2016.

21 Art. 310 / 1 (1) of the Law of the 10th August 2016.

22 Allen & Overy, The Luxembourg Partnership regime, Luxembourg, 2014, page 6.

common limited partnership[23]. Because of the unlimited nature of the GP's liability, it is most commonly incorporated as a limited liability company (*fr. société à responsabilité limitée* - S.à r.l., *de. Gesellschaft mit unbeschränkte Haftung* - GmbH) to protect its Shareholder(s).

The legislative framework of the Grand Duchy of Luxembourg makes a distinction between Partnerships (above mentioned SENC) that have or do not have a legal personality (*fr. la personnalité juridique, de. Rechtspersönlichkeit*). Thereby, partnerships which have legal personality are: (1) Partnership limited by shares (*fr. société en commandite par actions* – SCA)[24], (2) Common limited partnership (*fr. société en commandite simple* - SCS)[25], and the single type without legal personality is the special limited partnership (3) (*fr. La société en commandite spéciale* – SCSp).[26]

(1) Partnership limited by shares (*fr. société en commandite par actions, de. Die Société en commandite par actions* – SCA) is a commercial company, established by AoA[27], for a limited or unlimited period of time, by one or more shareholders (*fr. Actionnaires, de. Aktionäre/innen*) who are indefinitely and jointly liable for the obligations of the company and of one or more shareholders who only contribute a specific share capital[28] (*fr. capital social, de. Aktienkapital*).[29] The management of the company is carried out by the GP, or more specifically one or more Directors[30] (*fr. Directeur/Directrice, de. Direktor/Direktorin)* who can have limited or unlimited liability, and who may but need not to be unlimited partners, designated in accordance with the Articles[31] and

---

23 Title III, Art 310 – 1 to 310 -7 of the Law of the 12th July 2013, some articles are amended by Law of the 10th August 2016.

24 Title VI, Art 600 – 1 to 600 -7 of the Law of the 12th July 2013, some articles are amended by Law of the 10th August 2016.

25 Ibid (fn. 23).

26 Title II, Art 320 – 1 to 320 -9 of the Law of July 2013, some articles are amended by Law of the 10th August 2016.

27 The SCA is the only form of Partnership which is incorporated by an AoA, unlike SCS and SCSp that are established by LPA.

28 The SCA is the only form of Partnership whose share capital is divided by shares, unlike SCS and SCSp whose share capital consists of interest.

29 Art 600 – 1 of the Law of the 12th July 2013.

30 The SCA is the only form of Partnership in which managers are in practice called Directors.

31 Art 600 – 5, point 1, of the Law of the 12th July 2013.

incorporation deed (*fr. Constitution de societe*). It is important to note that managers who are not unlimited partners are liable in accordance with the article 441 – 9[32] of the 1915 Law's amendments made in 2013[33], as this type of partnership is a combination of features of a limited partnership (*fr. société en commandite simple* - SCS) with those of a public limited company (*fr. société anonyme* - SA)[34]. The form of fully paid-up shares can be: bearer shares[35], registered or dematerialized shares. Shares held by the GP may have priority rights, in general, all shares may be issued to the public. The transfer of shares in this legal form is freely transferable for limited and general partners[36].

Specifically, the Comercial Code has prescribed a minimum initial share capital (*fr. capital social minimum, de. Mindestgesellschaftskapital*) in the amount (or in the other currency equal to the amount) of EUR 30.000 which must be paid fully to the bank account of the partnership prior to its establishment. Therefore, making the contribution[37] in cash or kind (a report by a statutory auditor is required if a contribution in kind is made to the SCA[38]) is a fundamental condition for the incorporation (*fr. contrat de société, de. Firmenvertrag*) of this Partnership form.

---

[32] Directors, members of the executive committee and the chief executive officer shall be liable vis à vis the company in accordance with general rules of law for performance of the duties entrusted to them and for mismanagement. Directors and members of the executive committee shall be jointly and severally liable vis à vis the company and third parties for damages resulting from infringements of the Law or the articles of association of the company.

[33] Art 600 – 5, point 2, of the Law of the 12th July 2013.

[34] One may say that the SCA may be a useful legal form, with the intention of bringing together investors and entrepreneurs, as it is suitable for small and medium-sized family businesses (ownership may be transferred to a minor heir). One of the benefits is that it is set up in a way to enable the company to resist hostile takeovers.

[35] Art. 600-4 of the Law of 8 March 1989, Bearer shares are signed by the managers.

[36] Art. 430 – 4 of the Law of 6 April 2013

[37] Art 420 – 1, formally known as Art. 26 of the Law "The constitution of a public limited company requires: 1. that there is at least one partner; 2. that the capital is at least 30,000 euros; however, this amount may be increased by a grand-ducal regulation to be taken on the advice of the Council of State with a view to its adaptation either to variations in the national currency in relation to the unit of account, or to changes in European regulations."

[38] The statutory auditor (réviseur d'entreprises) is and external auditor from the list of CSSF – Financial Sector Supervisory Commission (Commission de Surveillance du

The second condition which is mandatory and must be fulfilled is that the SCA must be established by the GP and LP[39] via AoA. This legal form is established in front of the notary (*fr. acte notarié, de. Notarielle Urkunde*) via public deed which is also known as the Extraordinary General Meeting (EGM).

Finally, it must be registered on the RCS, where the incorporation deed is published in its entirety.

(2) Limited Partnership (*fr. société en commandite simple* – SCS[40], *de. Einfache Kommanditgesellschaft* – KG) is a common limited partnership that is a commercial company, entered for a limited or unlimited period, by one or more unlimited partners with unlimited and joint and

Secteur Financier), and which is not to be mistaken with the supervisory auditor (which is defined in the Art 600/7, of the Law of the 12th July 2013) and is actually an internal auditor. Therefore, the idea behind is that an audit by a statutory auditor supersedes the responsibility of the internal auditors and carries a broader mandate than the one granted to them.

39 Art 600 – 6 of the Law of the 12th July 2013.

40 Before the Amendments of the law, there were two previously existing forms of partnership: limited partnerships (Société en Commandite simple – S.E.C.S.) and Partnership Limited by Shares (Société en Commandite par Actions – S.e.C.A) whose successors are S.EC.S. and S.C.A. In the Limited partnership (S.E.C.S.) the limited shareholder is legally prohibited from participating in the management of the company. No minimum share capital is required. In principle, shares are not transferable unless the articles of association provide for otherwise. General partners have joint, several, unlimited liability. The S.e.C.S. is in principle fiscally transparent and is frequently used for international tax planning matters. See more at: Legal Guide to Forming a Corporation in Luxembourg, Noble & Scheidecker, March, 2008, available at: https://www.legal500.com/wpcontent/uploads/assets/legal500/images/stories/firmdevs/nobl11898/legal_guide_to_forming_a_corporation_in_luxembourg.pdf. The previously named form S.e.C.A was at the time a hybrid partnership with joint stock company and civil aspects, formed by two classes of shareholders, (i) the general partner(s) with unlimited, joint and several liabilities and (ii) the limited shareholders with limited liability. Its legal regime is quite similar to that of the S.A. but the management is reserved to the general partner. Except for provisions in the bylaws providing for the contrary, the veto right granted to the general managing partner allows an effective control over the management of such a company. This control may be relevant for listed companies by providing for an efficient mechanism against external takeovers. Legal Guide to Forming a Corporation in Luxembourg, Noble & Scheidecker, March, 2008, available at: https://www.legal500.com/wpcontent/uploads/assets/legal500/images/stories/firmdevs/nobl11898/legal_guide_to_forming_a_corporation_in_luxembourg.pdf.

several liabilities for all the obligations of the common limited partnership,[41] and one or more limited partners who only contribute a specific amount constituting partnership interests which may but need not be represented by investments as provided in the LPA[42].

The partnership can be incorporated in front of a notary with the public deed or established by a private deed simply by fully executing the LPA (short form or long form) between all partners (GP and LP). In practice, it is common that during the incorporation period, this type of Partnership may be established by a short form LPA, which is an incorporation document containing only the most important elements.

Once the SCS is formed, during the first close the Amended and Restated Limited Partnership Agreement (A&R LPA, which is in practice called the long-form LPA) supersedes the original or short-form LPA, which shall be of no further force or effect. The A&R LPA is containing more information on the form and substance of which has been mutually agreed upon by all the parties of the Agreement. Finally, once incorporated, within the deadline of 30 days, the Partnership must be registered on the RCS, to obtain the registration number (the B number) and to be publicly listed in the register. In the RCS, unlike for the above-mentioned SCA form, the incorporation deed/ LPA, won't be published in its entirety but only the short version (*fr. constat du constitution*).

After the registration, a deadline of 30 days will start for the registration of the UBO (Ultimate Beneficial Owner[43]), or if there are no UBOs in the structure, then an SMO (Senior Manager Official[44]) shall be registered, on the Register of Beneficial Owners (*fr. Registre des*

---

41 Title III, Art 310-1 to 310-7 of the Law of the 12 July 2013, some articles are amended by Law of the 10th August 2016.

42 Art 310-1 point 142 of Law of 23 August 2016 as a consolidated version of the Commercial Companies Act of 10 August 1915.

43 Physical or corporate individual or more, holding at least 25% of the assets in the Partnership. Thus, making him/her a significant owner.

44 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, Art 3, point 12: "senior management' means an officer or employee with sufficient knowledge of the institution's money laundering and terrorist financing risk exposure and sufficient seniority to take decisions affecting its risk exposure, and need not, in all cases, be a member of the board of directors;".

Bénéficiaires Effectifs - RBE[45]). This step became mandatory by the 5th EU Anti Money Laundering Directive and was initially embedded in the Luxembourg national Law by the Law of 12 November 2004, which was amended by the Law of 17 October 2010. Also, Luxembourg's national body Financial Sector Surveillance Commission (*fr. Commission de Surveillance du Secteur Financier* – CSSF) had brought many circulars and regulations in order to make sure that Luxembourg is acting in line with the EU law, the most important is the Regulation CSSF n12-02 of 14th of December 2010, which was recently updated on 14t August 2020 making the UBO information crucially transparent.

The share capital of Partnerships is not divided into shares but into interests (limited and unlimited, depending on the partner), the ratio of ownership between partners in practice is that GP owns less than 5% and LPs own more than 95% of the overall interest, for the decision-making purposes.

Transfer of shares is determinate by the terms and conditions in the LPA. If otherwise, in the absence of these provisions, any transfer (unless the transmission in case of death of a partner), any dismemberment, or any pledge requires the consent[46] of LPs[47]. Under penalty of nullity, ownership shares may only be transferred, subdivided, or pledged in accordance with the terms and conditions provided for in the partnership agreement[48].

(3) The special limited partnership (*fr. La société en commandite spéciale, de. Spezialkommanditgesellschaft* – SCSp[49]) was introduced to

---

45 https://www.lbr.lu/mjrcs-rbe/jsp/webapp/static/mjrcs/en/mjrcs-rbe/legal.html?pageTitle=footer.legalaspect.

46 For limited partners' ownership shares: transfers of limited partners' ownership shares for a reason other than death, subdivision or pledging, require the approval of the general partner(s); and for general partners' ownership shares: transfers of general partners' ownership shares for a reason other than death, subdivision or pledging, require the approval of the partners, who decide by majority vote representing three quarters of the ownership shares, and the approval of the general partners.

47 Art. 310 – 6 (1) Law of the 10th August 2016

48 Art. 310 – 6 (2) Law of the 10th August 2016

49 Title II, Art 320-1 to 320-9 of the Law of July 2013, some articles are amended by Law of 10 August 2016.

Luxembourg's 1915 Law by the Act of 12 July 2013[50] which was a consolidated version of the initial Commercial Companies act of 10 August 1915. This legal form was driven with the implementation of the Directive 2011/61/EU on Alternative Investment Fund Managers into Luxembourg's Company law. A more recent amendment that came into force in 2016[51] is defining this legal form as a type of Partnership which can be entered into for a limited or unlimited period. It must be incorporated by one or more unlimited partners with unlimited and joint and several liabilities for all the obligations of the partnership,[52] and one or more limited partners who only contribute a specific amount constituting partnership interests which may but need not be represented by investments as provided[53] in the LPA.[54]

Unlike other Partnership forms, the SCSp does not constitute a legal personality[55], thus is not considered to be a legal entity by nature[56]. Nevertheless, the company Law of Luxembourg recognizes that the Partnership incorporated in this form can (i) hold assets that are contributed or registered to his name (not to the name of the manager,

---

50 This amendment also brought some technical amendments concerning limited partnerships by shares and modernised the common limited partnerships.

51 Title II, Art 320-1 (formally known as Art. 22-1) to 320-9 of the Law of July 2013, some articles are amended by Law of 10 August 2016.

52 Art 441-9 of the Law of July 2013 „Directors, members of the executive committee and the chief executive officer shall be liable vis à vis the company in accordance with general rules of law for performance of the duties entrusted to them and for mismanagement. Directors and members of the executive committee shall be jointly and severally liable vis à vis the company and third parties for damages resulting from infringements of the Law or the articles of association of the company ".

53 As defined in Art 320-1 point 1, of the Law of 10 of August 2016.

54 La société en commandite spéciale est celle que contractent, pour une durée limitée ou illimitée, un ou plusieurs associés commandités indéfiniment et solidairement responsables des engagements sociaux, avec un ou plusieurs associés commanditaires qui n'engagent qu'une mise déterminée constitutive de parts d'intérêts, représentée ou non par des titres, conformément aux modalités prévues par le contrat social.

55 Art. 320-1 point 2 of the Law of 10 of August 2016.

56 Art. 320-1 point 2 of the Law of 10 of August 2016.

not partners)[57], and (ii) can represent itself in front of the court[58] (unless otherwise defined in the provisions of the LPA for such situations).

The share capital of the SCSp consists of pooled assets, contributions made (i) in kind, (ii) cash or (iii) industry (ie. sweat equity contributions), that are mandatory to be made for partners to be admitted as investors of the SCSp[59]. The contributions made other than a transfer of interest, including admission of new partners, shall be made in accordance with the conditions and formalities provided in the LPA[60]. The partnership may issue debt instruments[61]. The contributions made to the Limited Partners (partnership interest) may be represented by securities, but in case they are not secured, they can be represented by the Partner's account (*fr. comptes d'associés*)[62]. Transfer of shares is prescribed by law in the exact manner as for the above SCS[63].

The SCSp can be established in front of the notary by means of a public deed or incorporated via a private deed, by simple execution of the short or long-form LPA by all parties. Upon its incorporation, the SCSp shall be restarted on the RCS and RBE registers, where the mandatory information is publicly available and transparent.

There are specific provisions applicable to the SCSp and relating the tax treatment advantages, transparency of corporate documents including annual financial statements, in case incorporated as an AIF possibility to be excluded from VAT[64], etc. Additionally, both limited partnerships are not subject to a specific regulatory status. It is possible to use these structures to set up regulated, as well as unregulated vehicles. The last two also limited Partnerships, which are specific as

---

57 As written in Allen & Overy, The Luxembourg Partnership regime, Luxembourg, 2014, page 15 "[..] the assets contributed to the SCSp are exclusively reserved for the creditors whose claims have arisen in connection with the creation, operation or liquidation of the SCSp.".

58 Art. 320 – 8 of the Law of July 2013.

59 Art. 320-1 point 3 of the Law of 10 of August 2016.

60 Ibid.

61 Art. 320-4 point 3 of the Law of 10 of August 2016.

62 Allen & Overy, The Luxembourg Partnership regime, Luxembourg, 2014, page 6.

63 Art 320 – 7 of the Law of July 2013.

64 Also applicable to SCS legal form.

they are not the subject of a specific regulatory status, thus they can be used to set up both regulated and non-regulated vehicles[65].

D. Types of Partners in Partnerships

As mentioned before, both the Company Act of Serbia and 1915 Law recognize two types of partners (either a physical person or a legal person) which are mandatory to be admitted to incorporate[66] a Partnership, being: (1) *General partner* - GP (*sr. komplementar*[67]*, fr. associé commandité*), and (2) *Limited Partner* - LP (*sr. komanditor*[68]*, fr. associé commanditaire*). In both Codes, GP is jointly and severally liable[69] without any limitations for the commitments of the company, which is the reason why they are often referred to as the unlimited partner[70]. Additionally, in both Codes the LP is only liable up to the number of his/their contribution(s)[71], which is the reason why they are often referred to as the limited partner[72]. In Companies Act 1915 partners are divided by

---

65 Allen & Overy, The Luxembourg Partnership regime, Luxembourg, 2014, page 6.

66 Art 100, point 3 of the Law of the 24th of April 1983. Art 310 – 1 of the Law of 10 of August 2016

67 Art 125 of the Company Law 109/2021.

68 Art 134 of the Company Law 109/2021.

69 Article 1862 of Luxembourg civil code (the. "Civil Code") "In companies other than commercial ones, the partners are not jointly and severally liable for social debts, and one of the partners cannot oblige the others if they have not conferred on him the power to do so."

70 Art 320-3, point 1, of the Law of July 2013.

71 On the other hand, the Civil Code regulates that the partners of a company other than a commercial company are not jointly liable. As those two legal provisions are contradictory, in practice it is common that only after the unlimited company itself has been held liable by a court (Article 1400 -1 (formerly article 152) of the Company Law), the partner may be challenged, and if the partnership is held liable, the judgement will first condemn the unlimited company, then the partners (see more: Werner F. Ebke, The Limited Partnership and Transnational Combinations of Business Forms: "Delaware Syndrome" Versus European Community Law, the international lawyer, vol. 22, No. I, 1988, 203). Therefore, the creditor may take action against any partner of the unlimited company for the repayment of his claim (Article 200-1 (formerly article 14) of the Company Law), but as the unlimited and joint liability is applicable to relations with third parties only, he will be held liable after the Partnership.

72 Art 320-3, point 2, of the Law of July 2013.

their (i) pre-conditions, (ii) liability and ownership (securities as a creditor[73]), and (iii) management activity.

(i) There are mandatory pre-conditions that must be fulfilled by the company which is to act as a managing GP. Any person wishing to set up a company to do business in Luxembourg as a GP must have the authorization and approval which is required to carry out the activity as a trader[74]. This means that before setting up a partnership, it must be ensured that the GP is officially authorized to do business as a trader in the Grand Duchy of Luxembourg.

(ii) The GP (one or more) is jointly and severally liable[75] without any limitations for the commitments of the company, which is the reason why they are often referred to as the unlimited partner[76]. The LP on the other hand is (or are) only liable up to the amount of their contributions, thus making their liability limited to the partnership, constituting ownership interests to the company[77], which is the reason why they

---

73 Under Art 320 – 1 point 3, and Art 310 – 1 point 2 of the Law of 10 of August 2016, GP's security as a creditor will not be limited to the corporate assets of the unlimited company, therefore it will include his personal assets, making him liabilities unlimited. The LP's securities as a creditor will on the other hand depend on his contribution participation.

74 Art 320 – 1 point 6, and Art 310 – 1 point 5 of the Law of 10 of August 2016.

75 Article 1862 of Luxembourg civil code (the. "Civil Code") "In companies other than commercial ones, the partners are not jointly and severally liable for social debts, and one of the partners cannot oblige the others if they have not conferred on him the power to do so."

76 Art 320 – 3, point 1, of the Law of July 2013.

77 On the other hand, the Civil Code regulates that the partners of a company other than a commercial company are not jointly liable. As those two legal provisions are contradictory, in practice it is common that only after the unlimited company itself has been held liable by a court (Article 1400 -1 (formerly article 152) of the Company Law), the partner may be challenged, and if the partnership is held liable, the judgement will first condemn the unlimited company, then the partners (see more: Werner F. Ebke, The Limited Partnership and Transnational Combinations of Business Forms: "Delaware Syndrome" Versus European Community Law, the international lawyer, vol. 22, No. I, 1988, 203). Therefore, the creditor may take action against any partner of the unlimited company for the repayment of his claim (Article 200-1 (formerly article 14) of the Company Law), but as the unlimited and joint liability is applicable to relations with third parties only, he will be held liable after the Partnership.

are often referred to as the limited partner[78]. Because of the unlimited liability of the GP, it is most commonly established as a limited liability company, in order to protect the interests of its Shareholder(s).

(iii) management of the Partnership may be done by any of the partners, as long as GP and LP are separated. Most commonly the GP of the Partnership is a company established as a Limited Liability Company (*fr. société à responsabilité limitée* - S.à r.l., *de. Gesellschaft mit unbeschränkte Haftung* - GmbH) that is formed under the laws of Grand Duchy of Luxembourg, and has the ultimate liability for the management[79], operation and administration of the Partnership. The corporate purpose of the Company (GP) is to (i) act as a managing general partner (*associé gérant commandité*) or general partner (*associé commandité*) of one or more Luxembourg-based partnerships, (ii) to take on any corporate mandates (including without limitation), directorship mandates, management mandates, general partner mandates and mandates as a member of an investment committee) in relation to one or more Luxembourg or foreign partnerships, companies, entities, arrangements, or unit trusts, and (iii) hold any direct or indirect interests in or provide advisory or management services to, any such partnerships, companies, entities, arrangements or unit trusts, to the exclusion of any activity which is subject to approval under Luxembourg Act of 1993 on the financial sector.

The GP of the Partnership has the authority to make decisions that are within his scope[80], execute documents on behalf of the Partnership,[81] and thus is called an active partner in the practice, thus as LP most commonly does not have these management powers and rights it/they are called passive or sleeping partner. In SCS and SCSp the GP may act as an LP, only in case only if there always are at least one unlimited and one limited partner who are legally distinct from each other, and unless otherwise provided in the LPA[82].

---

78 Art 320 – 3, point 2, of the Law of July 2013.

79 Art 310 – 2, 320 - 3 of the Law of July 2013.

80 Art 320 - 3, point 3 of the Law of July 2013. In cases when the Partnership is an AIF, the GP must delegate some of its powers to the 3rd party such as AIFM.

81 Art 310 -3 of the Law of July 2013.

82 Art. 310 – 1, point 4 of the Law of 10 of August 2016, and Art. 320 – 1, point 6 of the Law of 10 of August 2016.

Other than the above, it is important that the decisions made by the GP are in the best interest of the Partnership and that during the decision-making process all procedural the GP is in compliance with all rules, and that the overall outcome is beneficial to the partnership and eventually LP(s).

The GP itself is managed by one or more managers, which are appointed by a resolution of the shareholder(s) of the GP, and by the law, the managers need not to be shareholders. If several managers are appointed, they constitute a board, which can consist of one or 2 different classes appointed by the shareholder(s). The board is authorised to delegate the day-to-day management activities and the power to represent the company to one or more directors, officers, managers or other agents, weather shareholders or not, to act individually or jointly[83].

If not otherwise defined by the incorporation deed of the Partnership, the GP has full power and authority to act on behalf of the Partnership, and to bind the Partners as such, to enter into, make and perform such deeds, contracts, agreements, undertakings, guarantees and indemnities as the GP may consider necessary, desirable and in the interest of the Partnership's business activity. The Partnership and its assets are managed by the GP, provided that the GP shall not carry on, and shall ensure that the Partnership does not carry on any activity that would constitute a regulated activity for the purposes of the Financial Act unless it is authorized by the Financial Act to perform such regulated activities.

The GP can be removed by the decision of LP(s) in two cases: with cause or without cause. In practice, the removal with cause would be triggered by gross negligence, wilful default, or fraud of the GP, a key executive,[84] or an affiliate of the GP who is involved in the operation of the Partnership. On the other side, the no-fault removal of the GP typically requires a vote of between 70% and 80% (by reference to LP commitments), where the votes may be cast by written resolutions. In such

---

[83] This is appointed during the Annual General Meeting (AGM) when the Board must report the authorised activities and advantages granted to those managers.

[84] Key executive is most commonly used in the closed ended funds in case if Key Persons (the individual or individuals who the investors believe are critical to sourcing, making, managing and exiting from investments) agree to dedicate an amount of their time to the management of the relevant Partnership.

case that the GP is removed, it should be replaced by the either LP who will be distinguished from the function as LP, or by a third party[85].

A non-resident partner of a Limited Partnership[86] who does not have a permanent establishment in Luxembourg, can be exempt to be subject to (i) Luxembourg income tax, (ii) municipal business tax, or (iii) net wealth tax, however, the LP may be subject to (i) any applicable tax treaty, (ii) liable to tax income or (iii) in case applicable municipal business tax on Luxembourg – sourced income[87]. Regardless of the limited partnership legal form, profit distributions made to non/resident partners are not subject to withholding tax in Luxembourg[88].

E. Corporate set-up: learning curve

Luxembourg's 1915 Law should be used as a productive example when it comes to the efficiency of a national corporate set-up. Regardless of the type of partnership, its (and GPs) incorporation in practice takes up to 2 or 3 months to have the first close. This is due to as well harmonized regulatory standards in national legislation as well as constantly developing a market practice that is regularly reforming its legal regulations. The benefits affecting Luxembourg's national financial market, which are resulting from such legal and market practice, should be good enough evidence of its 1915 Law's positive impact. Such flexible regulations should hopefully, be taken into account during the future developments of Serbia's Company Act.

Some of the efficient market practices are visible during the first steps of incorporation of the Partnership, as the LP is most commonly the same corporate entity that is acting as the Sole Shareholder of the GP (for the purposes of the prompt onboarding and establishment of the Partnership). Once the structure is set up, when the underlying project is to be acquired and investors admitted, during the meeting that is called in practice the first close, the initial investors are admitted into the Partnership. During this, the initial LP will be stepping down from

---

85 The standard market practice is to admit new GP within 90 days unless otherwise prescribed by the court.

86 Limited Partnership form, thus SCS or SCSp.

87 Allen & Overy, The Luxembourg Partnership regime, Luxembourg, 2014, page 17.

88 Ibid.

its position, as the now admitted investors will going forward act as LP(s).

The above-mentioned process is linked to Partnerships that are acting as Funds. But unfortunately, the explained process is not acceptable by the legislation and market practice in Serbia. Unlike in Luxembourg, the Partnership set-up and the overall process is lengthier and not well coordinated. Additionally, in Serbia, the Partnership as a legal form cannot be used to incorporate Fund Structures. Funds may be established in two legal forms: (1) as a limited liability company (*sr. Društvo s ograničenom odgovornošću* – d.o.o.) or (2) company stock company[89] (*sr. Akcionarsko društvo* – A.D.). By only providing only these two options to be used in practice, foreign investors which are used to Anglo-Saxon form of Funds (as Partnerships) are reluctant to proceed to invest in such endeavors.

Currently, Serbia is working on harmonization of Alternative Investment Funds and Open-ended Fund Laws by adopting two new main *lex specialis* regulating those Fund structures (*en. Alternative Investment Funds Act*[90] *and en. Open-ended funds Law*[91]). Unfortunately, in both laws the Partnership as a legal form is not yet recognised, as the Funds are established in accordance with the *lex generalis*, which has not yet recognised the importance of adopting the Anglo - Saxon approach. Thus, one may argue the Company Act of Serbia is in a way of disabling the further development of partnerships as a legal form of funds.

---

89 Art. 8 AIF Law of Republic of Serbia – Zakon o alternativnim investicionim fondovima ("Sl. glasnik RS", br. 73/2019).

90 Zakon o alternativnim investicionim fondovima ("Sl. glasnik RS", br. 73/2019) that amended the Investment Law Act from 2006 (Zakon o investicionim fondovima ("Sl. glasnik RS", br. 46/2006, 51/2009, 31/2011 i 115/2014).

91 Zakon o otvorenim investicionim fondovima sa javnom ponudom ("Sl. glasnik RS", br. 73/2019) that amended the Investment Law Act from 2006 (Zakon o investicionim fondovima ("Sl. glasnik RS", br. 46/2006, 51/2009, 31/2011 i 115/2014).

F. Conclusion

Positive impact of regulations of Partnerships in 1915 Law of Luxembourg, should be used as a good example and be adopted by Serbia's legislators in the hopefully near future. It can be concluded that some of their main advantages are: 1. their broad contractual freedoms (in a way that the incorporation deed is the main instrument which is used as a rule book for any future business of the partnership), 2. private seal as a possibility for establishment and liquidation of the partnership, 3. for some partnerships like SCS and SCSp the minimum capital provisions are not existent (which are again set out in the law based on the mutual trust), 4. withdrawals, 5. distributions, 6. suitable limited liability, and 7. available regulatory options and tax benefits. Those combined make a great tool for investments and business development in the *private equity* and venture area[92]. Unlike Luxembourg's 1915 Law, the Company Act of RS does not regulate Partnerships to the extent Luxembourg does, as they have no potential to be beneficial in the financial market.

Different legal forms of partnership are becoming quite common in many structures of new investors in the EU, and in the combination with the available vehicle shapes, they are becoming a go-to legal structure for multi-national companies in financial centers. This indicates that the role of funds that are established in the legal form of a partnership is becoming more inclusive in Luxembourg, within the structuring of investment structures that are targeting real estate, private debt, and private equity investment strategies. The national financial market of the Republic of Serbia is still developing in the above-mentioned investment areas, and it is possible that the investors both national and foreign are reluctant to invest in a fund related structure as a consequence of more available options which are more suitable for their projects in other jurisdictions, such as Luxembourg. If and when the Company Law of RS will adopt the strategies of other EU member states which have proven that they are beneficial for the national market, the PE, RE, and PD will be able to grow more and expands in such ways that are beneficial for the financial national market.

---

92 Marc Meyers, What the Luxembourg Sicar Offers Investors, 25 INT'l FIN. L. REV. 69 (2006).

The legislators are slowly adapting the EU acts by implementing them into the national law, which is a big step for the development of the national practice in the Republic of Serbia. However, if one uses Luxembourg's financial market as a comparison, moreover the effect partnerships have had on its development, the benefits are quite self-explanatory as the financial market has been blooming in the fund department over the last decade.