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Extending the scope of application of the EU Charter of Fundamental rights on the basis of the Court of Justice case law on European citizenship[1]

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Abstract

The paper comes out from Article 51para 1 of the Charter of Fundamental Rights of the European Union which determines the scope (field) of its application. According to the provision, provisions of the Charter are addressed to the Member States only when they are implementing Union law. In other words, provisions of the Charter are binding on the Member States only when they act within the scope (*ratione materiae*) of Union law. The Court of Justice of the European Union in its recent case law has extended considerably the scope of application (*ratione materiae*) of Article 20 of the Treaty on the Functioning of the European Union (former Article 17 of the Treaty establishing the European Community) relating to the European citizenship. It can be applied nowadays even in such situations which lack before required the cross-border dimension. Article 20 of the TFEU represents nowadays an autonomous source of rights for Union citizens, which can be applied in the purely internal situations (situations in which no actual movement has taken place). Extending the scope of application of the provisions of the Treaties leads to the extending of the scope of application of the Charter. The presentation will examine the scope of application of the Charter on the background of the recent Court of Justice case law on the European citizenship. *Inter alia*, the Court of Justice case law in *Zambrano*, *McCarthy* and *Dereci* will be discussed.

Key words

scope of application of the Charter of Fundamental Rights, extending the scope of application of EU law on European citizenship by the Court of Justice case law, cross-border dimension of the application of EU law on European citizenship, application of the EU law on European citizenship to purely internal situation, criterion “deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen”.

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1. SCOPE OF APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION AS REGARDS THE MEMBER STATES

According to Article 51 para 1 of the Charter of Fundament Rights of the European Union (later on "Charter"),[2] the provisions of the Charter are addressed to the Member States only when they are implementing Union law. Explanations relating to the Charter of Fundamental Rights,[3] which (according to the Article 6 of the Treaty on European Union (TEU) and Article 52 para 7 of the Charter) provide guidance in the interpretation of the Charter, state that as regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.[4] The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...'.[5] This rule applies to the central authorities of the Member States as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Following the rules relating to the application of the Charter, the Charter of Fundament Rights shall not be applicable as to the "exclusive Member States competences" or belonging to their "reserved domain". But even in the fields where Member States remain competent to regulate while the Union is not competent to lay down rules, the Member States must exercise their competence with regard to Union law.[6] Such a requirement flows from the *effet utile* of Union law.

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[2] Charter of Fundament Rights of the European Union. OJ C 303, 14.12.2007, p. 1–16.

[3] Explanations relating to the Charter of Fundamental Rights. OJ C 303, 14.12.2007, p. 17 - 36.

[4] See: Judgment of the Court of Justice of 13 July 1989 in a case 5/88 *Wachauf* [1989] ECR 2609; Judgement of the Court of Justice of 18 June 1991 in a case C-260/89 *ERT* [1991] ECR I-2925; Judgement of 18 December 1997 in a case C-309/96 *Annibaldi* [1997] ECR I-7493.

[5] Judgment of 13 April 2000 in a case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds.

[6] See, for example: Judgment of the Court of Justice of 2 October 2003 in case *C-148/02 Carlos Garcia Avello v Belgian State,* European Court reports 2003 Page I-11613, paragraph 25. Judgment of the Court of Justice of 12 May 2011 in a case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, paragraph 63.

According to Article 6 of the TEU, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Article 51 para 2 of the Charter confirms that the Charter may not have the effect on extending the field of application of Union law beyond the powers of the Union as defined in the Treaties. But extending the scope of application of the Charter by the way of extending the scope of application of EU law is not excluded by these provisions.

It follows that in order the Charter to be applied the link with EU law has to be established. Whenever a link can be established between a national measure and the application of the provisions of EU law (e.g., with respect to EU law on European citizenship, by moving to or visiting another Member State – cross-border link), the protection of fundamental rights at EU level is activated and thus the Charter of Fundamental rights should be applied. If, such a link is not found, the Charter will not apply. Extending the field (scope) of application of the Union law has the effect of extending the scope of application of the Charter.

2. EU LAW ON EUROPEAN CITIZENSHIP

According to the Article 20 of the Treaty on the Functioning of the European Union (TFEU) the status of European citizenship is granted to every national of a Member State. The status of European citizenship grants specific rights to the individuals being European citizens. Those rights are listed by the Articles 21 -24 of TFEU, as well as by the Title V. of the Charter.

Article 21 of TFEU grants the right to move and reside freely within the territory of the Member States. The right is subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members are laid down by the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[7]

3. EXTENDING THE SCOPE OF EU LAW ON EUROPEAN CITIZENSHIP BY THE CASE LAW OF THE COURT OF JUSTICE

[7] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. OJ L 158, 30.4.2004, p. 77–123.

Article 21 of TFEU (former Article 18 of the Treaty establishing the European Community) was interpreted by the Court in its initial case law in conjunction with the general prohibition of the discrimination on grounds of nationality.[8] Court of Justice has ruled that the right of free movement and prohibition of discrimination on grounds of nationality preclude the national law to grant social benefits to the nationals of Member States legally resident in another Member States under the conditions which differ to those applied to the national of the Member State. The Court of Justice has extended the scope of application of European citizenship law to such extent that any measures of the Member States that discriminate against citizens of the Union on the basis of their nationality, which may potentially affect individuals daily lives in another Member States were considered to be contrary to the right of free movement in conjunction with the prohibition of discrimination.[9]

In subsequent case law, the Court of Justice extended the scope of application of the right of free movement beyond a mere prohibition of discrimination.[10]

The basic feature of the Court of Justice case law was that the European citizens could rely on the right of free movement only if a supporting cross-border link was established (when they moved from the Member State of their origin and resided in another Member State). Such attitude can be seen, for example, in the Court of Justice decision in a case *Carlos Garcia Avello*[11] or joined cases *Uecker and Jacquet.*[12] The Court of Justice pointed out that citizenship of the Union, established by Article 17 EC, is not intended to extend the scope

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[8] See, for example: Judgement of the Court of Justice in a case C-85/96 *Martinez Sala v. Freistaat Bayern*, European Court reports 1998 Page I-02691; Judgement of the Court of Justice in a case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, European Court reports 2001 Page I-06193.

[9] For a broad interpretation of the right to free movement see, for example: EIJEKN, H.: "A new route into the promised land? Being a European citizen after Ruiz Zambrano". In *European Law Review* 2011, Vol. 36, No. 5, pp. 704 – 721. PRECHAL, S. – VRIES, S. A. EIJEKN, H.: "The principle of Attributed Powers and the "Scope" of EU Law" in BESSELINK, L.F.M. – PENNINGS, F. – PRECHAL, S. (eds): *The Eclipse of the Legality Principle in the European Union.* Alphen aan den Rijn: Kluwer Law International, 2011, pp.113-249.

[10] See, for example: Judgement of the Court of Justice in a case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö*, European Court reports 2004 Page I-05763.

[11] Judgment of the Court of Justice of 2 October 2003 in case *C-148/02 Carlos Garcia Avello v Belgian State,* European Court reports 2003 Page I-11613, paragraph 26.

[12] Judgement of the Court of Justice in joined cases *C-64/96 Land Nordrhein-Westfalen v Kari Uecker* and C-65/96 *Vera Jacquet v Land Nordrhein-Westfalen.* European Court Reports *1997* Page I-03171*,* paragraph 23.

ratione materiae of the Treaty also to internal situations which have no link with Community law. In *Carlos Garcia Avello* case, the Court continued that such a link with Community law does, however, exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State.

The Court of Justice in its recent case law has broadened the scope of application of Union law on European citizenship. The Court of Justice has ruled that within the ambit of the Article 20 of TFEU belong also the situations where no cross-border link exists. Individuals can therefore rely on the EU law on European citizenship even if they occur in purely internal situations. The Court of Justice set the applicability of the Article 20 of TFEU to the situations which lack cross-border dimension on the criteria "genuine enjoyment of the substance of the rights conferred to individuals by virtue of their status as citizens of the Union" used by the Court in its judgment on *Ruiz Zambrano* case.[13] The Court of Justice introduced the criteria by the reference to the former *Rottmann* case.[14]

The question raised before the Court of Justice in *Rottmann* case was whether the withdrawal of a German national's nationality is contrary to the EU citizenship provisions, if the withdrawal results in statelessness and therefore in losing the status of EU citizenship. Mr. Rottmann was an Austrian national by birth. A case was brought against him before Austrian criminal court because of the suspicion of serious fraud in his profession. After his hearing before the criminal court, he had moved to Germany, where he applied for German nationality. He became a German national, but few months later, the Austrian authorities informed the German authorities of the criminal proceedings pending against Mr. Rottmann. The German authority reacted by withdrawing his naturalization with retroactive effect. Due to his naturalization in Germany he has lost his Austrian nationality in accordance with Austrian law. If not having the nationality of a Member State (Austria or Germany), he was put to risk to lose the status of European citizen, as well. Although the situation of Mr. Rottmann could be interpreted as a cross-border situation since he migrated from Austria to Germany, the Court of Justice pointed out that:

"It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a

[13] Judgement of the Court of Justice of 8 March 2011 in a case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*. OJ C 130, 30.4.2011, p. 2–2, paragraph 42.

[14] Judgement of the Court of Justice of 2 March 2010 in a case C-135/08 *Janko Rottmann v Freistaat Bayern*. OJ C 113, 1.5.2010, p. 4–4.

decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto *falls, by reason of its nature and its consequences, within the ambit of European Union law*."[15]

The Court of Justice has based its decision in the *Rottmann* case on the status of EU citizenship and the consequences of the withdrawal of Member State nationality for that status. The withdrawal of his nationality would constitute an obstacle to his future exercise of rights conferred to him by the virtue of his status as EU citizens. This argumentation seems to be the decisive in the judgment of the Court of Justice in *Rottmann* case. The situation of Mr. Rottmann has fallen within the ambit of EU law because of its nature and its consequences, which would be the loss of the status of EU citizenship and the possibility to exercise the rights attached to the status.[16] The Court of Justice referred to this argumentation in its decision in the *Ruiz Zambrano* case, which facts obviously lack the cross-border dimension.

The case of Ruiz Zambrano began in 1999, when Gerardo Ruiz Zambrano, a Columbian national, came to Belgium with his spouse and their son. They applied for asylum in Belgium, but Belgian authorities refused their request. But because of the ongoing civil war in Colombia and with the view to principle of non-refoulement, they were not deported. While living in Belgium, two additional children, Diego and Jessica, were born to Ruiz Zambranos. The children were granted the Belgium nationality. After the births of Diego and Jessica, their father once again requested a residence permit in Belgium (for the third time). Now, he based his request on the fact of being the family member of EU citizens. He also applied for work permit and social benefits while being unemployed.

Within this context the Belgian Employment Tribunal referred three questions to the Court of Justice for preliminary ruling. The first question was whether Jessica and Diego Ruiz Zambranos can rely on their status as European citizens, even though they had not exercised their right to free movement - did not move from the Member State of their nationality to another Member State. The link with EU law based on cross-border dimension was missing. The question the Court of Justice had to answer was whether the EU citizens can rely upon the EU law without there being a cross-border connection. The Court of

[15] *Rottmann*, paragraph 42.

[16] For the detailed analysis of the *Rottmann* case, see, for example: CAMBIEN, N.: Case C-135/08, "Janko Rottmann v. Freistaat Bayern". In *Columbia Journal of European Law,* 2011, Vol. 17, No. 2, pp. 375-394.

Justice in its judgment in *Ruiz Zambrano* case has pointed out that the link with EU can be given even if the individuals do not participate on the life in other Member State than the Member State of their origin. The Court of Justice argued that the citizenship of the Union is intended to be the fundamental status of nationals of the Member States[17] and that in those circumstances, Article 20 of TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.[18] A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect. The refusal of a residence permit would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. If a work permit would not be granted to such a person, he would risk not having sufficient resources to provide for himself and his family (children with EU citizenship), what could result in leaving the territory of the Union. Diego and Jessica, citizens of the Union, would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

In *Zambrano case* the Court of Justice has ruled that Article 20 of TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, *in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.*

The criteria "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" provides the sufficient link with EU law even if individual who intends to rely on EU law finds him/her-self in a

[17] See, inter alia: Judgment of the Court of Justice of 20 September 2001 in a case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve.* European Court reports 2001 Page I-06193, paragraph 31; Judgment of the Court of Justice of 17 September 2002 in a case C-413/99 *Baumbast and R v Secretary of State for the Home Department.* European Court reports 2002 Page I-07091, paragraph 82; Judgment of the Court of Justice of 19 October 2004 in a case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, European Court reports 2004 Page I-09925, paragraph 25; *Garcia Avello*, paragraph 22 and *Rottmann*, paragraph 43.

[18] *Ruiz Zambrano*, paragraph 42.

purely internal situation.[19] The link with EU law is thus not more established only by the use of free movement (cross-border situation). It can be established simply by the status of European citizenship autonomously. Article 20 of TFEU enshrines an autonomous right. It constitutes a sufficient link with Union law by itself.[20] In that way, the scope of application of EU law on European citizenship is extended. No national measures, even the one falling within the exclusive competences of the Member States, may preclude the genuine enjoyment of the substance of the rights conferred by the status of European citizen.

EU citizens have now two ways of evoking the EU law. First, whenever there is an actual cross-border link, the *Directive 2004/38/EC applies*[21] granting the right to reside in other Member States subject to certain conditions.[22] Secondly, even if there is no cross-border link, but where the fundamental status of European citizenship is endangered, because the EU citizen has been precluded from enjoying this status, *article 20 of TFEU applies.* This new Court of Justice's methodology of application of EU law on European citizenship can be clearly observed for the first time in *McCarthy* case.[23] However, the Court of Justice in *McCarthy* case used the criteria of "deprivation of the

[19] The concept of internal situation is based on the distinction between the right to move and the right to reside. In answering the question whether Union citizens may rely on their right to move and reside under the article 21 TFEU, irrespective of an actual cross-border link, Advocate General Sharpston in *Zambrano case* has disconnected the right to move from the right to reside. The right to residency when seen as a free-standing right for European citizens allows extending the scope of application of Article 21 TFEU to the situations in which no actual movement has taken place. See: Opinion of the General Advocate Sharpston of 30 September 2010 in a case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, paragraphs 80 and 81.

[20] Direct applicability of the Article 20 of TFEU by citizens who have not used their free movement right reveals another dimension of EU citizenship – a concept that is developing autonomously and independently from national citizenship. It is argued that the Court has taken a significant step towards the constitutionalisation of EU citizenship. See: EIJEKN, H (2011), p. 721.

[21] The directive expressly limits its scope of application to the existence of the cross-border link. Article 3 of the Directive states that the Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

[22] The Directive in its Article 7 (titled „Right of residence for more than three months") prescribes, for example these conditions: to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

[23] Judgment of the Court of Justice of 5 May 2011 in a case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*. OJ C 186, 25.6.2011, p. 5–5, paragraphs 30 *et seq.* and paragraphs 44 *et seq.*

genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" in order to examine the applicability of Article 21 of TFEU and thus not Article 20 of TFEU.[24] In *McCarthy* decision, the Court of Justice has ruled that Article 21 of TFEU is not applicable to a Union citizen who has never exercised his right of free movement ... provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The most important aspect of the *Ruiz Zambrano* case, within the focus of the paper, is its influence on the application of the Charter of Fundamental Rights. Extending the scope of application of provisions of TFEU on European citizenship (to purely internal situation which lack cross-border link) leads to the extending of the scope of application of Charter since the Charter shall be applied when the factual circumstances of the case fall within the scope of application (*ratione materiae)* of EU law. The criteria "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" thus plays important role also with respect to the application of the Charter. The limits of the criteria are the limits of the application of the Treaty provisions on European citizenship as well as of the application of the Charter.

In *McCarthy* case the Court of Justice has observed that the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law.[25] McCarthy could not rely on the Directive 2004/38/EC because of not moving to or residing in a Member State other than that of her origin and also could not rely on the direct applicability of the Treaty provisions on European citizenship since the national measure applied to her case in the main proceedings does not have the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.[26]

McCarthy had a dual Irish/UK nationality. She married a Jamaican national and requested, on the basis of her status as a European citizen, a right of residence in the United Kingdom with her husband. The British authorities refused to grant Mr McCarthy a residence document. Mrs McCarthy had always lived in the United Kingdom and had never resided in Ireland.

[24] See: *McCarthy*, paragraphs 44 *et seq.*
[25] *McCarthy*, paragraph 55.
[26] *McCarthy*, paragraph 49.

But since her mother had Irish nationality, she could successfully apply for the Irish passport. Mrs McCarthy had been in receipt of social benefits and therefore did not fulfil the condition of having sufficient resources. Her situation thus did not fall within the scope of application of the directive on free movement. As to the direct reliance on provisions of TFEU, the fact that Mr McCarthy was refused a residence document as the spouse of Mrs McCarthy did not deprive Mrs McCarthy of genuine enjoyment of the substance of her rights as European citizen. Mrs McCarthy can exercise her rights as Union citizens fully and effectively without the presence of her husband. The scope of application of provisions of TFEU on European citizenship is limited to those situations in which European citizens would be eroded. Because the situation of Mrs McCarthy has no link with any of the situations governed by the EU law, she could also not rely on the respective provisions of Charter if she would like.

The Court of Justice followed the above described methodology of application of EU law on European citizenship with respect to the potential application of the Charter when the link with EU law is (would be) established in *Dereci*[27] and *Yoshikazu Iida*[28] cases. In these cases the Court of Justice has continued in defining the criteria of "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" with respect to the facts of the cases.

In *Dereci* case the Court of Justice has pointed out that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole. According to the Court, the criterion is specific in character inasmuch as it relates to situations in which a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined. But, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union

[27] Judgment of the Court of Justice of 15 November 2011 in a case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres*. OJ C 25, 28.1.2012, p. 20–20.

[28] Judgment of the Court of Justice of 8 November 2012 in a case C-40/11 *Yoshikazu Iida v Stadt Ulm*. Not published in the Official Journal of EU yet.

territory if such a right is not granted.[29] Court of Justice left the consideration whether the internal situations fall within the scope of Union law (leads to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status) to the court of the Member State. If the situations in *Dereci* case fall within the scope of EU law, there appears a need to measure the domestic law, falling within the scope of EU law, by the respective provisions of the Charter – respect for private and family life.[30]

In *Yoshikazu Iida* case the Court of Justice states that there are also very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status. The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109[31] and 2004/38, they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom. The Court of Justice observed that the claimant, who is a third-country national, is not seeking a right of residence in the host Member State in which his spouse and his daughter, who are Union citizens, reside, but in Germany, their Member State of origin. The claimant in the main proceedings has a right of residence under national law according to the German Government, and can in principle be granted the status of long-term resident within the meaning of Directive 2003/109. In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr

[29] *Dereci*, paragraphs 66 – 68.

[30] For the detailed analysis of *Dereci* case, see, for example: ADAM, S. – ELSUWEGE, P.: „Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*". In *European Law Review* 2012, Vol.37, Issue 2, pp. 176-190.

[31] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, p. 44–53.

Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States. The Court of Justice has recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions. The same applies to purely hypothetical prospects of that right being obstructed.[32] Outside the situations governed by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen. In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.[33]

4. CONSEQUENCES OF EXTENDING THE SCOPE OF APPLICATION OF TFEU ON EUROPEAN CITIZENSHIP ON THE BASE OF CRITERIA "DEPRIVATION OF THE GENUINE ENJOYMENT OF THE SUBSTANCE OF THE RIGHTS ATTACHING TO THE STATUS OF EUROPEAN UNION CITIZEN"

The most important consequence of the extending the scope of application of TFEU on European citizenship on the base of criteria "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" – extending the scope of application of the Charter, was already discussed in previous lines. However, few other consequences can be determined.

The application of the criteria "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" to the concrete facts of a case might result in *reverse discrimination*, which may occur in internal situations. Mrs McCarthy could not rely on the direct application of the provisions of TFEU on European citizenship because her situation could not deprive her of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen only because she could exercise her rights as

[32] *Yoshikazu Iida*, paragraphs 71-77.
[33] *Ibid*, 82.

Union citizen fully and effectively without the presence of her husband. Diego and Jessica Zambranos could rely on the direct applicability of the provisions of TFEU on European citizenship (their situation could deprive them of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen) only because they could not exercise their rights as Union citizens fully and effectively without the presence and support of their parents. The fact why the Zambranos children could rely on direct applicability of TFEU provisions on EU citizenship and Mrs McCarthy could not seems to be the difference in the age of Diego and Jessica on the one side and Mrs McCarthy on the other side. The presence of Diego and Jessica on the territory of the Member State of the EU, because of being the minors, completely depends on the presence and support of their parents (third country nationals). Contrary, the presence of Mrs McCarthy on the territory of the Member State (and thus her genuine enjoyment of the substance of the rights attaching to the status of European Union citizen), because of being an adult, does not depend on the presence of her spouse (a third country national) with her. In order to be with her husband, McCarthy could not rely on the EU law on European citizenship. Because her situation do not fall within the scope of application of EU law she could not rely on the provisions of the Charter (relating to, for example, the right to respect for private and family life), as well. However, she could claim her right to family life to be protected according to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which shall apply in the internal situations falling outside the scope of application of EU law. For the individuals, like Mrs McCarthy, it can be irrelevant whether to defend the respective fundamental right according to the Charter or ECHR, but only under the condition that the meaning and the scope of application of the rights contained in the ECHR are the same like the corresponding rights contained in the Charter. In the situation when the meaning and the scope of application of the rights contained in the ECHR are narrower than the meaning and the scope of application of the corresponding rights contained in the Charter, the individuals, like Mrs McCarthy, would be subject to worse situation only because of their age. Only because of the age they cannot be deprive of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen and thus do not fall within the scope of application of European Union citizenship law and, as a consequence of that, they cannot rely on the provisions of the Charter.

The other consequence of the extending the scope of application of TFEU on European citizenship on the base of criteria “deprivation of the genuine enjoyment of the substance

of the rights attaching to the status of European Union citizen" resides in the possible resistance of the Member States to such a broad interpretation of EU law by the Court of Justice. The resistance may cause that the Member States limit their rules on the acquisition of nationality to persons born on their territory, since Member States nationality opens the door to the European citizenship. That was the case in Belgium as the reaction on the Court of Justice judgment on *Zambrano* case. The respective Belgian law on the acquisition of Belgian nationality was changed[34], so that the situations such as that in *Ruiz Zambrano* case would be prevented in the future.[35]

5. CONCLUSION

The Charter of EU Fundament Rights is binding on the Member States when they act within the scope of application of Union law. Member States are binding by the provisions of the Charter whenever the link with EU law is established. In such case, national measures, even the ones falling within the exclusive competences of the Member States, has to respect the provisions of the Charter. The Court of Justice has extended the scope of application of Articles 20 and 21 of TFEU in the way that in order the link with those provisions of the TFEU to be established no cross-border dimension is more required. The link with the Articles 20 and 21 of TFEU can be established also with respect to the purely internal situations. The link is established whenever the national measure may preclude the genuine enjoyment of the substance of the rights conferred by the status of European citizen. The application of the criteria "genuine enjoyment of the substance of the rights conferred by the status of European citizen" may cause some problems. Within the paper, the problems of reverse discrimination and resistance of the Member States to such a broad interpretation of EU law by the Court of Justice were outlined. The vagueness of

[34] According to the new law, persons born in Belgium who would potentially become stateless do not acquire Belgian nationality if, owing to an administrative procedure or registration, the child would be able to obtain the nationality of his/her parent's country of origin. For the details, see, for example: EIJKEN, H. (2011), p. 720.

[35] To the problems relating to new methodology of application of EU law on European citizenship analysed in the paper, see, for example: KOCHENOV, D. – PLENDER, R.: "EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text" In *European Law Review* 2012, Vol.37, Issue 4, pp. 369-396. PLATON, S.: Le champ d'application des droits de citoyen européen après les arrêts *Zambrano*, *McCarthy* et *Dereci*. De la boît de Pandore au labyrinthe de Minotaure. In *Revue trimestrielle de droit européen* 2012, Vol.48, No.1, pp. 23-52. PATAUT, E.: Citoyenneté de l'Union européenne 2011 - La citoyenneté et les frontières du droit de l'Union européenne. In *Revue trimestrielle de droit européen* 2011, Vol.47, No.3, pp. 561-576.

the criteria calls for the limitations of its use to be settled by the Court of Justice. By the interpretation of the respective provisions of EU law the Court of Justice has an enormous impact on the scope of application of the Charter to the measures of the Member States.

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Agreement on the Unified Patent Court and its Statute as an Atypical Source of EU Law

Dohoda o jednotném patentovém soudu a jeho statutu jako atypický pramen práva EU

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Abstract in original language

Již více než 30 let Evropská unie usiluje o zavedení unijního patentu, pro jehož efektivní fungování je nezbytné vytvoření jednotného patentového soudu v rámci Evropské unie. Za tímto účelem došlo k přípravě návrhu Dohody o jednotném patentovém soudu a návrhu jeho statutu. Cílem tohoto příspěvku je zanalyzovat některé právní aspekty tohoto návrhu smlouvy.

Abstract

The European Union has been making effort to establish a unitary patent for more than 30 years. For the effective functioning of this patent, unified patent court is inevitable to create within the European Union. For this purpose, "draft Agreement on an Unified Patent Court and draft Statute" has been prepared. This paper aims to analyze several legal aspects of this draft Agreement.

Key words in original language

Jednotný patent EU, evropský patent, Jednotný patentový soud, Dohoda o jednotném patentovém soudu, právo EU

Key words

EU unitary patent, European patent, Unified Patent Court, Agreement on the Unified Patent Court, EU law

The European Union (hereinafter "EU") has been attempting to establish a unitary patent that is valid throughout the whole EU territory for about 30 years.[1] However, if this patent is enforced in the jurisdiction of each Member State separately, as is the case of European patents, it would be unaffordable for smaller entities, such as SMEs, because of the high cost of patent litigation.

To ensure cost-effective enforcement of both the unitary and the European patents, the EU Council introduced a draft agreement creating a European

[1] The first attempt goes back to the 1970's: Convention for the European Patent for the Common Market" of December 15, 1975 (not in force). The latest is a Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, COM(2011) 215 final of April 13, 2011; as amended by Council doc. 17578/11 of December 1, 2011.

and Community Patents Court dated March 23, 2009.[2] The agreement was supposed to be concluded between EU Member States, other Member States of the Convention on the Grant of European Patents (European Patent Convention), and the EU itself. The court's jurisdiction covered unitary patents and also European patents having effects in the EU and non-EU Member States.

The court did not fit within the EU institutional and judicial framework. Therefore, its creation was accomplished on the basis of an international (mixed) agreement and not by an act of secondary legislation, such as, a regulation as is the case of Community trademarks and designs[3] that are valid within the whole territory of the EU.

It is advantageous that the court's jurisdiction relate to the two industrial property subject-matters. Under Article 96 of CTM Regulation, the Community trademark courts designated in each Member State have exclusive jurisdiction over disputes involving actual or threatened infringement of Community trademarks that occur within the territory of any of the Member States. (Article 98(1) of CTM Regulation). If the national Community trademark court issues a protective order according to Article 102(1) of the CTM Regulation, this order applies in the territory of other Member States. This principle has been confirmed by the case law of the Court of Justice.[4] The jurisdictional regime also contains the Community design Regulation.

Unfortunately, this jurisdictional system cannot be used in cases involving a uniform patent because not every Member State has specialized patent courts with qualified judges. Because of the complexity of patent disputes and the non-existence of a centralized court of appeal, it would be almost impossible to ensure a uniform approach in patent litigation. Therefore, creation of an independent patent judicial system for unitary patents is required.

On June 25, 2009, the Council of the EU submitted the draft Agreement to the Court of Justice (hereinafter "CJ") to determine its compatibility with EU law, namely the Treaty on European Union (hereinafter "teU") and the Treaty on the Functioning of the European Union (hereinafter "TFEU").

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[2] Council Document 7928/09 of 23 March 2009 on a revised Presidency text of the draft agreement on the European and Community Patents Court and draft Statute

[3] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version); this Regulation repealed former Council Regulation (EC) No 40/94 of 20 December 1993 but it brought no substantive legal changes ("CTM Regulation"), and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

[4] See judgment of April 12, 2011 in case C-235/09 *DHL Express France v Chronopost* [2009] ECR 00000. This judgment deals with interpretation of Article 98 of the previous CTM Regulation No. 40/94. Number of this Article in current CTM Regulation is 102.

In its opinion[5] published on March 8, 2011, the CJ concluded that this proposed Agreement contravenes the aforementioned treaties. This opinion led to the making of substantive changes to the draft Agreement and the introduction of its modified version bearing the new title "Draft Agreement on a Unified Patent Court and draft Statute" of June 14, 2011. The court should have jurisdiction over uniform patents and European patents valid in EU Member States as well. Therefore, the creation of this court could not have been done through secondary legislation. This draft has gone through several amendments during its short history.[6]

One of the CJ's concerns with respect to the previous draft expressed in paragraph 68 of its opinion was the sincere cooperation according to Article 4(3) of TEU requiring Member States to ensure in their respective territories the application of and respect for EU law. The Commission, in its document[7] prepared as a reaction to the CJ's opinion, inferred that the CJ's concern relates especially to the creation of an international court outside the framework of the EU Treaties with the participation of third states.

In order to put the new draft in line with the CJ's opinion, non-EU countries were excluded from the Agreement. Purging the non-EU Member States stems from the CJ's opinion; however, removal of the EU as one of the contracting parties poses additional questions. The Luxembourg delegation raised this issue in its note distributed on July 11, 2011.[8]

Luxembourg argued that the Agreement will result in an alteration of the EU's acquisition of jurisdiction, especially Regulation (EC) 44/2001 and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation).[9] It points to the Judgment of the CJ of March 31, 1971 (the AETR case),[10] where the CJ held that Community (EU) powers exclude the possibility of concurrent powers on the part of Member States since any steps taken outside the framework of the EU institutions would be incompatible with the unity of the internal market and the uniform application of EU law. In addition, Article 3(2) of TFEU entrusts the EU with exclusive competence for the conclusion of an

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[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CV0001:EN:HTML

[6] The last version of this Draft (consolidated text) is of October 12, 2012, Council Document 14750/12.

[7] Non-paper of the Commission services of May 26, 2011 (10630/11)

[8] Creating a unified patent litigation system - Note from the Luxembourg delegation (Document 12704/11) available at: http://register.consilium.europa.eu/pdf/en/11/st12/st12704.en11.pdf

[9] Needs of making alterations to, inter alia the Brussels I Regulation, are described in Council Document 14191 (LIMITE) of September 20, 2011 entitled "Compatibility of the draft agreement on the Unified Patent Court with the Union acquis".

[10] Case 22-70 *Commission v Council* [1971] ECR 263 (the AETR case)

international agreement, in so far its conclusion may affect common rules or alter its scope.

Furthermore, the Luxembourg delegation stated that the Unified Patent Court would apply and interpret not only the regulations dealing with the unitary patent but also TFEU rules on the internal market and the Charter of Fundamental Rights. Therefore, the question arises whether Member States may establish an international court with such powers. The note of the Luxembourg delegation is relevant and should be seriously examined by the Council. However, it is happening with a reluctance to share the legal stand-point in these matters with the public.[11]

Also, there have been other allegations put forward against not only the Draft but against the regulations that are supposed to form the legal basis for the uniform patent, for example, by the Max Planck Institute for Intellectual Property and Competition Law. In its paper,[12] doubts regarding the compatibility of EU law with the ECJ's opinion are raised. The Unified Patent Court is designed to be similar to the model of the Benelux Court of Justice, but with significant differences. This Court, in fact, replaces the national legal systems. Moreover, review of the decisions of the European Patent Office are not mentioned in the Draft at all, which leads to infringement of the EU law principles of rule of law and of the completeness of the system of judicial review.

Nevertheless, even the establishment of a unitary patent itself is becoming complicated. After the introduction of the proposal of a Council Regulation on the Community patent of July 5, 2000, Member States got involved in a long-lasting discussion about a requirement of translation of unitary patents. On June 30, 2010, the Council proposed a Regulation on the translation arrangements for the European Union patents that provided that the patents would be published in the official language of the proceedings before the European Patent Office together with the translation of claims into the two remaining official languages, whilst translations to the official language of a Member States would be required in the case of a dispute. However, Italy and Spain did not agree with the language regime set forth in that regulatory proposal, and for this reason, the remaining 25 Member States have agreed on enhanced cooperation between themselves with regard to the creation of unitary patent protection.

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[11] Read about unsuccessful attempt to obtain the full version of document 15856/11 entitled "OPINION OF THE LEGAL SERVICE – Draft agreement on the European Union Patent Jurisdiction (doc.13751/11) – compatibility of the draft agreement with the Opinion 1/09" and marked confidential ("LIMITE"); Horns, H. A.: EU Council: Something To Hide? Might Legal Opinion Tun Out To Be A Bombshell? - available at: http://blog.ksnh.eu/en/2011/12/18/eu-council-something-to-hide-might-legal-opinion-tun-out-to-be-a-bombshell/.

[12] Max Planck Institute for Intellectual Property and Competition: The Unitary Patent Package: Twelve Reasons for Concern (October 17, 2012)

This enhanced cooperation was approved by the Council of the European Union by virtue of the Council Decision of March 10, 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU). On the basis of this decision, the Commission prepared two new regulatory proposals.[13] However, the two dissenting Member States challenged the decision on enhanced cooperation before the Court of Justice seeking annulment of this regulation.[14] In principle, these two countries argue the misuse of power and the missing competence of the Council to establish enhanced cooperation to create a unitary patent. The intended objectives could have been achieved on the basis of a special agreement pursuant to Article 142 of the European Patent Convention.[15] If the CJ were to find that the use of the enhanced cooperation is appropriate, they put forward arguments against the fulfillment of conditions for enhanced cooperation. For example, infringement of Article 20 (2) TEU because the decision authorizing enhanced cooperation must be adopted as a last resort, breach of Article 118 TFEU, whose purpose is to create uniform protection of intellectual property rights within the EU but the rights to a unitary patent are not valid in the whole of the EU, breach of the principles set forth in Article 326 TFEU, inter alia, undermining the internal market, creating a barrier or discrimination in trade between Member States, and distorting competition between them.

In the author's opinion, it is obvious that the creation of a uniform patent together with a Unified Patent Court is not a matter that will be accomplished in the very near future. The text of the underlying regulation on the unitary patent together with the second draft dealing with the creation of Uniform Patent Court should be subject to major alteration.

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[13] Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection (COM(2011) 215 final) of April 13, 2011; as amended by Council doc. 17578/11 of December 1, 2011 and Proposal for Council Regulation implementing enhanced cooperation in
the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011) 216 final) of the same date

[14] C-274/11 *Kingdom of Spain v Council of the European Union* (action filed on June 3, 2011) and C-295/11 *Italien Republic v Council of the European Union* (action brought on June 10, 2011)

[15] Article 142 (1) of the European Patent Convention reads as follows: "*Any group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States.*"

PROTECTION OF HUMAN RIGHTS OF ALLEGED INTERNATIONAL TERRORISTS BY THE ECHR AND THE CJEU IN A COMPARATIVE VIEW[1]

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Abstract in original language

Tento příspěvek se zabývá problematikou Sankčního režimu Al-Kajdy a Talibanu, konkrétně pak případy souvisejícími s daným režimem a rozhodovanými Soudním dvorem EU a Evropským soudem pro lidská práva. Úvod je zaměřen na základní fakta o sankčním režimu. Druhá část se zabývá případem Kadi, který byl, a opět je, projednáván před SDEU. Třetí část analyzuje rozsudek ESLP ve věci Nada. Závěrečná část je věnována srovnání předmětných dvou judikátů. Cílem příspěvku je nalézt případné podobnosti ve zmiňovaných rozsudcích.

Key words in original language

Sankční režim Al-Kajdy a Talibanu; SDEU; Kadi; ESLP; Nada

Abstract

This paper deals with an issue of Al-Qaida and the Taliban Sanctions Regime, in particular with cases related to that sanctions regime and decided by the two main European judicial instances, by the Court of Justice of the EU and by the European Court of Human Rights. An introduction is focused on basic facts about the sanctions regime. The second part deals with Kadi case before the CJEU. In the third the Nada case before the ECHR is analyzed and the final part is dedicated to a comparison of the two given judgments. The aim of the article is to find similarities in the judgments.

Key words

Al-Qaida and the Taliban Sanctions Regime; CJEU; Kadi; ECHR; Nada

1. INTRODUCTION

In 1999 Al-Qaida and the Taliban Sanctions Regime[2] with its sanctions measures directed against Al-Qaida and the Taliban

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[1] This contribution is supported by the Rector of the Masaryk University according to the programme: Support of the Students' Projects at the MU - Category A - Support of the Specific Research Projects, identification code of the project MUNI/A/0934/2011.

[2] Al-Qaida and the Taliban Sanctions Regime was established by the UNSC resolution 1267. After that there were many other UNSC resolutions that had changed this sanctions regime usually in respect of the right to a fair trial of listed persons. More in NECHVÁTALOVÁ, L. *Činnost ombudsmana*

terrorists was established. According to the relevant UNSC resolutions the states were responsible for implementation of it in their national legal systems. The problems with its application have become when the listed persons[3] started to challenge listing before national and even international courts. These courts found out in some cases that a procedure of listing and delisting[4] does not respond to the guarantees for a fair trial.

This paper deals with the above mentioned matter before the Court of Justice of the European Union, concretely with the Kadi case in the first part and in the second part it discusses the sanctions regime before the European Court of Human Rights, in particular the Nada case. The third part is focused on a comparison of the two given judgments. The aim of the paper is to analyse two given cases, to compare them and find similar features of them.

2. AL-QAIDA AND THE TALIBAN SANCTIONS REGIME BEFORE THE CJEU

There were more than one case before the Court of Justice of the EU related to Al-Qaida and the Taliban Sanctions Regime. One of the most famous is the so called Kadi case. Anyway, before we will elaborate on the Kadi case, we should be focused on a reason why is the Court of Justice of the EU or the European Union involved in the matter of Al-Qaida and the Taliban Sanctions Regime.

2.1 LEGAL REGULATION OF THE EU

When the UN Security Council adopted resolution 1267 (1999) and ensuing resolutions concerning Al-Qaida and the Taliban Sanctions Regime, the European Community decided to implement them firstly by the common positions adopted under the Common Foreign and Security Policy (CFSP) and afterwards by adopting Council Regulation (EC) No. 467/2001 and then by Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, Al-Qaida network and the Taliban, and repealing

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(zřízeného na základě rezoluce RB OSN 1904(2009)) v souvislosti se zápisem (údajných) teroristů na seznam Sankčního výboru RB OSN 1267/1989, 1091 - 1101 p. *In* ŽATECKÁ, E., KOVÁČOVÁ, L., NECHVÁTALOVÁ, L., VOMÁČKA, V. *COFOLA 2012 The Conference Proceedings*. 1. vyd. Brno: Masarykova univerzita, 2012, 1724 p., ISBN 978-80-210-5929-0.

[3] Listed persons means alleged Al-Qaida and the Taliban terrorists listed on the so called Consolidated List established by UNSC resolution 1333 (2000) and administered by the Al-Qaida and the Taliban Sanctions Committee which deliberates about listing or not and about delisting or not of the mentioned terrorists.

[4] Both procedures are based on (political) decisions of Al-Qaida and the Taliban Sanctions Committee that consists of all UNSC member states.

Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan ("Regulation"). As it is stated in par. 4 of the Regulation's Preamble: "*These measures [stated in the UNSC resolutions relating to Al-Qaida and the Taliban Sanctions Regime] fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.*" The EC (and subsequently the EU) has decided by this provision that it is its duty (in accordance with its powers) to implement the measures into EU law because the implementation could affect a competition within the territory of the EU member states. There were implemented sanctions measures in the Regulation and the Consolidated List was implemented in an Annex of this Regulation (updated by decisions of the EU Commission).

2.2 THE CASE OF KADI

2.2.1 THE CASE BEFORE THE COURT OF THE FIRST INSTANCE

The process of the case of Mr. Kadi before the EU courts is quite complicated. It began on 18 December 2001 when Mr. Kadi lodged an application to the Court of the First Instance ("CFI")[5]. He claimed to annul the Regulation in so far as it concerned him because according to his opinion the measures imposed on him under this Regulation violated his right to be heard and his right to an effective judicial protection (he was never asked about his relations to Al-Qaida or the Taliban by the EC bodies but he was restricted in his rights by the EC Regulation); simply he wanted his name to be deleted from the Annex to the Regulation (from the implemented Consolidated List). CFI held that it is not allowed to review in a full range the EC acts that "only" implement the sanctions stipulated by the UNSC resolutions adopted under the Chapter VII of the UN Charter because the EC has no margin of appreciation in this area. CFI further stated that there could be only a "limited" judicial review of the act, in particular the court is allowed to decide only if the EU act is in compliance with ius cogens of international law.

[5] Judgment of the Court of First Instance (Second Chamber) of 21 September 2005, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, case T-315/01.

2.2.2 THE CASE BEFORE THE EUROPEAN COURT OF JUSTICE

Because CFI dismissed the application of Mr. Kadi, Mr. Kadi decided to appeal to the European Court of Justice ("ECJ")[6] because he did not agree with legal qualification of the CFI. ECJ had deviated from the CFI's opinion. It decided that EC courts have to perform a full review of the lawfulness of all EC acts.[7] It further ruled that legal system of the EC is completely autonomous legal system. And even if the EC adhere to the international law in general if there are EC acts implementing the obligations from the international law, those acts have to be in compliance with fundamental rights that are integral parts of general principles of the EC (EU). Subsequently it decided to delete Mr. Kadi because his fundamental rights (the right of the defence and the right to an effective judicial review) were violated by listing him in the Annex without giving him a chance to defend himself.

2.2.3 THE CASE BEFORE THE GENERAL COURT OF THE EUROPEAN UNION

In the last stage Mr. Kadi had to lodge an application again, now to the General Court of the European Union (previously the Court of the First Instance)[8] because the European Commission did not delete him from the Annex. The reason for not deleting him was that the EU Commission revealed the reasons for listing to Mr. Kadi thus Commission gave him a chance to defend himself. In fact the EU Commission just revealed him general reasoning of the Al-Qaida and the Taliban Sanctions Committee and Mr. Kadi had no chance to oppose it. The General Court upheld the decision of the ECJ and it decided that there is no judicial immunity of the EC/EU acts implementing sanctions stated in the UNSC resolutions adopted under the Chapter VII of the UN Charter and that there must be a full judicial review of EC/EU acts freezing assets of the individual for an indefinite time. Further it held that the EU Commission adhered to the right of defence of Mr. Kadi in the "most formal and superficial sense". The General Court of the EU concluded that the Regulation have to be annulled so far as it concerns Mr. Kadi.

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[6] Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P.

[7] For an analysis of full judicial review of the sanctions measures by the EU courts see CIAMPI, A. *Security Council Targeted Sanctions and Human Rights*, p. 119. *In* FASSBENDER, B. *Securing Human Rights? Achievements and Challenges of the UN Security Council.* New York: Oxford University Press, 2011, 219 p., ISBN 978-0-19-964149-9.

[8] Judgment of the General Court (Seventh Chamber) of 30 September 2010, *Yassin Abdullah Kadi v European Commission*, T-85/09.

Nowadays the case is already again before the Court of Justice of the EU. The EU Commission (and many EU Member States) has appealed because it does not agree with the legal opinion of the General Court of the EU.

3. AL-QAIDA AND THE TALIBAN SANCTIONS REGIME BEFORE THE ECHR

3.1 THE FACTS OF THE CASE

The first case that had to be decided by the European Court of Human Rights[9] is related to the Italian and Egyptian citizen, Mr. Nada, living in the Italian enclave Campione d'Italia surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by the Swiss lake Lugano.[10] Mr. Nada was listed in November 2001 onto the UN Consolidated List and subsequently in the Annex of the Taliban Ordinance (the national act implementing sanctions measures stated in UNSC resolutions related to Al-Qaida and the Taliban Sanctions Regime). Thus he was not allowed to travel through the territory of Switzerland what actually meant in his extraordinary situation that he was forced to stay in the enclave and he was not allowed even to travel to Italy of which was a citizen.

On the basis of this situation Mr. Nada complained to Swiss administrative bodies. He did not receive any reasoning of his listing and therefore he wanted to be deleted from the Annex to the Taliban Ordinance to be enabled (among others) to travel freely to Italy. The Swiss authorities did not acknowledge his objections with reasoning that they were just implementing the UNSC resolutions adopted under the Chapter VII of the UN Charter so they have no margin of appreciation in the area of who would be listed and who would not. Because Mr. Nada was not satisfied with their attitude he submitted an application to the European Court of Human Rights.

3.2 THE LEGAL ASSESSMENT

3.2.1 PRELIMINARY OBJECTIONS

On 12 September 2012 the ECHR decided on Mr. Nada's case. There were two preliminary objections within the case. The first objection was focused on the responsibility for implementation of the measures. The Swiss government alleged that the sanctions measures or more precisely obligations arising from UNSC resolutions adopted under the Chapter VII of the UN Charter *"were binding and prevailed over any other international agreement".*[11] And because the measures were

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[9] Judgment of the European Court of Human Rights of 12 September 2012, *Nada v. Switzerland*, application No. 10593/08.

[10] Par. 11 of the Judgment in the case *Nada v. Switzerland.*

[11] Par. 102 ibid.

adopted by the UN Security Council, this issue *"fell outside the scope of the Court's review"*.[12]

The ECHR dismissed these objections. The reasons for this were following: *"the relevant Security Council resolutions required States to act in their own names and to implement them at national level…The acts [the Swiss Taliban Ordinance and its Annex] therefore relate to the national implementation of UN Security Council resolutions…The alleged violations of the Conventions are thus attributable to Switzerland*.[13]

3.2.2 ALLEGED VIOLATIONS OF ART. 8 AND 13 OF THE CONVENTION

Mr. Nada alleged that his right for the protection of his private and family life was breached by Switzerland. The main problem was that he was not allowed to travel from the Italian enclave through the Swiss territory to Italy (of which was a citizen). Mr. Nada's family and friends were in Italy. Moreover Mr. Nada was seriously ill and he was not allowed to travel even to the doctor abroad.

The Court found out that Switzerland did not even attempt to harmonise two different obligations arising from the international law (from the UNSC resolutions adopted under the Chapter VII and from the Convention). Further it stated that there was not a fair balance between the restrictions on free movement of Mr. Nada and the legitimate aim of the protection Swiss nation against terrorism and *"the interference with his right to respect for private and family life was not proportional and therefore not necessary in a democratic society"*[14]. The Art. 8 of the Convention was breached by Switzerland.

In the case of alleged violation of Art. 13 Mr. Nada complained that there was no effective remedy before the Swiss authorities to make a complaint about a violation of the rights guaranteed by the Convention. The core of this complaint was that Mr. Nada was allowed to submit an application for delisting to the Swiss authorities but they did not decide his applications on the merits with reference to the binding character of the UNSC resolutions under the Chapter VII of the UN Charter. The ECHR ruled that there was nothing in international law (UNSC resolutions) *"to prevent the Swiss authorities from introducing mechanism to verify the measures taken at the national level pursuant to those resolutions"*.[15] It can be concluded

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[12] Par. 103 ibid.

[13] Par. 120 and 121 of the Judgment in the case *Nada v. Switzerland* .

[14] Par. 198 ibid.

[15] Par. 212 ibid.

that the Swiss authorities should have been more active in the matter of delisting Mr. Nada.

4. COMPARATIVE VIEW

If we compare the two above mentioned cases then we would come to the following conclusions. In the both cases the international courts decided on the matter of Al-Qaida and the Taliban Sanctions Regime having held that this issue can be decided on the merit. Thus they did not admit objections that implementation of the UNSC resolutions adopted under the chapter VII of the UN Charter do fall outside the scope of the courts' review.

The second common feature of the two cases is that courts admitted violation of the right to an effective judicial review or effective remedy against listing. The courts ruled that there is nothing in the international law what would forbid the Switzerland or the EU to review the listing of given individuals.

5. CONCLUSION

Regarding to the above mentioned information we can conclude that the two highest European courts have some similarities in their judgments on the matter of Al-Qaida and the Taliban Sanctions Regime. The courts actually invite the given subjects not to adhere to Al-Qaida and the Taliban Sanctions Regime automatically (only with reference to the binding character of the UN legal system) and without considering if the fundamental or human rights of listed individuals can be violated. The question that can arise is if the regime can be effective in the situation when every state has a margin of appreciation who to list and who not. The stated preventive nature of the sanctions regime can lead us to the conclusion that at least UNSC considers that with that system it could be difficult to be effective.

What is indisputable is the fact that the preventive nature of the sanctions regime without possibility to challenge the listing before the independent and impartial body is indefensible. The UNSC is therefore pushed to change the nowadays sanctions system relating to Al-Qaida and the Taliban or to reconcile with the fact that European states will probably change their attitude to the preventive and binding nature of the sanctions measures and sanctions regime.

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- Judgment of the General Court (Seventh Chamber) of 30 September 2010, *Yassin Abdullah Kadi v European Commission*, T-85/09.
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THE RIGHT TO INFORMATION ABOUT THE RIGHT TO SILENCE AS EU PROCEDURAL GUARANTEE IN CRIMINAL PROCEEDINGS AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS

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Abstract in original language

Darba mērķis ir analizēt tiesības uz informāciju par tiesībām klusēt kā vienas no neskaidrākajām un pretrunīgākajām procesuālajām tiesībām, kas ir noteiktas Eiropas Parlamenta un Padomes 2012. gada 22. maija Direktīvā 2012/13/ES par tiesībām uz informāciju kriminālprocesā. Autores aplūko aktuālos un problemātiskos jautājumus par minēto tiesību izpratni un efektīvu aizsardzību ES dalībvalstu tiesību sistēmās.

Key words in original language

ES procesuālās tiesības kriminālprocesā; ES krimināltiesības; cilvēktiesības; tiesības uz informāciju; tiesības klusēt; tiesības sevi neapzūdzēt; tiesības neliecināt.

Abstract

The objective of the paper is to analyze the right to information about the right to silence as one of the most ambiguous and controversial procedural guarantees, which are provided in the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. Authors examine the actual and problematic aspects about the comprehension and effective protection of these rights in legal systems of EU member states.

Key words

EU procedural guarantees in criminal proceedings; EU criminal justice; human rights; right to information; right to silence; right not to incriminate oneself; right not to testify.

INTRODUCTION

The Lisbon treaty[1], which entered into force on 1st December 2009, constitutes a major step in the development and protection of human rights in Europe. Article 6 of the Treaty on European Union[2] provides

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

[2] Consolidated version of the Treaty on European Union, OJ C 83 of 30.3.2010.

that the Charter of Fundamental Rights of the European Union (the Charter)[3] is now legally binding, having the same status as primary European Union (EU) law, and that the EU 'shall accede' to the European Convention on Human Rights (the ECHR)[4]. Furthermore the Lisbon treaty abolished the former "third pillar" (police and judicial cooperation in criminal matters) thus providing that the regulation in this field now takes the form of regulations, directives and decisions, namely by applying the ordinary legislative procedure. However Article 82 (2) of the Treaty on the Functioning of the European Union provides that EU may adopt only directives to "establish minimum rules" in defined areas of criminal procedure, inter alia, concerning the rights of individuals in criminal procedure, if such regulation is necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal maters having a cross-border dimension. The article also provides that rules establishing minimal rules concerning the rights of individuals in criminal procedure shall take into account the differences between the legal traditions and systems of the Member States.[5]

On 30 November 2009 the Council of the European Union adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Roadmap) that proposes the adoption of five legislative measures taking a step-by-step approach: the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).[6]

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[3] Charter of Fundamental Rights of the European Union, OJ C 83, 30.03.2010.

[4] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Available: http://www.unhcr.org/refworld/docid/3ae6b3b04.html [accessed 26 November 2012].

[5] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 83, 30.3.2010.

[6] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ C 295, 4.12.2009, Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF [accessed 26 November 2012].
The roadmap has to be seen as step-by-step EU activities in the legal regulation of procedural guarantees in criminal proceedings. The first measures in this field was taken already form 2002, which resulted in the adoption of Green paper form the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union of 19. February 2003. Available: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf [accessed 26 November 2012].

Consequently there have been adopted first directives laying down common minimum standards on the rights of suspects and accused persons in criminal proceedings throughout the European Union.[7] The directive applied for measure B of the Roadmap is Directive of 22nd of May 2012 on the right to information in criminal proceedings (The Directive on the Right to Information).[8] Article 3(1) of the Directive on the Right to Information provides the list of the rights about which suspects or accused persons have to be informed. Among the other rights (the right of access to a lawyer, the right to free legal advice, the right to be informed of the accusation, the right to interpretation and translation) it provides also the right to remain silent.

Article 6 of the ECHR and Article 47 of the Charter enshrine the right to a fair trial, but does not include the right to remain silent. The right to remain silent is one of the aspects of the right not to incriminate oneself.[9] The European Court of Human Rights (the ECtHR) in a number of cases has stated that it is generally recognized international standard, which lies at the heart of the notion of a fair procedure under Article 6.[10] In addition Paragraph 2 (g) and 3 of Article 14 of the International Covenant on Civil and Political Rights sets out two main aspects of the right not to incriminate oneself - the right not to be

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See Strada-Rozenberga K., EU Criminal Justice – Development Trends and Impact in Latvia, International Scientific Conference. The Quality of Legal Acts and its Importance in Contemporary Legal Space, 4-5 October, 2012 at the University of Latvia Faculty of Law, Riga, p. 423-435.

[7] As the first directive for measure A of the Roadmap was adopted Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.
On Measure C of the Roadmap the European Commission has adopted a Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. Available: http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf [accessed 26 November, 2012]

[8] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. OJ L 142, 1.6.2012, p. 1–10.

[9] The detailed analyses of the notions „the Right to Silence", „the Right not to Incriminate Oneself", „the Privilege against Self Incrimination" goes beyond the scope of this article. There has been a broad discussion about the terminology – about these notions. The authors supports the view that the notion „the Privilege agaist Self-Incrimination" (in civil law systems equally used – „the Right not to Incriminate Oneself") includes the right to silence. See Peçi I., Sounds of Silence: A research into the relationship between administrative supervision, criminal investigation and the nemo-tenetur principle. Nijmegen: Wolf Legal Publishers, 2006, p. 78.; Callewaert J., The Privilege against Self-Incrimination in European Law : an Illustration of the Impact of the Plurality of Courts and Legal Sources on the Protection of Fundamental Rights in Europe. ERA-Forum: scripta iuris europaei, 2004, Issue 04, p. 488.

[10] *Saunders v. United Kingdom* (App. no 19187/91), ECHR 1996-VI, no. 24, para. 68; *John Murray v United Kingdom* (App. no18731/91) ECHR 1996-I, no. 1, para. 45.

compelled to testify against himself and the right not to confess guilt.[11] These rights constitute the main aspects of the right not to incriminate oneself. The latter is one specific aspect of the general right to fair trial applied to those who are charged with a criminal offence.

Although the right to remain silent is generally recognized procedural guarantee in criminal proceedings which emerges from common traditions of European legal systems, at the same time it is one of the most ambiguous and controversial rights with different interpretation among the Member States that includes cases of serious infringement thus creating ambiguity in the understanding and efficient implementation of the right in national legal systems.[12] This is confirmed by the fact that the right to remain silent was not included in the first proposal of the Directive on the Right to Information.[13] The authors will try to reveal the actual and problematic aspects about the comprehension and effective protection of these rights in national legal systems.

THE TERMINOLOGY

The notion "the Right to Remain Silent" used in Article 3 (1) of the Directive on the Right to Information may cause confusion in application of these rights in Member States legal systems.

Research analyzing protection of the procedural rights in the EU national legal systems shows that these rights are recognized in EU Member States, however the wording that a suspect has the right to 'remain silent' is only used in the Spanish and Dutch Letter of Rights, but does not exist in other Member States. For example, the Letter of rights of Czech Republic provides that the person "is not obliged to testify".[14] Also Article 66 (1) 15 of Criminal Procedure Law of Latvia (CPL) provides that a suspect and accused has "the right to testify or refuse to provide testimony".[15]

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[11] UN General Assembly, International Covenant on Civil and Political Rights. 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 Available: http://www.unhcr.org/refworld/docid/3ae6b3aa0.html [accessed 26 November 2012].

[12] Trechsel S., Summers J. S., Human rights in criminal proceedings. Oxford: Oxford University Press, 2005., p. 341.; Zahar A., Sluiter G. K. International Criminal Law: a critical introduction. New York: Oxford University Press, 2008, p. 303.

[13] Spronken T., de Vocht D., EU Policy to Guarantee Procedural Rights in Criminal Proceedings : "Step by Step", In: North Carolina Journal of International Law and Commercial Regulation, 2011, Vol. 37, Issue 02, p. 466-467.

[14] Spronken T., EU-Wide Letter of Rights in Criminal Proceedings. Maastricht University. 2012., p. 28. Available: http://arno.unimaas.nl/show.cgi?fid=20056 [accessed 26 November 2012].

[15] Criminal Procedure Law, Latvia (21.04.2005.) Available: http://www.likumi.lv/doc.php?id=107820 [accessed 26 November 2012].

The notion “the Right to Silence” is characteristic to common law legal systems while in the civil law systems as an equal term is used “the Right not to Testify” or “the Right to Refuse to Provide Testimony”. There is no necessity to change the legislation, however it has to be clarified what does these rights mean.

The provision of the Directive on the Right to Information does not clearly reveal the meaning of the notion “the Right to Remain Silent”. First paragraph of Article 4 of the Directive on the Right to Information provides an obligation on the Member States to ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. An indicative model Letter of Rights, which is set out in Annex I of the Directive on the Right to Information, as concerns to the right to remain silent contains such information: “While questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. [..]” So the question is whether the suspect or accused person has right not to speak at all or only not to answer to specific incriminating questions.

The notion “the Right to Remain Silent” has to be interpreted broadly. According to the case-law of the ECtHR the accused persons have the right not to provide testimony regardless of its nature. ECtHR in the case *Saunders v. United Kingdom* states: " [..] bearing in mind the concept of fairness in Article 6 [..] [of the ECHR - authors' note], the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility."[16] Therefore it has to be acknowledged that the right not to testify provided for suspects and accused persons includes the right to refuse to provide testimony completely as well as the right not to give answers to particular questions thus giving a person option to choose whether to use this right, when, and how extensively.

THE IMPORTANCE OF THE RIGHT TO INFORMATION ABOUT THE RIGHT TO SILENCE

The right to information is a general principle which has particular importance in criminal procedure. Article 90 of the Constitution of the Republic of Latvia (the Constitution) provides “Everyone has the right to know about his or her rights."[17] The Constitutional Court of the

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[16] *Saunders v. United Kingdom*, (App. no 19187/91), ECtHR 1996-VI, 24, para. 71.

[17] The Constitution of the Republic of Latvia. (15.02.1922.) Available: http://www.likumi.lv/doc.php?id=57980 [accessed 26 November 2012].

Republic of Latvia has emphasized the importance of the this constitutional principle by pointing out that it introduces the whole catalog of the fundamental human rights - Chapter XIII of the Constitution - and provides the subjective public right of every person to be informed about their rights and also responsibilities. [18] The right to information as a general principle of criminal procedure can be found in the criminal procedure laws of the Member States, for example, in Article 8 (1) of the Code of Criminal Procedure of Estonia; in Article 15 (3) of the Criminal Procedure Code of Bulgaria. The recognition of the right to information as a general principle in the criminal procedure is important in order to ensure the observance of this principle both within the national legislation and in practice.

The objective of the right to information is to ensure the protection of other fundamental rights in criminal procedure, namely, it creates precondition that lets a person to be aware of the rights he or she has been given. The Constitutional Court has indicated that only a person, who knows his or her rights, is able to use them effectively and in the case of unjustified infringement – defend them in the fair trial.[19] Also Article 3 (1) and 19th recital of the preamble of the Directive on the Right to Information requires that the informing must be carried out in a manner that allows the practical and effective exercise of the rights.

The objective of the right to information about the right to silence is to ensure, that a suspect or accused person who waives the right to silence and testifies, comprehend the importance and consequences of such refusal. Namely, that a person refuses form the right to silence knowingly and intelligently. This requires not just formal informing about the right to silence, but also explaining the nature and legal consequences of the rights (Article 150 (4) of the CPL). It should be noted that a suspect or accused person may not understand the right to silence and even believe that exercising of the right can be used against him or her. Therefore it is important to inform a person that he or she has the right to refuse to provide testimony completely as well as the right not to give answers to particular questions. A person must also be informed, that the failure to provide testimony will not be assessed as a hindrance to ascertaining the truth in a case or an evasion of the pre-trial proceedings (Article 66 (3) of the CPL). Namely, that the use of the right can not have adverse consequences. The authors will return to this issue later.

Another important aspect Article 3 (1) read in conjunction with the 19th recital of the Directive on the Right to Information provides that the information about the rights has to be provided promptly, that is, at

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[18] Judgement of the Constitutional Court of Republic of Latvia of 20 Decembre 2006. in case 2006-12-01 "Par Prokuratūras likuma 1. panta pirmās daļas, 4. panta pirmās daļas, 6. panta trešās daļas, 22. panta un 50. panta atbilstību Latvijas Republikas Satversmes 1., 58., 82., 86. un 90. pantam", *Latvijas Vēstnesis,* 28.12.2006., nr. 06., para. 16.
[19] Ibid.

the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

Article 4 read in conjunction with the 22th recital of the Directive on the Right to Information imposes an obligation for the Member States to ensure that suspects or accused persons who are arrested or detained, are provided with a written Letter of Rights drafted in an easy comprehensible manner so as to assist those persons in understanding their rights. Article 3 (2) read in conjunction with the 26th recital of the Directive on the Right to Information requires to take into account any particular needs of vulnerable suspects or vulnerable accused persons, who cannot understand the content or meaning of the information, for example because of their youth or their mental or physical condition.

The requirement for the conscious decision whether to use the right to silence requires informing not just about the right to silence, but also about other rights that can help a person to take conscious decision regarding whether to provide a testimony or not. The other rights stated in the Directive on the Right to Information such as the right to information about the accusation and the right to free legal advice are essential in order to ensure provision of the right to remain silent.

The above requirements allow the suspects and accused persons effectively exercise the rights to silence.

THE IMPACT ON PRACTICE

Considering the impact of the right to information about the right to silence on national legal systems, the major challenge is to ensure the guarantees defined in the Directive on the Right to Information in practice. Lets us look at the situation in Latvia.

A quantitative survey among 201 accused persons, 42 defenders and 88 officials who perform criminal proceedings was carried out in 2012 with an objective to find out how effective the right not to incriminate oneself is respected in practice.[20] The questions also concerned the right to information about the right to silence. The survey shows that in practice the right to information about the right to silence is considerably violated.

The accused persons were asked a question whether the right not to testify was explained to them before the testifying. 43% of the surveyed accused persons answer “no”; 21% - that the right was explained only in the first time of interrogation; 16% answer that the right was explained every time, 15% - that the right was explained but not every time; and 5% - that the right was explained only in the adjudication of case in court (Graph No.1.).

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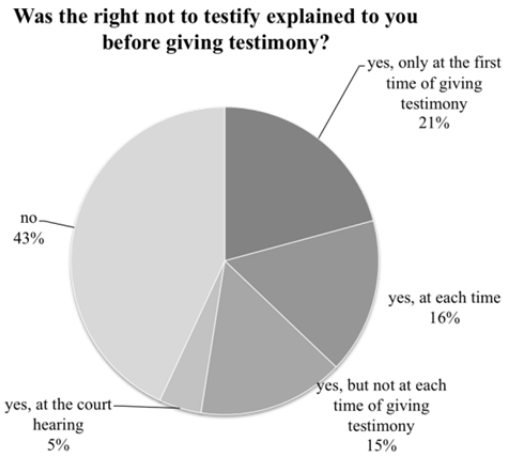
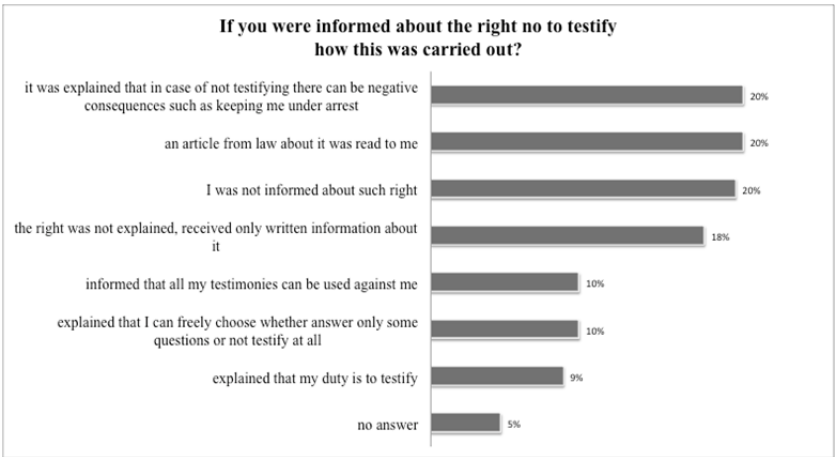
[20] The survey was carried out by Irēna Ņesterova for her PhD thesis „The Right not to Incriminate Oneself in Criminal Procedure” that are currently being written.

Graph No.1. - Accused persons (201 respondent)



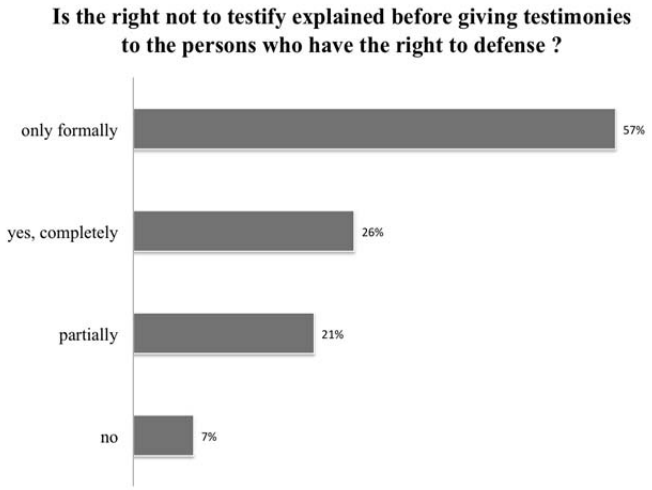
The answers to the next questions clearly show that in practice in many cases instead of the informing persons about the right no refuse to testify, the suspected or the accused person is either only formally informed about the right or even compelled to provide testimony. In response to the question about how the right not to testify was explained 20% of respondents state that they were threatened with unfavorable legal consequences if they choose not to testify, for instance, keeping them under arrest. Another 20% were not informed about this right at all. The corresponding article from the law was red and explained in 20% of cases, in 18% only written information without any explanation was supplied. Only 10% had received a warning that all the given testimonies can be used against them and 10% were informed that they can freely choose whether to answer only some questions or refuse from providing a testimony completely, while 9% were explained that it is their duty to testify. 5% of respondents didn't answer this question (Graph No.2.).

Graph No.2. - Accused persons



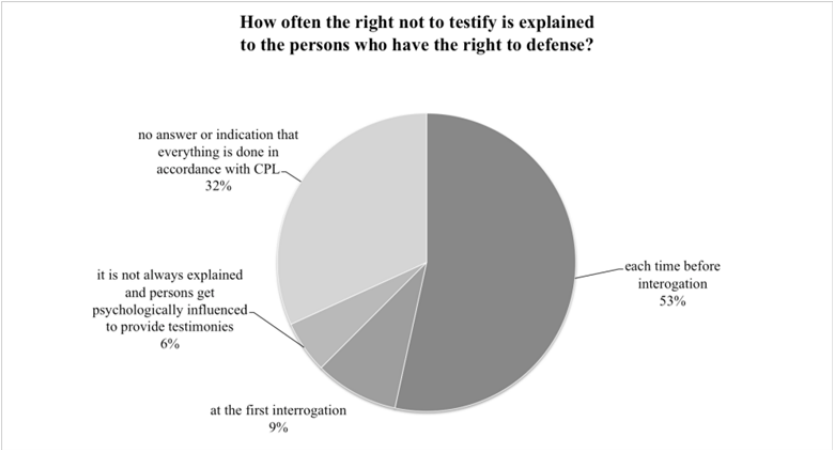
The responses from 42 defenders and 88 officials who perform criminal proceedings also show that in practice the right not to testify often is not explained to suspects or accused persons. 57% of defence counsels state that this right is explained only formally, 26% think that it gets fully explained, 21% - that it gets explained only partially and 7% say that it doesn't get explained at all (Graph No.3.).

Graph No.3. – Defence counsels (42 respondent)



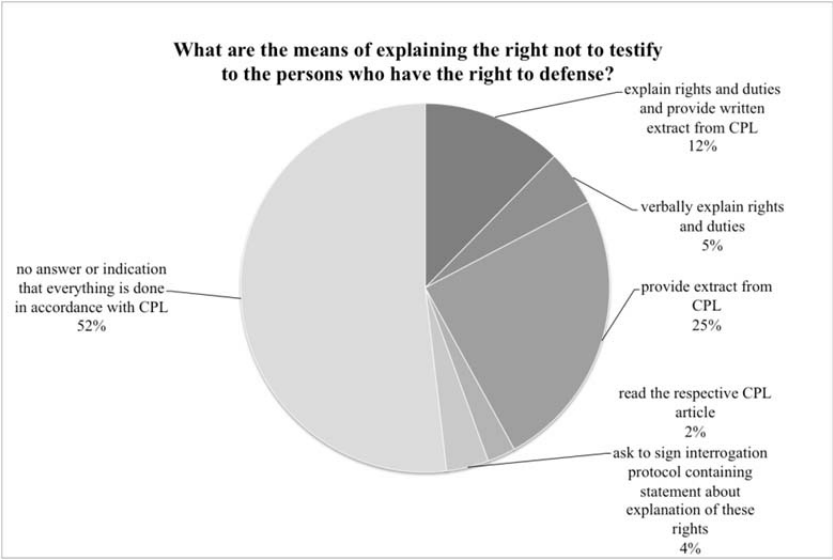
The officials who perform criminal proceedings (judges 23%, police officers 53%, prosecutors 24%) were also asked a question how often the right not to testify is explained to the suspects or accused persons. 53% state that the right not to testify is explained before each interrogation, 9% - before the first interrogation, 6% admit that this right is not always explained and persons get psychologically influenced to provide testimonies, 32% do not answer a question or make an excuse that everything is done in accordance with CPL (Graph. No.4.).

Graph. No.4. – Officials who perform criminal proceedings (88 respondents)



The next question was regarding the methods of explaining the right not to testify to the accused persons. More than a half (52%) don't answer this question or make an excuse that everything is done in accordance with CPL, 25% explained that they provide written extract from the CPL, 2% - read aloud the article from the CPL, 4% ask to sign interrogation protocol containing statement about explanation of these rights and only 12% explain the rights and duties (Graph. No.5.).

Graph. No.5. - Officials who perform criminal proceedings



It can be concluded that in legal practice in Latvia the right to silence is one of the rights which are not explained most frequently. For example, the accused are more often informed about the right to legal advice. The right not to testify often is not explained at all or explained only formally. Likewise there are instances when persons get misled to believe that they have a duty to testify or that exercising the right to silence can cause adverse consequences such as

deprivation of the liberty by applying arrest.

These problems are common to other EU Member States. The research on comparative criminal justice in Europe reveals that also in other countries the suspects and accused persons can suffer from adverse consequences in case of not providing testimony. The decisions on pre-trial detention relied on the fact that a person has remained silent or has not confessed his or her guilt can be found in Italy, Hungary, Belgium and Poland.[21] This reveals that although adverse consequences for exercising the right to silence are prohibited, in practice they take place, particularly in the form of pre-trial detention.

In order to comply with the Directive on the Right to Information, the Member States should take all appropriate steps including financial, organizational and disciplinary measures to ensure that in practice suspects and accused persons are effectively informed about the right to silence.

TOWARDS HIGHER STANDARDS

When adopting the right to information about the right to silence in national legal systems Member States should not be confined to the implementation of the minimum standards required in EU and other international human right systems. In accordance with Article 82 (2) of the Treaty on the Functioning of the European Union adoption of the minimum rules concerning the rights on individuals in criminal proceedings shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

In the implementation of EU law the interaction between EU law and other international human rights standards, in particular, provided by the ECHR and the case-law of the ECtHR must be considered. According to Article 52 (3) of the Charter in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the latter. The Article also provides that the provision shall not prevent Union law providing more extensive protection. ECtHR does not act as a "fourth instance".[22] The ECtHR has emphasized that it is for the national courts to assess the evidence before them, while it is for the ECtHR to ascertain that the proceedings considered as a whole were fair.[23] The ECtHR in the process of developing a self-incrimination principle as a part of the general principle of a fair trial under Article 6 (1) of the ECHR, has to create a doctrine, that accords with the diverse

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[21] Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p. 405., 349., 86., 459.

[22] Criminal Procedure in Europe. Vogler R., Huber B. (ed. by) Berlin: Duncker & Humblot, 2008, p.16.

[23] *Telfner v. Austria* (App. no 33501/96), judgment of 20 March 2001, para. 13.

legal systems of its member nations.[24] The ECHR harmonizes the protection of the right not to incriminate oneself by creating the minimal not maximal standards. The national legal protection should comply with these standards, but may also increase them.

An important issue in the scope of the right to information about the right to silence is how the non-informing or undue informing about the right to silence affects the validity of acquired evidence and its further use in criminal procedure. The ECtHR doesn't acknowledge that withholding of procedural safeguards such as the right to information[25] by itself causes breach of the right against self-incrimination provided that acquired evidence is properly used in further procedure. In several EU Member States – Italy, Slovenia, Hungary - the criminal procedure laws directly provide that a testimony obtained without providing the information about the right to remain silent can not be used as an evidence against the accused person.[26] It must be welcomed that Member States ensure that the violation of the requirement to inform accused person about the right to silence can lead to the absolute inadmissibility of evidence.

One of the most controversial and discussed issues is the possibility to draw adverse inferences from the silence of an accused person. In most EU Member States the national legislation does not allow such adverse inferences. An exception is the Criminal Justice and Public Order Act (1994)[27] of England, which allows judges and juries to consider as evidence of guilt a suspect's failure to answer police questions during interrogation as well as a defender's refusal to testify during trial. It allows to make a "proper" and "common sense" inferences - a person cannot be convicted on the basis of an inference alone and there must be other sufficient evidence establishing the *prima-facie* case against the suspect person.[28] The adverse inference

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[24] See Berger M., Europeanizing Self-incrimination: the Right to Remain Silent in the European Court of Human Rights. Columbia Journal of European Law, 2006, No.12, p. 342.

[25] *Zaichenko v. Russia* (App. no 39660/02), judgment of 18 February 2010, para. 55-60.

[26] Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p. 392, 404.-405.; Article 117 (2) of the Criminal Procedural Code of the Republic of Hungary. (1998.) Available: http://www.legislationline.org/documents/section/criminal-codes/country/25 [accessed 26 November 2012]; Criminal Procedure Act of Slovenia. (26.01.2006.) Available: http://legislationline.org/documents/section/criminal-codes [accessed 26 November 2012]

[27] Criminal Justice and Public Order Act. (1994) Available: http://www.legislation.gov.uk/ukpga/1994/33/contents [accessed 26 November 2012]

[28] Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p.139.; Milovanovich Z., Privilege against Self-incrimination: a Comparative Perspective. In Fields, C. B., Moore Jr. R.H. Comparative and international

issue has generated a number of cases in the ECtHR, which has not found that the drawing of adverse inferences from the silence of accused person by itself is contrary to Article 6 of the ECHR indicating: "Whether the drawing of adverse inferences from an accused's silence infringes Article 6 [..] is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation." [29]

These provisions have caused broad discussion and criticism in the legal doctrine.[30] Although the provisions cannot be applied arbitrarily, they create significant pressure to give evidence and as a result increase risk of an innocent person to be convicted of a criminal offense. The empirical research has shown that after the provision although the number of suspects exercising their right to remain silent has declined, the rates at which admissions are made and convictions secured have not affected. Therefore they are regarded as pointless weakening of the right not to incriminate oneself.[31] Thus informing an accused person about the possibility to draw adverse inferences from his or her silence must be considered as unlawful restriction that unduly infringes the right to silence.

Member States should maintain and strive to implement higher standards and refrain from undue restriction of the right to silence in order to avoid miscarriage of justice or in other words - to protect innocent persons from false accusations.

CONCLUSION

1. The right to silence is one of the most ambiguous and controversial rights which are provided in the Directive on the Right to Information with different interpretation among the Member States of the EU that includes cases of serious infringement thus creating ambiguity in

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criminal justice: traditional and nontraditional systems of law and control. 2nd ed. Long Grove, IL: Waveland Press, 2005, p. 381.

[29] *John Murray v United Kingdom* (App. No 18731/91) ECHR 1996-I, no. 1., para. 48; *Averill v. United Kingdom* (App. no18731/91) ECHR 2000-VI, para. 44.

[30] See Easton S. The case for the right to silence, 2nd ed, Aldershot etc.: Ashgate, 1998.; Criminal Procedure in Europe. Vogler R., Huber B. (ed. by) Berlin: Duncker & Humblot, 2008, p. 66.; Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p. 140.; Statement of the European Criminal Bar Association (ECBA) on the Greenpaper Presumption of Innocence of 26 April 2006. Available: http://www.ecba.org/content/index.php [accessed 26 November 2012].

[31] Criminal Procedure in Europe. Vogler R., Huber B. (ed. by) Berlin: Duncker & Humblot, 2008, p.66.; Cape E., Namoradze Z., Smith R., Spronken T., Effective Criminal Defence in Europe. Antwerp – Oxford – Portland: Intersentia, 2010, p. 140.

understanding and efficient implementation of the right in national legal systems.

2. The concept "the right to remain silent" which is used in the Directive on the Right to Information may cause confusion in applying these rights in EU Member States legal systems, because it is characteristic to common law legal systems, while in the civil law systems "the right not to testify" is used as an equal term.

3. The major problems in adopting the right to information about the right to silence in the Member States of the EU is ensuring them in practice. Both the comparative studies of European criminal procedure and the survey of the accused persons, defence counsels and officials who perform criminal proceedings, which was carried out in Latvia shows that in practice the right to information about the right to silence is significantly violated.

4. When adopting the right to information about the right to silence in national legal systems the Member States of the EU should not be confined to the implementation of minimum standards, but to maintain and strive to implement higher standards and refrain from undue restriction of the right to silence. For example, it shall be recognised that the violation of the requirement to inform suspect or accused person about the right to silence can lead to the absolute inadmissibility of evidence. Also informing an accused person about the possibility to draw adverse inferences from his or her silence as it is provided in legal framework of England has to be regarded as unlawful restriction of the rights to silence.

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Principles of municipal service in the Russian Federation and in the European Union

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Abstract

The article considers problems of legal regulation of principles of municipal service in the Russian Federation and in the European Union and its consequences for municipalities.

Key words

municipal service, principles of municipal service, the Russian Federation, the European Union, municipalities, public service.

The modern western theory of law divides all principles of law into two groups: general and fundamental principles. The fundamental principles are "originally constitutional provisions, in hierarchy of the statuses settle down above laws". Such fundamental principles of the Russian law are fixed in the Constitution of the Russian Federation. The general principles are the provision (rule) of the objective right (instead of the natural or ideal right) which not surely are reproduced in provisions (rules) of a positive law, however they are often fixed in laws and this way principles dominate over a positive law. The general principles of law shouldn't contradict the fundamental principles that establish main provisions of local government, municipal service in the Russian Federation and in the European Union. All fundamental principles of law are general principles, but general principles of law can become fundamental only after their regulation in the state Basic law (Constitution).

The analysis of legal regulation of the principles of municipal service by the European Union Law and the Russian Federation Law lets us see the main difference between these systems of law.

There are 23118 municipalities in the Russian Federation as of January 01, 2012[1]. The European Union totals 27 member

[1] URL: http://http://www.gks.ru/dbscripts/munst/

countries currently[2], each of those has its own municipalities. These quantitative indexes of municipalities follow us to understanding that local government and municipal service particularly need detailed legal regulation at the federal level in the Russian Federation and at the level of the European Union. In spite of the fact that the legislation on municipal service can't be absolutely identical for each municipality of a state, it should be under construction on uniform principles – fundamental (constitutional) principles and general principles of law, namely: principles fixed in the law that regulates local government or municipal service directly.

In Russian Municipal law all principles of municipal service are shared on two independent, but the interconnected groups: principles of functioning of municipal service and organizational principles of municipal service.

The legislation of the Russian Federation has a federal legal act that regulates general positions of municipal service in the Russian Federation and its main basic principles. It is the Federal Law "About municipal service in the Russian Federation" (02.03.2007, № 25).

The main principles of municipal service in the Russian Federation are (Article 4):

1) Human rights and freedoms;

2) Equal access of the citizens knowing a state language of the Russian Federation to municipal service and equal conditions of its passing irrespective of sex, race, nationality, origin, property and official capacity, residence, religion, belief, belonging to public associations and other circumstances not connected with professional and business qualities of the municipal employee;

3) Professionalism of municipal employees;

4) Stability of municipal service;

5) Availability of information on activity of municipal employees;

6) Interaction with public associations and citizens;

7) Unity of the main requirements to municipal service considering historical and other local traditions;

8) Legal and social security of municipal employees;

9) Responsibility of municipal employees for default or inadequate execution of the functions;

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[2] URL: http://europa.eu/about-eu/countries/member-countries/index_en.htm

10) Extra party membership of municipal service.

More than that every municipality of the Russian Federation has a right to set its own principles of municipal service, but they shouldn't contradict the principles established by the Federal Law.

The situation with establishment of principles of municipal service in the European Union is quite different.

The first difference between the legal regulations of municipal service in the Russian Federation and in the European Union concerns with understanding of what "municipal service" is.

According to article 2 Federal Law "About Municipal Service in the Russian Federation" the municipal service is a professional activity of citizens which is carried out on a constant basis at the positions of municipal service replaced by an execution of an employment agreement (contract). Modern domestic doctrinal sources of the Russian Municipal law confirm that the service can be considered municipal only at simultaneous existence of four conditions: 1) it is professional activity of the corresponding person; 2) it is carried out on a constant basis; 3) the real service assumes occupation of one of positions of municipal service; 4) the position of such service is replaced only on the basis of the contract.

In the European Union it is used to understand municipal service as municipal (public) services as those. Some papers of the European Union includes such definitions of municipal service when European public (municipal) service means ‘a cross-border public sector service supplied by public administrations (refers to either national public administrations (at any level) or bodies acting on their behalf, and/or EU public administrations), either to one another or to European businesses and citizens’[3].

Such distinction underlies establishment of different principles of municipal service in the Russian Federation and in the European Union.

There is no special legal act in the European Union that sets the general principles of municipal service. But it has various official papers which contain some principles of municipal service and uncover their contents. Besides it's important to consider that European Union Law after Lisbon gains one significant feature: regulations, instructions and

[3] European Interoperability Framework (EIF) for European public services (European Commission; Bruxelles, le 16.12.2010; COM (2010) 744 final).

decisions accepted on the basis of legislative procedure get the status of legal acts of the European Union. Those categories of acts accepted out of this procedure have the status of bylaws.

For example, there is the European Interoperability Framework (EIF) for European public services (European Commission; Bruxelles, le 16.12.2010; COM (2010) 744 final). It has the Chapter 2, dealing with the 'underlying principles', that sets out general principles of good administration that are relevant to the process of establishing European public services. They describe the context in which European public services are decided and implemented. These underlying principles reflect the expectations of citizens, businesses and public administrations with regard to public service delivery. All these principles complement one another regardless of their different natures, e.g. political, legal or technical.

All twelve underlying principles of the EIF are broken down into three categories:

- The first principle sets the context for EU action on European public services;
- The next group of underlying principles reflect generic user needs and expectations;
- The last group provides a foundation for cooperation among public administrations.

The underlying principles of European public service are next ones:

1. Subsidiarity and proportionality (the subsidiarity principle requires EU decisions to be taken as closely as possible to the citizen; the proportionality principle limits EU action to what is necessary to achieve agreed policy objectives, this means that the EU will opt for solutions that leave the greatest possible freedom to Member States);
2. User-centricity (public services are intended to serve the needs of citizens and businesses, those needs should determine what public services are provided and how public services are delivered);
3. Inclusion and accessibility (inclusion means allowing everyone to take full advantage of the opportunities offered by new technologies to overcome social and economic disadvantages and exclusion; accessibility ensures that people with disabilities and the elderly can use public services with the same service levels as all other citizens);
4. Security and privacy (citizens and businesses must be assured that they interact with public administrations in an environment of trust and in full compliance with the

relevant regulations, e.g. on privacy and data protection, this means that public administrations must guarantee the privacy of citizens and the confidentiality of information provided by businesses);

5. Multilingualism (ideally, European public services provided EU-wide should be available in all official EU languages to ensure that rights and expectations of European citizens are met);
6. Administrative simplification (this principle is closely linked to underlying principle 2, user-centricity);
7. Transparency (citizens and businesses should be able to understand administrative processes);
8. Preservation of information (records and information in electronic form held by administrations for the purpose of documenting procedures and decisions must be preserved; the goal is to ensure that records and other forms of information retain their legibility, reliability and integrity and can be accessed as long as needed, taking into account security and privacy);
9. Openness (openness is the willingness of persons, organisations or other members of a community of interest to share knowledge and stimulate debate within that community, the ultimate goal being to advance knowledge and the use of this knowledge to solve problems; European public administrations should aim for openness, taking into account needs, priorities, legacy, budget, market situation and a number of other factors);
10. Reusability (public administrations must be willing to share with others their solutions, concepts, frameworks, specifications, tools and components);
11. Technological neutrality and adaptability (public administrations should render access to public services independent of any specific technology or product);
12. Effectiveness and efficiency (public administrations should ensure that solutions serve businesses and citizens in the most effective and efficient way and provide the best value for taxpayer money).

European public services are built from the most basic service components that group three types of components, namely interoperability facilitators, services based on base registries, and external services, together called basic public services.

So municipal service in the Russian Federation and municipal service in the European Union have the similar

general aims, tasks, ideas, positions, the similar basic principles, however they have different definitions in the Russian legislation and in the legislation of the European Union.

Thus, the main difference between the principles of municipal service in the Russian Federation and in the European Union is that such principles in the Russian Federation are reduced to principles of passing municipal service and its organization, while in the European Union generally the principles concern directly rendering of municipal (public) services.

This distinction leads to the following situation. The purpose of adoption of the Russian Federal Law № 25 was establishment of the general principles of municipal service which then would be concretized by municipalities. But actually municipalities in their local acts only repeat conditions of the municipal service containing in the Federal Law, without adapting municipal service for the local features.

Local government in the European Union bases on a decentralization principle. That's why the system of principles of municipal service is arranged under conditions in every municipality of European Union countries, because there "municipal service" is understood as a process of rendering of municipal (public) services as those.

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THE RELATIONSHIP BETWEEN US AND EU AS MEMBERS OF WTO

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Abstract in original language

Článok sa zameriava na hlavné črty vzťahu medzi Európskou úniou a Spojenými štátmi ako členmi WTO, základné črty ich sporov a ich riešenie v podmienkach WTO. Keďže sú členmi WTO, ich obchodné politiky musia byť založené na požiadavkách WTO/GATT. Spory medzi nimi sú ovplyvnené o.i. používaním rastových stimulátorov v hovädzom mäse, daňami a leteckými dotáciami.

Key words in original language

Európska únia, Spojené štáty, WTO, vzťah, spor

Abstract

The article is focused on the main features of the relationship between the EU and the US as members of the WTO, main features of disputes and their solutions in terms of the WTO. As members of the WTO, trade policies both of them have to be based on requirements of the WTO (GATT). Disputes between them are affected i.a. by usage of hormone growth promotes in beef, taxes or aircraft subsidies.

Key words

European Union, United States, WTO, relationship, dispute

1. INTRODUCTION

The relationship between the United States and the European Union as members of the World Trade Organization[1] is a transatlantic relationship of two big regional subjects. Market regulation of these regional subjects entailing a potential "clash" of different economic cultures and is the new battlefield in international trade.[2] Settlement of transatlantic trade disputes between these two members of the WTO has become a common feature of the WTO activities. The goal of this article is to focus on legal aspects of trade relationships between The United States and The European Union as members of The World Trade Organization. For presentation of this relationship is useful to mention at first some information about the WTO and settlement of disputes of this organization. Then we will refer about the US and the

[1] The contribution was prepared as part of the project: APVV-0823-11.

[2] Koopmann, G.: The EU, the USA and the WTO- an Uneasy Relationship. In: Intereconomics: Review of European Economic Policy, 2004, vol. 39, issue 2, pp. 58.

EU as members of the WTO and finally some facts about disputes affecting relationship of these two members. Because we can say, that the story of dispute settlement at the World Trade Organization (WTO) is, in large part, the story of the transatlantic relationship between the United States (US) and European Community (EC), now European Union.[3]

2. THE WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) is the principal global international organization that deals with trade rules between nations. The goal of this organization is to help producers of goods and services, exporters and importers conduct their business.[4] The WTO is rules-based, member-driven organization what means that all decisions are made by member governments, and the rules are outcome of negotiations among members.[5] Major principles of the World trade organization, namely reciprocity and nondiscrimination, are simple rules. They can deliver en efficient outcome, when they are used together. Both rules can help to neutralize externalities resulting from terms-of-trade effects.[6]

Countries seeking to join the World Trade Organization must negotiate the terms of their accession with current members, as provided for in Article XII of the WTO Agreement.[7] The accession process strengthens the international trading system because it ensuring that new members understand and implement WTO rules from the outset.[8]

But aim of this article is not the functioning of the WTO. We would like to focus on WTO Dispute Settlement, which is mainly issue of

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[3] Busch. M. L., Reinhardt, E.: Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement. [online] Dostupné na internete: <http://userwww.service.emory.edu/~erein/research/florence.pdf

[4] What is the WTO? [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

[5] The WTO. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/thewto_e.htm

[6] Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <http://eiop.or.at/eiop/texte/2005-012a.htm

[7] "...any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO..."

[8] WTO Accessions. [online] Dostupné na internete: <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/wto-accessions

trade relationship between The United States and The European Union.

2.1. WTO Dispute Settlement

One of the unique features of the WTO in comparison to other international organizations is dispute settlement.[9] As Palmeter describes, The World trade organization was established by transformation of GATT within the Uruguay Round negotiations,[10] which the most significant achievement was Dispute Settlement Understanding.[11]

The WTO´s procedure for resolving trade conflicts[12] under the Dispute Settlement Understanding is significant for enforcing the rules and for ensuring that trade flows smoothly. A dispute occurs when one member government believes another member government is violating an agreement, which authors are member governments themselves, or a commitment that it had made in the WTO.[13] Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. But the point is not to pass judgment. The priority is to settle disputes,[14] through consultations if possible. Under the old GATT a procedure for setting disputes existed, but it had no fixed timetables, rulings were easier to block and settlement of disputes took a long time. The Uruguay Round agreement brought more clearly defined stages in procedure. This agreement also, in

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[9] Breuss, F.: WTO Dispute Settlement: An Economic Analysis of Four EU-US Mini Trade Wars- A Survey. In: Journal of Industry, Competition and Trade, 2004, pp. 275.

[10] Dispute Settlement Understanding is agreement which established the dispute settlement system and was negotiated as part of the Uruguay Round in 1995.

[11] Busch. M. L., Reinhardt, E.: Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement. [online] Dostupné na internete:< http://userwww.service.emory.edu/~erein/research/florence.pdf

[12] For more information about the WTO and its procedures, see: Agreement Establishing the World Trade Organization and its annexes. [online] Dostupné na internete: <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

[13] Dispute settlement. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

[14] Settling disputes is the responsibility of Dispute Settlement Body, which consists of all WTO members, and it can establish „panels" of experts to consider the case when two sides cannot agree.

contrast with GATT, made it impossible for the country losing a case to block the adoption of the ruling.[15]

The dispute settlement process is also about preserving the balance of political advantage from negotiated rules and schedules, and the sanctions process is as much to do with preventing abuse as correcting it. According to some opinions, dispute settlement at the WTO serves three essential functions: to clarify and interpret the agreements that have been negotiated in the WTO; to prevent abuses that would diminish the benefits that countries derive from WTO membership; and to preserve the balance of benefits and obligations negotiated by the political process.[16] But essential functions of DS system, as basic, are stated in article 3 of DSU: first, to promptly settle disputes; second, to preserve members' rights; and third, to clarify the meaning of the existing provisions.[17]

The great accomplishment, but not only, of the DSU was the establishment of an Appellate Body. It helps to ensure some consistency across findings, but there is no possibility of appeal when panels authorize retaliation. There have been some inconsistent awards of authorization to retaliate, particularly with respect to violations of the prohibition on export subsidies, which have their own dispute settlement provisions. By authorizing retaliation but limiting its size, the WTO helps to prevent disputes in which both parties and the trade system could be severely damaged.[18]

2.2. Retaliatory measures

At first side, it has to be mentioned that the DSU does not actually use the term "retaliation," but term "suspension of concessions or other obligations. Most of time, a complaining member would choose to suspend obligations in such a way that it can restrict trade of the responding member. Retaliation is linked to the implementation stage of WTO dispute settlement. It is complaining member´s response to non-implementation by a responding member of an adverse ruling by the WTO´s Dispute Settlement Body. Retaliation should represent a

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[15] A unique contribution. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

[16] Josling, T.: WTO Dispute Settlement and the EU- US Mini Trade Wars: Commentary on Fritz Breuss. In: Journal of Industry, Competition and Trade, December 2004, Vol. 4, Issue 4, pp. 337- 338.

[17] Understanding on rules and procedures governing the settlement of disputes. [online] Dostupné na internete: <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf

[18] Lawrence, R. Z.: The United States and the WTO Dispute Settlement System. [online] Dostupné na internete: <http://www.hks.harvard.edu/fs/rlawrence/United%20States%20and%20the%20WTO%20Dispute%20Settlement%20System.WTO_CSR25.pdf

measure of last resort used only after failed attempts by the complaining and responding members at agreeing on mutually agreeable compensation. It´s important to remind that retaliation is subject to multilateral authorization by DSB, because retaliatory measures constitute a departure from basic WTO obligations.[19] Authorization for retaliation is granted just temporary, as long as the member retaliated against has not implemented the underlying adverse Dispute Settlement Body ruling. Retaliation is not intended as punishment or compensation for past economic harm of complaining member.[20]

The Dispute Settlement Body and therefore a Dispute Panel has a power to authorize the suspension of trade concessions by a complainant to respondent where there is a harm, nullification or impairment, according to the paragraph 2 of Article XXIII of GATT 1994. Following this provision, Members of the WTO are binding to accept the rulings of the DSB and also for the DSB to permit sanctions against countries acting contrary to the WTO rules. Compensations and the suspension of concessions, which is of Most-Favoured Nation (MFN) treatment, to a WTO Member are intended as temporary measures. They are only implemented if the recommendations and rulings of the DSB are not acted upon within a reasonable time period. These measures cannot be applied retrospectively. Where nullification or impairment is ruled to have occurs, a respondent may choose between compensation (may have form of tariff reductions and is voluntary) and suspension of concessions (it´s default means of restitution and is more complex) as the form of restitution. The grounds for compensation, the suspension of concessions and retaliation are established by Article 22 of the DSU and the magnitude of any compensation or suspension of concessions is required to be equivalent to the level of harm caused by illegal measure.[21]

3. US AS A MEMBER OF WTO

The United States of America has been member of WTO since January the 1st 1995.[22] The official sites of the Office of the United States Trade Representatives stated that the core of trade policy of the US is permanent support to multilateral trading system based on rules. The US, working through the World Trade Organization, is one of

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[19] See: Art.7.3, 22.1 of the DSU.

[20] Malacrida, R.: Designing WTO Retaliatory Measures: The Case For Multilateral Regulation Of The Domestic Decision- Making Process. [online] Dostupné na internete: <http://ebookbrowse.com/malacrida-domestic-process-of-designing-retaliatory-measures-august-08-doc-d340823663

[21] Kerr, W. A., Gaisford, J. D., eds.: Handbook on International Trade Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

[22] United States of America and the WTO. [online] Dostupné na internete: < http://www.wto.org/english/thewto_e/countries_e/usa_e.htm

the world leaders in the reduction of trade barriers and to expand global economic opportunity, improve living standards and reduce poverty.[23] According to some estimate, US incomes are some 10 percent higher than they would be if the economy were self-sufficient.[24]

The US membership in the WTO requires the US open their own markets to the benefit of American consumers and industries using import. It also supports trade liberalization abroad, opening markets and keeps them open for US exporters. WTO Agreement implementing these commitments in written, so there is less temptation for governments to meet and re-save the harmful trade barriers under the short term political pressures. The main reason why many governments not based barriers to US exports of the agreements signed with the US government to reduce barriers and keep them to a minimum. Governments are aware that in the event that would raise tariffs beyond the "bound" rates written in WTO agreements, or by others violated provisions aimed at maintaining the open market, they would be subject of the dispute, which was resolved within WTO dispute settlement system.[25]

Following the report of the Council on Foreign Relations,[26] The WTO provides more benefits to the United States than GATT did. These benefits lie on provisions which cover more issues interesting for United States: The WTO includes rules on standards and technical barriers to trade; it protects intellectual property; it covers agriculture and services. But the biggest advantage of the WTO is that it includes a mechanism to enforce these rules, the dispute settlement system. This has reduced the need for the United States to resort to unilateral retaliatory measures, limiting an important source of tension between the United States and its partners and so generating a significant foreign-policy dividend. Indeed, since the advent of the dispute settlement system, the United States has generally abided by its agreement not to impose unilateral trade sanctions against WTO

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[23] The World Trade Organization. [online] Dostupné na internete: <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization

[24] Lawrence, R. Z.: The United States and the WTO Dispute Settlement System. [online] Dostupné na internete: <http://www.hks.harvard.edu/fs/rlawrence/United%20States%20and%20the%20WTO%20Dispute%20Settlement%20System.WTO_CSR25.pdf

[25] Americans Reaping Benefits of U.S. Membership in WTO. [online] Dostupné na internete: <http://www.cato.org/publications/commentary/americans-reaping-benefits-us-membership-wto

[26] See: Lawrence, R. Z.: The United States and the WTO Dispute Settlement System. [online] Dostupné na internete: <http://www.hks.harvard.edu/fs/rlawrence/United%20States%20and%20the%20WTO%20Dispute%20Settlement%20System.WTO_CSR25.pdf

members without WTO authorization (The Banana case is probably exception). Anyway, the shift to multilateral enforcement helps ensure the legitimacy of the trading system.

4. EU AS A MEMBER OF WTO

European Union is a single customs union with a single trade and tariff policy. European Union´s participation in the WTO started in January the 1st 1995, since when EU became a member of WTO. The 27 member States of the European Union are also WTO members in their own right. The European Commission, the EU´s executive arm, speaks for all EU member States at almost all WTO meetings. According to some opinions, the EU Council could be viewed not just as an intergovernmental institution gathering a group of Member States´ representatives on a regular basis through its various committees, but rather as an accountable legislative body, analogous to the US Senate.[27] The EU is, in addition to the WTO, a member of some groups in the negotiations (former coalitions in the WTO), as Friends of Ambition (NAMA)-seeking to maximize tariff reductions and achieve real market access in NAMA, or "W52" sponsors-proposal for "modalities" in negotiations on geographical indications and "disclosure."[28]

European Union, and also some others organizations as, for example, the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), is considered as good example of Regional Trade Agreement (RTA). Today's Multilateral Trading System consists of the world-wide liberalization ambitions under the WTO and of a subset of numerous RTA. Increasing integration in the EU, on the one hand increases its negotiation power at the WTO, on the other hand it diminishes the need for settling trade disputes within its borders and, hence, makes hands free for conflict settling vis à vis third countries. In the transatlantic trade disputes the EU is more often the complaining than the defending party.[29]

Only customs unions, like the EU, conduct a common commercial policy with a common external tariff. All other RTAs consist of a looser arrangement with a free trade arrangement. The most important trading partner for the EU is the USA. The EU and the USA are each other's main trading partner and account for the largest bilateral trade

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[27] Leal- Arcas, R.: The EC in the WTO: The three- level game of decision making. What multilateralism can learn from regionalism. [online] Dostupné na internete: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594943

[28] The European Union and the WTO. [online] Dostupné na internete: <http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm

[29] Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <http://eiop.or.at/eiop/texte/2005-012a.htm

relationship in the world. The EU and the USA are also each other's most important source for Foreign direct investment (FDI).[30] The USA was the largest investment partner of the EU, accounting for nearly 45% of both outward and inwards flows of FDI.[31]

As we can focus on the EU as regional organization and the WTO as manifestation of multilateralism, the problems that the enlarged EU will face in its internal decision- making process can be paralleled to the WTO´s decision- making process, and thus the European experience can be used as guidance in the WTO forum. So we could learn from EU´s benefits and avoid the mistakes of the European experience in the decision- making process of international trade fora.[32]

5. US/EU DISPUTES WITHIN WTO

Trade relationship between states, for example US and EU, is characterized by trade rules which are an unruly mix of economic, political and legal constructs.[33] According to high level of US- EU commercial interactions, trade intensions and disputes are not unexpected. Major trade conflicts between US and EU have varied causes. The disputes are involving agriculture, aerospace, steel, etc. Other conflicts arise when one of these WTO members initiate actions or measures to protect or promote their political and economic interests. The underlying cause of these disputes over such issues as sanctions, unilateral trade actions and preferential trade agreements are different foreign policy goals and priorities of Brussels and Washington. These bilateral trade disputes have real economic and political consequences for the bilateral relationship. They can be weakening efforts of the two partners to provide strong leadership to the global trading system.[34] Anyway, trade disputes have a potential of turning into the conflicts. But both sides lose out most times. To

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[30] Foreign direct investment- direct investment into production in a country by a company in another country, by buying a company in the individual country or by expanding operations of an existing business in that country.

[31] Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <http://eiop.or.at/eiop/texte/2005-012a.htm

[32] Leal- Arcas, R.: The EC in the WTO: The three- level game of decision making. What multilateralism can learn from regionalism. [online] Dostupné na internete: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594943

[33] Josling, T.: WTO Dispute Settlement and the EU- US Mini Trade Wars: Commentary on Fritz Breuss. In: Journal of Industry, Competition and Trade, December 2004, Vol. 4, Issue 4, pp. 337.

[34] Ahearn, R. J.: Trade Conflict and the U.S.- European Union Economic Relationship. [online] Dostupné na internete: <http://fpc.state.gov/documents/organization/71826.pdf

prevent such conflicts, countries have agreed on trading rules and joined the WTO to mediate disputes.[35]

5.1. Cases with usage of retaliatory measures

The WTO Dispute Settlement Mechanism (DSM) allows for sanctions, mostly via retaliatory tariffs in present. It offers a cooperative interpretation of non-compliance. For example, if only two countries are involved in a trade dispute within the multilateral agreements of the WTO a collapse of an agreement is not plausible. Then we have to weigh economic values against political values. It´s more understandable that the complainant and respondent may lose in welfare terms, both governments, for political economy motives, still prefer the outcome to the initial situation. However, each retaliatory action answering the non-compliance with a former agreement has incalculable consequences, especially when the retaliation is not executed with some form of transfers, but with imposing retaliatory tariffs. That´s the reason why someone state that retaliation in the present form never can "rebalance" the original status.

According to Breuss, tariffs from an economic point of view are very bad instruments for countermeasures. Although the right to request financial reparation for a wrongful act, including damages incurred in the past, is a basic principle of international law in case compliance is not possible the question is the method in which sanctions should be executed. A much more efficient and easier retaliation instrument than tariffs would be direct transfers from the government of the non-complying country to the government of the country having got the authorization of compensation by the WTO. The government authorized for compensation could than easily redistribute the received transfers to the companies which suffered the concrete loss. In his point of view, whether transfers as retaliatory measures would also be covered by the present DSU legislation is an open question. Article 22.1 DSU never speaks about tariffs explicitly but only about compensation and the suspension of concessions or other obligations. Suspension of concessions implies as a rule the reintroduction of tariffs as the major part of concessions.[36]

Speaking about retaliation with tariffs, this sanction as a rule a decision by the arbitrators under Dispute Settlement Understanding[37]

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[35] Free trade in peril. [online] Dostupné na internete: <http://news.bbc.co.uk/2/hi/business/342821.stm

[36] Breuss, F.: WTO Dispute Settlement: An Economic Analysis of Four EU-US Mini Trade Wars- A Survey. In: Journal of Industry, Competition and Trade, 2004, pp. 309.

[37] E.g. in the "Hormones" case that "the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US$ 116.8 million per year would be consistent with Article 22.4 of the DSU."

is interpreted as the authorization for the complaining party to impose countermeasures up to the level of nullification or impairment in the form of additional 100% ad valorem duties. The retaliatory tariff is meant to be and is usually prohibitive what means that the imports of the targeted products of the retaliation list come to a halt absolutely or that they decline markedly. So no tariff revenue can be collected or only a limited amount. When either the US or the EU is retaliating against each other following violating the WTO agreements we have the situation of a (retaliatory) „ trade war," in which both parties reduce trade by imposing trade contracting measures simultaneously. For fairly low dimension of these disputes we call them „mini trade wars." Out of the large number of Dispute Settlement cases, in only seven occasions the WTO-Dispute Settlement authorities (Arbitrators) allowed the complainant party to introduce retaliatory measures against another WTO member. Concerned EU-US trade dispute, there were three such cases, namely the Hormones case, the Bananas case and the FSC case.[38]

5.1.1. Hormones case[39]

In the beginning of this case, in 1986-1987, the United States invoked GATT dispute settlement under the Tokyo Round´s Technical Barriers to Trade Agreement in response to the EU´s initial ban on hormone-treated meat in the 1980s. They also instituted retaliatory tariffs on EU imports, which stayed in effect until May 1996. In 1996, both subjects had requested WTO consultations in an attempt to resolve the dispute. In April 1996, the United States requested a WTO dispute settlement panel case against the EU, claiming that the ban is inconsistent with the EU´s WTO obligations under the WTO agreement on Sanitary and Phytosanitary (SPS). Australia, Canada, and New Zealand joined the United States in the complaint. But the EU maintained the ban. In 1997, the WTO dispute settlement panel released its report, in which agreeing with the US that the ban violated several provisions of the SPS Agreement. Specifically, the EU ban was found to violate SPS requirements that such measures: a) be based on international standards, guidelines or recommendations (Article 3.1); b) be based on a risk assessment and take into account risk assessment techniques developed by the relevant international organizations (Article 5.1); and c) avoid arbitrary or unjustifiable distinctions that result in discrimination or a disguised restriction on international trade (Article 5.5).

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[38] Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <http://eiop.or.at/eiop/texte/2005-012a.htm

[39] Complainants: United States (WT/DS26) and Canada (WT/DS48). For summary of Hormones Case, see: The Hormones case. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c5s3p1_e.htm

The WTO Appellate Body, in 1998, on the EU appeal, found that the EU ban did contravene the EU´s obligations under the SPS Agreement, but left open the option for the EU to conduct a risk assessment of hormone-treated meat. A WTO arbitration panel ruled subsequently that 15 months from the date of the decision would be a reasonable period of time for the EU to conduct its assessment. By the deadline, the EU did not complete its scientific review and decided it would not consider removing the ban before conducting additional review. So the US retaliated by imposing its current trade sanctions against US imports of EU products from 1999. Following the 1997 WTO decision, the EU ordered various research studies and performed scientific reviews of the issue. In 1999, as justification for continuing the ban, the EU offered scientific reviews and opinions that estradiol may be carcinogenic. In 2003, EU press release claimed that EU´s scientific reviews constitute thorough risk assessment based on current scientific knowledge and thus fulfill the EU´s WTO obligations. Accordingly, in 2003, the EU issued a new directive and revised its ban to permanently ban estradiol and provisionally ban the five other hormones. US trade and veterinary officials have repeatedly rejected the EU studies, claiming that the scientific evidence is not new information nor does it establish a risk to consumers from eating hormone-treated meat. The United States also claims that these findings ignore even scientific studies by European scientists. In 2004, the EU requested WTO consultations. They claimed that the United States should remove its retaliatory measures since the EU has removed the measures found to be WTO inconsistent in the original case. In 2005, the EU initiated new WTO dispute settlement proceedings against the United States and Canada. Panel report from the March of 2008 cited fault with all three parties (EU, United States, and Canada) on various substantive and procedural aspects of the dispute. The EU had not presented sufficient scientific evidence to justify the import ban and the United States and Canada had maintaining their imposed trade sanctions. The panel found procedural violations of both parties under the WTO Dispute Settlement Understanding by unilateral actions. Both parties filed appeals citing procedural errors and disagreements with the panel findings.

In October 2008, the WTO Appellate Body issued a mixed ruling that allows for continued imposition of trade sanctions on the EU by the United States and Canada, but also allows the EU to continue its ban on imports of hormone-treated beef (by stating that the EU´s ban is not incompatible with WTO law).

The WTO Appellate Body´s reversal of the panel on this issue of scientific evidence has led some to argue that this is a potentially precedent-setting decision that might be perceived to instruct dispute settlement panels to be more deferential to national governments when

the relevant scientific evidence is not available to make an objective risk assessment.[40]

In this dispute, brought by Canada and the United States, the EU has refused to remove its import restrictions despite to be found as illegal by a WTO panel and has willingly accepted retaliation on the grounds that its import restrictions are justified by health fears over the long-term effects on consumers.[41]

5.1.2. The Bananas case[42]

In 1993, the Council of the European Union adopted Reg. No. 404/93 on the common organization of the market in bananas and subsequent EU legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas (the "BFA"). This regulation established a regime for the importation, sale and distribution of bananas (Common Market Organization for bananas), and implement, supplement and amend that regime. The import regime with a complicated tariff-quota system had two ideas. First, to have a common trade regime for EU's Single Market and second, to prefer ACP countries (African, Caribbean, Pacific) at the expense of traditional bananas supplier from Latin America and the USA. The Bananas dispute with the EU started in 1996. Ecuador, Guatemala, Honduras, Mexico and the USA filed a complaint against this import regime for bananas (with the third parties Saint Lucia, Dominican Republic, Nicaragua and Jamaica) at the WTO by starting formal consultations with the EU and WTO panels were set up. The EU import regime was found to be illegal by the WTO in 1997. The main criticisms were the setting aside of a quantity reserved solely for ACP imports (failure in "non-discrimination requirements" of Article XIII of GATT 1994), and the allocation of licenses on a "historical" basis. According to WTO, in the Bananas case several WTO provisions are relevant or agreements are violated, respectively: GATT (I, II, III, X, XI, XIII), Licensing, Agriculture, TRIMS and GATS (II, XVI, XVII). The EU adjusted its Common Organization of the Market in Bananas with the Council Regulation (EU) No 2587/2001, coming into force as of January 1, 2002. The US government lifted its sanctions as of 1 July 2001, as a consequence of the earlier agreement with the USA and Ecuador.

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[40] Johnson, R., Hanrahan, Ch. E.: The U.S.- EU Beef Hormone Dispute. [online] Dostupné na internete: <http://www.nationalaglawcenter.org/assets/crs/R40449.pdf

[41] Kerr, W. A., Gaisford, J. D., eds.: Handbook on International Trade Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

[42] Complainants: Ecuador, Guatemala, Honduras, Mexico, United States (WT/DS27). For summary of Bananas case, see: EC- Bananas III. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds27sum_e.pdf

The Banana dispute is a very complex case, involving goods trade and services, tariffs and quotas and a whole bunch of countries. In addition to the USA and the Latin American producers also the 78 ACP countries and the EU are involved in the Banana case.[43] To make the story even more complex,[44] in this case arose an important procedural dispute over the relative primacy and sequencing of compliance and compensation. The US wanted to retaliate immediately while the EU argued that this could only be done of its new trade measures for bananas were found not to comply with the WTO rules. An arbitration panel ruled that an Article 21.5 ruling was not a prerequisite for action under Article 22.6, but its decision has never been adopted.[45]

5.1.3. The Foreign Sales Corporations case (FSC)[46]

The US tax income tax concession for foreign sales corporations was first raised in GATT by the EU based on earlier legislation in1973. The US argued that the concession did not constitute a subsidy but has agreed to amend its legislation according to WTO findings. The EU is not convicted that the amendments so far proposed will go far enough.[47]

In 1997 the EU requested for consultations on the US Internal Revenue Code and related measures establishing special tax treatment for Foreign Sales Corporations. The FSC scheme provides for an exemption to the general tax rules which results in substantial tax savings for US companies. The EU argued that the exemptions from the US direct taxes of a portion of FSC income related to exports and of dividends distributed to US parent companies constitute export

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[43] Within the EU there are at least four groups with different trade regimes before the EU implemented its common organization of the market in bananas in 1993: a) free trade countries (Austria, Finland, Germany, and Sweden); b) Tariff imposing countries (Belgium, the Netherlands, Luxembourg, Denmark and Ireland); c) ACP supplied countries (Italy and the United Kingdom); d) Countries with own production (France, Greece, Spain and Portugal). In each of these groups the welfare implications of the EU banana regime of 1993 were different.

[44] Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <http://eiop.or.at/eiop/texte/2005-012a.htm

[45] Kerr, W. A., Gaisford, J. D., eds.: Handbook on International Trade Policy. Cheltenham, UK: Edward Elgar Publishing Limited, 2007, pp. 504.

[46] Complainant: European Communities (WT/DS108). For summary of FSC case, see: US-FSC. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds108sum_e.pdf

[47] Johnson, M. D. C.: US-EU trade disputes: Their causes, resolution and prevention. [online] Dostupné na internete: <http://www.eui.eu/RSCAS/Research/Transatlantic/Johnson.pdf

subsidies contrary to provisions of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (ASCM). The US introduced the FSC scheme in 1984 as a replacement of its old export promoting tax scheme condemned by a GATT panel in 1981. The EU decided to request the establishment of a WTO Panel in 1998 after unsuccessful rounds of consultations. According to the WTO Panel report, the FSC constituted a prohibited export subsidy under the Subsidies Agreement and an export subsidy in violation of the Agriculture Agreement. Since satisfactory change in the FSC regulations did not take place, the EU has requested the WTO to authorize trade sanctions on the US up to a maximum amount in the FSC trade dispute. The EU's objective was not the punitive duties on US products but the creation of an incentive for US to withdraw the illegal exports subsidy. The FSC case is quantitatively by far the most important case for both sides.

Contrary to the first two cases the FSC dealt with trade conflict between the EU and the US, when it would not have been solved, could have led to a trade war of considerable dimension and it would have involved nearly all sectors of both economies and change in sectoral competitiveness in both countries, which are not easily predictable.[48]

5.2. Contemporary cases with importance

One of the key trade disputes between the United States (US) and European Union (EU) in present arises from the rivalry between Boeing and Airbus in the highly competitive large civil aircraft industry. Previous disputes on subsidy issues between the two largest aircraft manufactures peaked in early 90s. In 1992, the EU and the US regulated the government involvement in the large civil aircraft industry by a bilateral agreement, Agreement on large civil aircraft.[49] This agreement allowed each party to provide a certain level of support to their respective aircraft industry. Both Airbus and Boeing, obtained, under the terms of the joint agreement, several government aids for the development of large civil aircraft like the Airbus A380 and the Boeing 787 "Dreamliner." [50] While Airbus was supported in terms of agreement by voluminous loans ("launch aids" for the development of new planes), the aids granted in terms of the

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[48] Breuss, F.: Economic Integration, EU-US Trade Conflicts and WTO Dispute Settlement. [online] Dostupné na internete: <http://eiop.or.at/eiop/texte/2005-012a.htm

[49] For the text of agreement, see: Agreement on Trade in Civil Aircraft (1992). [online] Dostupné na internete: <http://www.jurisint.org/pub/06/en/doc/29.htm

[50] Haak, A., Brüggemann, M.: The WTO Airbus- Boeing Subsidies Conflict, Overview on Latest Developments and Outlook. [online] Dostupné na internete:
<http://www.theworldlawgroup.com/files/file/docs/TW%20Boeing.pdf

agreement to Boeing mainly consisted of government-financed Research & Development support to this US aerospace producer. But in 2004, the US unilaterally announced its withdrawal from the agreement and immediately filed a challenge at the WTO of all EU support ever granted to Airbus, even though the US had previously agreed to this support. In turn, the EU had just option to respond itself immediately with a parallel the WTO challenge of the US government support to the US aerospace industry, including benefits to Boeing under the so-called US Foreign Sales Corporation Scheme, which the US government had continued to provide to Boeing.[51] So the Large Civil Aircraft case is subject of two ongoing cases, Boeing case and Airbus case.

5.2.1. Boeing case[52]

In its WTO challenge against the US, the EU has challenged various US Federal, State and local subsidies benefitting Boeing. NASA has provided Boeing with more than US$2 billion in subsidies through eight NASA-funded federal research programs through direct payments and free access to facilities, equipment and employees. The AB confirmed that the above programs provided subsidies in the form of a direct transfer of funds or the provision of goods and services by NASA to Boeing for which no fee is payable and for which Boeing acquired the commercial IP rights. The AB confirmed moreover that the US Department of defence (DOD) under its Research Development, Test and Evaluation programs has transferred to Boeing, at no cost, dual use technology worth up more than US$1 billion for direct use in Boeing's production of Large Civil Aircraft as well as free access to DOD's facilities. The AB clarified that the relations between NASA and DOD on the one side, and Boeing on the other side was akin to that of a joint venture, with the essential feature that the fruits of the joint labour largely went to one partner, Boeing, which had provided none of the funding. Also Kansas and Washington State granted tax subsidies. According to the proceedings in this case, following the final report of the Appellate Body adopted by DSB, after the US compliance period, the US submitted a compliance report. After the EU reviewed the US compliance claims, the EU submitted a request for consultations on the US compliance of the DSU and a request for the authorization of countermeasures under the DSU. After compliance consultations where the US failed to provide detailed evidence to the EU to support its compliance claims, in present time the EU requested the establishment of a WTO

[51] Background fact sheet WTO disputes EU/US Large Civil Aircraft. [online] Dostupné na internete: <http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146486.pdf

[52] Complainant: European Communities (WT/DS317, WT/DS353).

compliance panel to address the failure of the US to remove WTO-inconsistent subsidies to Boeing.[53]

5.2.2. Airbus case[54]

The US complaint was particularly aiming on the launch aids and loans granted to Airbus taking into consideration the fact that Boeing had not been supported by such funds. According to aviation experts, the US were also trying to prevent the EU from granting further launch aids to Airbus for the development of the A350, Airbus' competitor to the 787 "Dreamliner."[55]

In this case, The Appellate Body overturned several key findings made by the Panel in favor of the EU. Certain subsidies remain, even though the economic impact of these support measures in the Large Civil Aircraft market has been found to be very limited, nowhere near the US allegations (claims). The interesting point of this case is the development of WTO appellate procedure. At the joint request of the parties, the Appellate Body, for the first time in an appellate proceeding, adopted additional procedures to protect the business confidential information and highly sensitive business information submitted in the proceedings, because that disclosure of such information could be "severely prejudicial" to the originators of the information.[56]

6. CONCLUSION

The United States and European Union have a large bilateral trade relationship in the world which has a big potential. Cause the size and importance of trade ties the US and the EU are the key players in the global trade. They are the largest trade and investment partner for most of other countries. Its transatlantic relationship defines the shape of the global economy. For two economies of such commercial importance, the US and the EU encounter a number of trade disputes

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[53] For more about Boeing case see: United States — Measures Affecting Trade in Large Civil Aircraft. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm

[54] Complainant: United States (WT/DS316, WT/DS347). For more about Airbus case, see: European Communities — Measures Affecting Trade in Large Civil Aircraft. [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm

[55] Chanda, S.: The battle of the big boys: A critical analysis of the Boeing-Airbus dispute before WTO. [online] Dostupné na internete: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1944588

[56] EC and certain member states — large civil aircraft (DS316). [online] Dostupné na internete: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds316sum_e.pdf

which are dealt through the dispute settlement mechanism of the WTO. Despite huge fuss disputes currently only impact small percentage of trade between the United States and the European Union.[57] For better cooperation the US and the EU established a High Level Working Group to identify policies and measures to increase US/EU trade and investment and in 2007 the Transatlantic Economic Council was set up to guide and stimulate the work on transatlantic economic convergence. So we can just wait for the effect of these group and council on trade between the US and the EU. However, the US and the EU are big subjects of trade and in every relationship, not excluding trade one, disputes arise all the time. But important is the will to settle the dispute and the way of this settlement.

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COMMON SECURITY AND DEFENCE POLICY AFTER THE LISBON TREATY - INSTITUTIONAL INNOVATIONS

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Abstract in original language

This contribution provides an overview of the institutional structures and innovations, that the EU has at its disposal to steer and implement its Common Security and Defence Policy (CSDP) after the entry into force of the Lisbon Treaty. CSDP is by no means the only policy framework through which the EU channels its support to peacebuilding. The analysis of the current institutional set-up may help to better understand potential implications for EU's peacebuilding activities.

Key words in original language

Institutional innovations, common security and defence policy, High Representative, Permanent President of the European Council European External Action Service, Political and security committee, European defence agency.

1. INTRODUCTION

The Lisbon Treaty introduced several innovations intended to make the Common Security and Defence Policy more coherent and transparent, as a result, to strengthen the EU's role as a global actor. The essential innovations in the area of the Common Security and Defence Policy (CSDP) focus upon consolidating over 10 years of experience of the European Security and Defence Policy and these are a logical consequence of the treaty reforms in Maastricht (1992), Amsterdam (1997) and Nice (2001) and political agreements such as the French-British Summit in Saint Malo (1998).

Since then, the European Union has launched a total of 26 civilian and military operations worldwide in the framework of the European Security and Defence Policy (ESDP). This rapid evolution and implementation of the ESDP, however, made institutional as well as conceptual adaptation necessary. Consequently, the Lisbon Treaty includes several substantial innovations in this field. It also relabelled the ESDP as the Common Security and Defence Policy (CSDP).

2. INSTITUTIONAL INNOVATIONS

The Lisbon Treaty has created new and long-awaited foreign policy architecture for the European Union by introducing three key innovations: *a High Representative for Foreign Affairs and Security*

Policy, a permanent President of the European Council and a European External Action Service.

a) The High representative (HR)

One of the main innovations of the Lisbon Treaty in the area of security and defence has been the creation of the new office of the HR. The HR conducts the CFSP[1], chairs the newly established Foreign Affairs Council[2] and is one of the Vice-Presidents of the Commission[3]. By providing the HR with this mandate, the Lisbon Treaty incorporates the former 'troika formation' – the High Representative of the CFSP, the Commissioner for External Relations and the Foreign Minister of the country holding the rotating presidency – into one position. Some have called the new HR 'triple-hatted' for taking over the areas of responsibility formerly exercised by these three actors. Others have called the HR 'double-hatted' for serving both the Council and the Commission. This section illustrates that, if one carefully observes the tasks and responsibilities of the HR under the Lisbon Treaty, notably her role in the progressive framing of a Common Defence Policy and her responsibility to conduct the CSDP, the HR is, in fact, quadruple-hatted.[4]

The Lisbon Treaty gives the new office of the HR four main tasks. Firstly, the HR is responsible for putting into effect the CFSP together with the Member States, 'using national and Union resources'. The HR exercises a right of initiative; she is mandated to submit proposals for the development of the CFSP and the CSDP and has the ability to execute these as mandated by the Council. Also, the HR is responsible for managing and implementing the policies of, and has the right to propose, and exercise authority over, EU Special Representatives In performing these tasks, the HR assumed the hat of the former High Representative for CFSP, Javier Solana.

Secondly, in her capacity as Vice-President of the Commission, the HR 'shall ensure the consistency of the Union's external action' and 'shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action'. Moreover, together with the Council, the HR ensures the unity, consistency and effectiveness of action by the Union.

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[1] Treaty of European Union, article 18.2.

[2] Treaty of European Union, article 18.3 and 27.1.

[3] Treaty of European Union, article 18.4.

[4] WOUTERS, J., BIJLMAKERS, S., MEUWISSEN, K. The EU as a Multilateral Security Actor after Lisbon: constitutional and institutional aspects, p. 18.

Thirdly, the HR presides over the Foreign Affairs Council. According to Article 27 TEU, the HR ensures the implementation of the decisions adopted by the European Council and the Council. She contributes to the development of the CFSP through her right of initiative, represents the Union for matters relating to CFSP, conducts political dialogue with third parties on the Union's behalf, and expresses the Union's position in international organizations and at international conferences. The HR also constitutes the link to the Parliament for CFSP. The position as chair of the Foreign Affairs Council was previously held by the President of the External Relations Council, the Minister of Foreign Affairs of the six-monthly rotating presidency.

Fourthly, the HR conducts the CSDP. As noted, the CSDP is an integral part of the CFSP and includes the progressive framing of a common Union defence policy when the European Council, acting unanimously, so decides. The HR may make proposals to the Council relating to CSDP. The Council can adopt decisions unanimously and may, where appropriate, propose the use of both national resources and Union instruments together with the Commission. If the EU opts to use civilian and military means in the exercise of tasks referred to in Article 42(1) TEU, the HR, acting under the authority of the Council and in close and constant contact with the PSC, shall ensure the 'coordination of the civilian and military aspects' of such tasks. In addition, the HR plays an important role in the establishment of permanent structured cooperation. Finally, the HR has assumed the duties of former HR Javier Solana as head of the European Defence Agency and has become chairman of the EDA's Steering Board, its decision-making body.[5]

b) Permanent President of the European Council

The Lisbon Treaty establishes the full-time position of the President of the European Council. The mandate of the President is to chair the European Council and drive forward its work. Moreover, he 'shall ensure the preparation and continuity' of its work and 'shall endeavour to facilitate cohesion and consensus within the European Council'. In addition the President ensures, at his level and in his capacity, the external representation of the Union on issues concerning the CFSP 'without prejudice to the powers of the High Representative'. These responsibilities imply that the President of the European Council plays a role in the formulation and implementation of aspects of CFSP. Moreover, with the Lisbon Treaty, the European Council gained the mandate to adopt by unanimity decisions on the strategic interests and objectives of the Union relating to all areas of the external action of the Union, including CFSP.

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[5] WOUTERS, J., BIJLMAKERS, S., MEUWISSEN, K. The EU as a Multilateral Security Actor after Lisbon: constitutional and institutional aspects, p. 18 - 19.

By establishing the office of President of the European Council, the Lisbon Treaty provides a clear-cut solution to the problems posed by its previous chair, the head of state or government of the Member State holding the six-month rotating presidency. Ensuring consistency and continuity under the TEU's previous arrangements proved difficult as the EU's priorities changed every six months with a new incoming presidency. The presidency combined the job in Brussels with the normal tasks as head of state. This often resulted in a lack of leadership and a lack of time to properly prepare the European Council's meetings.[6]

The new post of President of the European Council sits alongside that of the existing Presidents of the Commission and the European Parliament. The latter essentially represents that institution, whilst the Presidents of the Council and Commission share the role of representing the Union's external relations policies. Whilst President Van Rompuy chairs meetings of European Heads of State in the European Council and President Barroso presides over meetings of the College of Commissioners, the sharing of external representation duties is more uncertain. So far, the President of the Commission has had a leading role on traditional trade matters in the framework of the G8, while the President of the Council, has led on issues related to the global financial and economic crisis, including attending the newly formed G20 as well as representing the Union at President Obama's high-profile Nuclear Security Summit, in Washington in April 2010.[7]

c) European External Action Service

The European Council established the new European External Action Service (EEAS) in its Decision on 26 July 2010, after having consulted the European Parliament and having obtained the consent of the Commission.[8] The EEAS is seen as a key structure in helping the Union meet the expectations of a more visible, coherent and effective EU foreign policy following the adoption of the Lisbon Treaty.[9]

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[6] PIRIS, J. C. The Lisbon Treaty: a legal and political analysis, p. 206.

[7] QUILLE, G. The European External Action Service and the Common Security and Defence Policy (CSDP). In GRECO, E., PIROZZI, N., SILVESTRI, S. EU Crisis management: Institutions and capabilities in the making, p. 58.

[8] This happened after the General Affairs Council had reached agreement on the HR's proposal on the structure of the EEAS on April 2010 and the European Parliament had adopted the Brok report on the proposal on 8 July 2010.

[9] QUILLE, G. The European External Action Service and the Common Security and Defence Policy (CSDP). In GRECO, E., PIROZZI, N., SILVESTRI, S. EU Crisis management: Institutions and capabilities in the making, p. 55.

As a *sui generis* service separate from the Commission and the Council Secretariat, bringing together all geographical and thematic desks, the EEAS constitutes an interface between the main institutional actors of the Union's foreign policy and a source of strengthened coherence for EU external relations. The EEAS, staffed by officials from the Council Secretariat, the Commission and national diplomatic services, is destined to become the centre of information-sharing on the latest political developments outside the Union and foreign policy-making with EU institutions and ministries. Serving the HR, the President of the Council and the Commission, it could complement and harmonize their activities and contribute to horizontal and vertical coherence in European foreign policy.[10]

In designing EU external policy and implementing it at Brussels and Delegation level, the EEAS is one of the main actors responsible for the EU's response to conflict. The EEAS contributes to the programming and management cycle of the following instruments:

a) Development Cooperation Instrument (DCI),
b) European Development Fund (EDF),
c) European Instrument for Democracy and Human Rights (EIDHR)
d) European Neighbourhood and Partnership Instrument (ENPI)
e) Instrument for Stability (IfS), regarding assistance provided for in Article 4 TEU (Assistance in the context of stable conditions for co-operation) which is the only part of the IfS that is formally programmed
f) Instrument for Cooperation with Industrialised Countries
g) Instrument for Nuclear Safety Cooperation

Regarding the abovementioned instruments, the EEAS is responsible for the preparation of:

a) country and regional funding allocation to determine the global financial envelope
b) country and regional strategy papers
c) national and regional indicative programmes

The EEAS works with the relevant Commission services throughout the whole cycle of programming, planning and implementation of the abovementioned instruments. As this is a new process that came about with the establishment of the EEAS, it is not yet clear how this co-operation will be organised in practice. The EEAS is also involved in

[10] GASPERS, J. The quest for European foreign policy consistency and the Treaty of Lisbon. In Humanitas Journal of European Studies, 2(1), p. 33.

implementing the EU‘s response to conflict, either through its headquarters in Brussels or the 136 EU delegations worldwide.[11]

The EEAS is also responsible for communication and public diplomacy in third countries, drafting country and regional strategy papers, and election observation missions. Furthermore, the EEAS, in co-operation with the Commission’s services, is involved in the programming, planning and management of relevant funding instruments, such as the Instrument for Stability and the European Instrument for Democracy and Human Rights.

EEAS Crisis Management Structures

The EEAS now includes all the Crisis Management Structures which were previously in the Council Secretariat. They fall under the direct authority of the HR. In December 2008, the Council decided to merge into a single directorate the *Crisis Management Planning Directorate* (CMPD), which is responsible for the politico-strategic planning level of CSDP civilian missions and military operations, as well as for their strategic review. Despite the higher number of civilian missions deployed to date, planners with military background in the CMPD outnumber those with a civilian background.[12]

Established in 2007, the *Civilian Planning Conduct Capability* (CPCC) has the mandate to provide input into the Crisis Management Concepts (CMC) of civilian CSDP missions, contribute to the development of the concepts, plans and procedures for civilian missions etc. It has a staff of about sixty, including official and seconded national experts, who further coordinate advice and support civilian staff deployed in the missions (roughly three thousand men and women). The head of the CPCC is the Civilian Operations Commander who is the overall commander of all civilian Heads of Missions and reports directly to the HR and, through the HR, to the Council.

The *EU Military Staff* (EUMS), which was transferred from the Council General Secretariat to the European External Action Service in 2011, works under the direction of the Military Committee working group of the Member States Chiefs of Defence and under the authority of the HR/VP. It performs early warning, situation assessment and strategic planning for CSDP missions. It includes units liaising with the UN and NATO, and also a cell at the Supreme Head-quarters Allied Powers Europe (SHAPE) of NATO for those EU operations

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[11] Power Analysis: The EU and peace-building after Lisbon, p. 10 - 11.

[12] EPLO Briefing Paper 1/2012. Common Foreign and Security Policy structures and instruments after the entry into force of the Lisbon Treaty, p. 6.

drawing on NATO's assets and capabilities under the Berlin Plus Agreements.

The *EU Situation Centre* (SITCEN) is the EU "intelligence centre" is located in the EEAS and is the focal point of Situation Centres based in Member States as well as third countries. It monitors the international situation, with a focus on particular geographic areas and sensitive issues such as terrorism and the proliferation of weapons of mass destruction and exchanges information with the foreign, intelligence, security and defence bodies of Member States. It provides early warning, situational awareness and intelligence analysis to inform timely policy decisions under CFSP and CSDP.

3. OTHER INSTITUTIONAL INNOVATIONS

The Political and Security Committee

The Political and Security Committee (PSC) is one of the preparatory bodies of the Foreign Affairs Council. Established as a permanent body in 2001, it monitors the international situation in areas covered by CFSP, delivers opinions to the Council at the request of the Council, the HR or on its own initiative, and exercises, under the responsibility of the Council and of the HR, the political control and strategic direction of the crisis management operations stipulated in Article 43 TEU (Article 38 TEU). The PSC is usually authorized to take a number of decisions, such as to amend the planning documents, including the operation plan, the chain of command and the rules of engagement, as well as decisions to appoint the EU Operation Commander and EU Force Commander. The PSC receives military advice and recommendations on military matters from the EU Military Committee (EUMC). The EUMC is made up of Chiefs of Defence of the Member States, usually represented by their military representatives, and exercises military direction of all military activities within the EU framework. It receives support from the EU Military Staff, a permanent body essentially comprised of military personnel seconded by Member States. The Committee for Civilian Aspects of Crisis Management (CIVCOM) advises the PSC and provides policy recommendations on civilian missions and priorities.[13]

The PSC is the permanent body constituted by permanent representatives of EU Member States who are based in Brussels and who meet at ambassadorial level (the Member States' PSC Ambassadors). It is in charge of monitoring CFSP and CSDP within the Council of the EU and of exercising political control and setting the strategic direction of crisis management operations (Article 38

[13] WOUTERS, J., BIJLMAKERS, S., MEUWISSEN, K. The EU as a Multilateral Security Actor after Lisbon: constitutional and institutional aspects, p. 23.

TEU). The PSC formulates opinions on these issues at the request of the Council, the HR or on its own initiative. The PSC now has a permanent chair directly linked to the Corporate Board of the EEAS. The PSC is assisted by the Military Committee (EUMC) and the Committee for the Civilian Aspects of Crisis Management (CIVCOM).

European defence agency

The Lisbon Treaty elevates the EDA to treaty level, incorporating it in the legal framework of CSDP. The EDA was established by the Council on 12 July 2004 on the basis of a joint action (Council of the European Union 2004) 'to support the Council and the Member States in their effort to improve the EU's defence capabilities in the field of crisis management and to sustain the ESDP as it stands now and develops in the future' (Article 2). The EDA was envisaged as a 'capabilities agency' not solely concerned with defence procurement, as was the case with national armaments agencies, but also with research and development. In addition, the EDA was given an important political component, namely to direct and evaluate Member States' progress towards fulfilling their capability commitments.[14] A new joint action was adopted on 17 July 2011 to consolidate and implement Article 45(1) TEU governing the EDA, including its tasks. The HR became the new chair of the EDA. She is responsible for the overall organization and functioning of the Agency and 'shall ensure that the guidelines issued by the Council and the decisions of the Steering Board are implemented by the Chief Executive, who shall report to the Head of the Agency'. The HR chairs the EDA's Steering Board, which acts within the framework of the guidelines issued by the Council (Article 8) and can exercise the tasks defined in Article 9 of the Joint Action.[15]

These institutional innovations may have a major impact on the peace-building potential of the EU, provided that the Member States are willing to unite behind the EU and to breathe new life into a truly common foreign and security policy which pursues the preservation of peace and the prevention of conflicts as one of its major objectives. CSDP, after the Lisbon Treaty as before, is an area where decision making rests primarily with the Member States and where coordination between EU and national foreign policy priorities remains a challenge.

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[14] See: GREVI, G., HELLY, D. AND KEOHANE, D. (2009) European Security and Defence Policy. The First Ten Years, Paris: European Union Institute for Security Studies.

[15] See: EPLO Briefing Paper 1/2012. Common Foreign and Security Policy structures and instruments after the entry into force of the Lisbon Treaty, p. 11.

4. CONCLUSION

This contribution analyzed the institutional changes that were introduced by the Lisbon Treaty, examining how the novelties condition the EU's coordination, flexibility and coherence with regard to CFSP and CSDP, to assess ultimately whether the changes enhance the EU's capacity as a multilateral security actor.

The Lisbon Treaty introduced important changes to achieve a more effective and coherent CSDP. Against growing critique of the EU's ineffectiveness and incoherence in its security and defence policies, especially in the field of crisis management, much effort was spent on making these intergovernmental policies run more smoothly, improving coordination among national governments and between the Commission and the Council, and providing for more coherent decisions and implementation. For example, with the creation of the European External Action Service (EEAS) an EU body was established that is tasked to increase the effectiveness not only in EU diplomacy, but also in CSDP and crisis management. However, the Lisbon Treaty's focus on effectiveness and coherence has overshadowed the question of accountability for CSDP decisions.

The Lisbon Treaty provides the institutional ingredients for generating a higher degree of coherence in the EU's multilateral security relations. The quadruple-hatted High Representative presents a valuable tool to enhance consistency and the visibility of the EU in multilateral fora, as well as coordination between the Member States through her close engagement with all actors involved in the development and delivery of CFSP and CSDP. In practice, however, this role proves highly challenging and Catherine Ashton's ability to live up to the job has been questioned on multiple accounts. Skilful diplomacy on the part of the High Representative will be essential to harmonize national positions in the Council and to generate the necessary will for capability development in the CSDP field. As interface between the EU external actors and exercising an important coordinating role in third countries and in international organizations, the EEAS and Union delegations could prove instrumental, once fully operationalized. Whether these new players have the ability to enhance the capacity of the EU to act as a multilateral security actor is only one side of the coin. Practice today shows that EU Member States are not willing to give up their national stances when an EU position has been agreed upon. This practice has the potential to undermine the relevance of common EU positions and the effectiveness of the newly introduced actors.

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SOCIAL POLICY AFTER THE TREATY OF LISBON AND THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Abstract

After the Treaty of Lisbon has entered into force the Charter of Fundamental Rights of the EU has gained the same legal value as the Treaty on EU and the Treaty on Functioning of the EU. Bearing in mind that the EU Charter contains social rights and principles, as well as the fact that its relevant provisions endeavour to deal with the issue of application and interpretation of these rights within the EU law, the paper will endeavour to highlight what influence this can bring about for the EU social and employment policies.

Keywords:

Charter of Fundamental Rights of the EU; Community Charter of Fundamental Social Rights of Workers; Convention for the Protection of Human Rights and Fundamental Freedoms; European Social Charter; Revised European Social Charter; Social Rights; Principles; Court of Justice; Interpretation

1. THE JOURNEY OF SOCIAL RIGHTS IN THE EUROPEAN UNION

Back in 1951 and in 1957 when the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Atomic Energy Community and the Treaty establishing the European Economic Community were signed, the establishment of the abovementioned Communities as political and economic projects took place. It was especially the four fundamental freedoms[1] which focused on the economic aspect of these Communities thus leaving any social dimension aside. It became clear only later that the social advantages the Communities should automatically have resulted in have not appeared. That is why the social dimension of the integration within Europe was highlighted by Jacques Delors, the 1985 – 1995 president of the European Commission, who was well aware of the fact that economic objectives of the common market have to be intertwined with the harmonisation of social legislation.[2] One of the means how to reach this was the adoption of a declaration constituting the Community Charter of Fundamental Social Rights of Workers.[3] It was

[1] *ie* free movement of goods, persons, services and capital.

[2] Jacques Delors revealed his plan in 'L'Espace Social Européén' (1986) 2 EC Bull. 12.

[3] Hereafter referred to only as the „1989 Community Charter".

adopted and proclaimed at the meeting of the European Council held in Strasbourg on 9 December 1989 and it contained fundamental social rights of workers which were not – at that time – recognised neither by primary nor by secondary European Union[4] law.[5]

Despite its solemn proclamation the 1989 Community Charter has never gained legally binding status. Nevertheless, its influence on legal initiatives of the European Commission in the field of social policy was remarkable[6] and the EU succeeded in adopting numerous legal acts (predominantly directives) dealing with partial questions of labour law.

This *status quo* characterised by the absence of legally binding catalogue of fundamental (and social) rights started to change in 2000, when the Council, European Parliament and the European Commission solemnly proclaimed the text of the Charter of Fundamental Rights of the European Union[7] at the Nice European Council. The text of this charter contained not only civil and political rights, but also social and economic ones. However, like the 1989 Community Charter, the 2000 version of the EU Charter was not legally binding, although – again like the 1989 Community Charter – it gained much respect.[8]

The legal status of the EU Charter should have changed due to the Treaty establishing a Constitution for Europe[9] which integrated the text of the EU Charter into its normative text *via* making it its Part II. Owing to the unsuccessful referenda in France and in the Netherlands in 2005 the EU Constitution has never become a piece of EU primary law, hence retaining the declaratory status of the EU Charter.

Finally, thanks to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community[10] which entered into force on 1st December 2009 the EU Charter made it to its legally binding status. Thus it reached level which has never been gained by the 1989 Community Charter and by the rights enumerated herein. However, due to the efforts of making the Treaty of Lisbon less constitutional, the text of the EU Charter is

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[4] Hereafter referred to as the „EU". The author will use term not only for the EU as such but also for its predecessors – for the European Coal and Steel Community, European Economic Community, European Community and the EU (1993 – 2009).

[5] With the exception of equal pay for men and women.

[6] Commission (EC), 'Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers' (Communication) COM (89) 568 final, 29th November 1989.

[7] Hereafter referred to only as the „EU Charter".

[8] It has been cited by the Advocates General (*eg* by Sir Francs Jacobs in his opinion delivered in the case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para. 39), by the General Court (*eg* in case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365), even by the European Court of Human Rights in Strasbourg (*eg* in case *Goodwin v UK* (App no 28957/95) (2002) 35 EHRR 18, paras. 58 and 100). Eventually, also the Court of Justice used the EU Charter to underpin its arguments, *eg* in case C-131/03 *R.J. Reynolds Tobacco Holdings, Inc. et al. v Commission* [2006] ECR I-7795, para. 122.

[9] [2004] OJ C310/01; hereafter only the „EU Constitution".

[10] [2007] OJ C306/01; hereafter referred to only as the „Treaty of Lisbon".

neither reproduced in the Treaty on the European Union[11] nor in the Treaty on the Functioning of the EU,[12] in its protocols or annexes.

Although the journey of the EU Charter to its legally binding character was everything but straightforward, it is worth looking at the reasons which have underlain the emergence of such document containing a wide range of fundamental rights in the field of EU law. Firstly, the intergovernmental conference taking place in 2000 considered that the primary objective of EU Charter was to give the EU primary law, more precisely its change to be brought about by the Treaty of Nice,[13] a social dimension which was still considered to be lacking. Another important aim was to make the fundamental rights more visible to the EU citizens.[14]

2. LEGAL RANKING OF THE EU CHARTER AND ITS MEANING FOR THE SOCIAL RIGHTS ENCOMPASSED THEREIN

The legally binding status of the EU Charter ensues from art 6 (1) *in fine* TEU. However, this provision merely *mentions* the EU Charter and *refers to it* (emphasis added).[15] It is therefore questionable whether the EU Charter ranks among sources of EU primary law.

As it has been established by many scholars dealing with EU law,[16] the sources of EU primary law are: the treaties, their protocols (together with agreements annexed to these protocols[17]), annexes to the treaties and the accession treaties.[18] Taking cognisance of this one could be led to a conclusion that the EU Charter is something different than a „true" source of EU primary law. This argument can be even further substantiated by the fact that the whole text of the EU Charter should have been incorporated in the EU Constitution. Thus, it can be

[11] [2010] OJ C83/01; hereafter „TEU".
[12] *ibid*; hereafter only „TFEU".
[13] [2001] OJ C80/01.
[14] One must however not forget that – legally speaking – the EU Charter, especially it newly established legally binding character, produces also different effects than just visibility of fundamental rights within the EU.
[15] „[...] [the EU Charter] shall have the same legal value as the [TEU and TFEU]." As seen by Pítrová, Lenka, in 'Listina Základních práv Evropské unie' in Gerloch, Aleš, Šturma, Pavel *et al.*, *Ochrana základních práv a svobod v proměnách práva na počátku 21. století v českém, evropském a mezinárodním kontextu* (Auditorium, Praha 2011) 427 the EU Charter has become part of EU primary law „by reference".
[16] *eg* Kaczorowska, Alina, *European Union Law* (Routledge-Cavendish, Oxon 2009) 206.
[17] As was the case of the Protocol on Social policy (*ie* a protocol annexed to the Treaty on EU [1992] OJ C191/01) and the Agreement on Social Policy which was referred to by this protocol. The General Court in its decision in case T-135/96 *UEAPME v Council* [1998] ECR II-2335 finally stated that also an agreement referred to by a protocol represents a source of EU primary law.
[18] Or, to put it more simply – all elements of EU primary law are reproduced within the wording of the treaties.

stated that EU Charter is – at least – a „specific" source of EU primary law.[19]

The fact that the EU Charter has the same legal value as the TEU and TFEU is important from the point of view of review of legality as well as preliminary reference proceedings.[20] Here, the Court of Justice would be at no pain to declare that source of EU secondary law which would be found to be contrary to one or more provisions of the EU Charter is void[21] or invalid.[22]

However, the relationship of the EU Charter to the EU primary law measures is not this straightforward. When being questioned on the compliance of EU primary law and of the EU Charter, the Court of Justice would most probably enter the exercise of balancing the fundamental rights against the rights encompassed in the EU primary law[23]. *Via* this reasoning a twofold value of fundamental rights included in the EU Charter can be distinguished.

Therefore the question arises – how can one be sure about the stance of the Court of Justice towards fundamental rights established by the EU Charter and towards their ranking within the EU primary law?

3. THE EU CHARTER AND SOCIAL RIGHTS AND PRINCIPLES

The EU Charter provides for number of fundamental trade union rights and labour and social standards,[24] hereby encompassing the „provisions which are at heart of labour law and industrial relations"[25] in the EU. Moreover, it gives the social and economic rights the same status as to the civil and political ones, hence elevating the character of social rights as fundamental rights and making them „constitutional".

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[19] Another argument might be that the EU Charter is – beyond any doubt – *not* a source of EU secondary law (emphasis added). It takes none of the forms recognised by art 288 TFEU, nor is it any other act of EU institutions not expressly mentioned in art 288 TFEU – since it has been drafted by the Convention and it was merely proclaimed by EU institutions.

[20] Arts 263 and 267 TFEU respectively.

[21] Under art 264 first indent TFEU.

[22] Under art 267 first indent b) TFEU. The Court of Justice has declared a provision of secondary act invalid in case C-236/09 *Test-Achats v Council* (Court of Justice 1st March 2011), paras. 33 and 34 (this holds true even though the squashed article was a provision of Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37, *ie* a source of EU secondary law adopted before the EU Charter obtained its legally binding force).

[23] Such „balancing exercise" was undergone *eg* in case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, paras. 69 – 80.

[24] Bercusson, Brian, *European Labour Law* (Law in Context Series, 2nd edn CUP, Cambridge 2009) 210.

[25] *ibid* 384.

The EU Charter contains also such social rights and principles[26] which are truly specific and concrete in nature and which were previously not considered as fundamental rights.[27] However, it has to be mentioned that the EU Charter has omitted some social rights which are recognised by relevant international law instruments.[28] Thus the advantage of perceiving the social rights as fundamental ones is outweighed by the fact that there are still two categories of such rights.

"The principal provisions relating to 'social matters' can be found in Title III [of the EU Charter] entitled 'Equality' and Title IV, 'Solidarity', although two key rights, the right to freedom of association and of assembly and the freedom to choose an occupation and the right to engage in work, are found in Title II 'Freedoms' and the prohibition of slavery and forced labour is found in Title I 'Dignity'".[29]

The fact that social rights are encompassed in the legally binding EU Charter brings about these consequences:

1. supremacy of social rights enumerated in the EU Charter over conflicting national legal provisions;
2. possibility of directly effective EU Charter provisions containing social rights;
3. their influence on interpretation and application of EU law and on its implementation by the Member States;
4. influence of the Court of Justice of the EU on the social rights provided for in the EU Charter.

ad 1:

Provisions of the EU Charter could not have been considered as being supreme before the EU Charter gained legally binding status. By now all national provisions implementing EU law and infringing upon the social rights of the EU Charter have to be disapplied.[30]

ad 2 and 3:

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[26] The difference between rights and principles as contained in the EU Charter is not clear and their distinction is worth deeper analysis. However, for the present purposes it suffices to say that the EU Charter contains and differentiates both of these and that it also provides for different models of their application and interpretation.

[27] *eg* the Constitution of the Slovak Republic (act No 460/1992 Coll. as amended), whose Title II Chapter 5 also contains social and economic rights, does not recognise the rights of the elderly (art 25 EU Charter), workers' right to information and consultation within the undertaking (art 27 EU Charter), right to access to placement services (art 29 EU Charter) and the right to reconcile family and professional life (art 33 (2) EU Charter) as fundamental social rights.

[28] Such is the case of the right to fair remuneration which is recognised by the European Social Charter (art 4), by the Revised European Social Charter (art 4) and by the 1989 Community Charter as well (point 5).

[29] Barnard, Catherine, *EC Employment Law* (Oxford EC Law Library, 3rd edn OUP, Oxford 2006) 29.

[30] In line with well-established doctrine of the Court of Justice of the EU (*eg* case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para. 21) that an EU measure renders the conflicting provision of national legal order inapplicable.

As far as direct effect of the social rights of the EU Charter is concerned it has to be clarified from the outset that not all provision containing social rights are capable of being described as directly effective. This is predominantly due to the fact that the content of these rights depends on the rules of EU law and/or on national laws and practices which also deal with these rights.[31] Hence, only some of these rights can be directly relied upon due to the fact that they meet all the conditions prescribed for the direct effect.[32] However, those social rights which are not capable of exerting direct effect still have to be interpreted in a way which enables uniform interpretation and application of EU law and its observance by the Member States.

ad 4:

By virtue of art 51 (1) EU Charter the Court of Justice of the EU as one of the EU institutions is also bound by the EU Charter and thus has to respect its provisions. Moreover, in accordance with art 19 (1) second sentence TEU it also has to secure the application and interpretation of EU law, nowadays meaning also the application and interpretation of the EU Charter.

As it has already been shown[33] – as the EU law stands now – one can be sure that the Court of Justice will invalidate any EU secondary act which is contrary to the EU Charter. Such opinion of Court of Justice can also assure us that it will also declare any national measure implementing EU law incompatible with EU legal order once it will infringe upon the EU Charter. However, the relationship of the EU Charter *vis-à-vis* EU primary law remains to be seen.

Moreover, the case-law of the Court of Justice of the EU can – and most probably will – be at hand to elaborate on the social rights as established by the EU Charter. The question of what influence can the Court of Justice of the EU have on the interpretation and application of social rights and principles contained in the EU Charter is deal with below.[34]

4. INTERPRETTION AND APPLIATION OF THE EU CHARTER IN THE FIELD OF SOCIAL POLICY AND EMPLOYMENT – A THORNY ISSUE

In line with art 52 (2) EU Charter the rights which are contained in the EU Charter and which are also recognised by the Treaties shall be exercised under the conditions and limitations as set by the Treaties. However, *eg* grounds for non-discrimination stated in art 21

[31] *ie* workers' right to information and consultation within the undertaking (art 27 EU Charter), right of collective bargaining and action (art 28 EU Charter), protection in the event of unfair dismissal (art 29 EU Charter) and social security and social assistance (art 34 EU Charter).

[32] As established by Court of Justice in 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 3, 12 and 13. Directly effective social rights contained in the EU Charter hence could be *eg* non-discrimination (art 21 EU Charter), equality between women and men (art 23 EU Charter) or right of access to placement services (art 29 EU Charter).

[33] Ch 2.

[34] Ch 4.

(1) EU Charter are much wider than those set out by art 19 TFEU.[35] Hence there can be a discrepancy between the content of these rights although the drafters of the EU Charter aimed at exactly opposite solution.

Furthermore, in accordance with art 52 (3) first indent EU Charter the rights contained in the EU Charter should be accorded the same meaning and scope as in the Convention for the Protection of Human Rights and Fundamental Freedoms,[36] as far as rights contained herein and also in the EU Charter are concerned.[37] However, the problem with social rights is that not all of them are included in ECHR.[38]

Moreover, this article enables the EU to provide for more extensive protection of those rights which are laid down by the ECHR. However, then the question arises what will be the content of every particular right; and whether the consistency between the Court of Justice's case-law on fundamental rights and relevant decisions of the European Court of Human Rights will be hereby assured. Another question which can also emerge is what if a decision of the Court of Justice of the EU affords any of these rights greater protection than is provided for on the basis of the ECHR despite the fact that (one or more) Member State(s) would not agree with such extensive interpretation. Such judicial activism will make the Court of Justice of the EU a true human rights court and will also make the Member States guarantee even more fundamental rights protection than they were willing to afford.

Further guidance as to the interpretation of social rights can be found in art 52 (3) second indent EU Charter dealing with constitutional traditions common to the Member States. However, it is questionable whether social rights contained in the EU Charter can be interpreted uniformly since not all social rights have to stem from the constitutional traditions common to the Member States.[39] Could this then mean that one social right can be interpreted differently by each Member State when it is implementing EU law? Will each Member State follow its own constitutional traditions? Or will it be guided by those "common" ones?[40] Finally, the very same reasons may make the

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[35] The EU Charter contains these extra non-discrimination grounds: colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth.

[36] Hereafter only as the „ECHR".

[37] So-called coherency rule.

[38] As far as rights relating to social policy and employment are concerned, only prohibition of slavery and forced labour (art 5 EU Charter and art 4 ECHR), freedom of assembly and of association (art 12 EU Charter and art 11 ECHR), non-discrimination (art 21 EU Charter and art 14 ECHR) and right of collective bargaining and action (art 28 EU Charter and art 11 ECHR) are established by both of these instruments.

[39] Take *eg* the right to strike, which is a sensitive issue especially for the United Kingdom of Great Britain and Northern Ireland.

[40] The question is whether there is really something like "the constitutional traditions common to the Member States". One can also argue that only the Court of Justice of the EU knows what these are since it refers to them on a regular basis (*eg* in case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd.* (Court of Justice 6th September 2012), para. 52).

interpretation of social rights established in the EU Charter problematic also for the EU institutions.

In addition to this art 52 (7) EU Charter expressly mentions that for the sake of interpretation of the EU Charter due regard should be given to Explanations Relating to the EU Charter.[41] However, these explanations are not a source of EU law and hence can not be perceived as binging.[42] Therefore any guidelines which they aim to provide regarding the social rights are not relevant.

An additional rule which is available in order to interpret EU Charter's social rights is the so-called stand-still clause contained in art 53 EU Charter. According to this provision and as far as social rights are concerned, protection granted to these rights should be at least the same as it is established by, *inter alia*, international agreements to which *all* Member States are parties (emphasis added). As the explanations to the EU Charter mention at various places, social rights contained in the EU Charter were inspired – among others – by the European Social Charter and by the Revised European Social Charter.[43] Despite the fact that the European Social Charter has been ratified by all 27 EU Member States and thus it can serve the purpose anticipated by art 53 EU Charter, its modernised version – the Revised European Social Charter – has been ratified only by 18 of them.[44] Hence it cannot be used to guarantee the level of protection as foreseen by the stand-still clause.

Moreover, the effort of art 53 EU Charter to rely upon relevant international agreements ratified by all Member States can be halted because of an additional circumstance. The EU Member States are completely free as to their decision to ratify or not ratify any international legal instrument dealing with the topic of social rights.[45] Therefore it also holds true that they can decide to denounce such international agreement and hence make art 53 EU Charter dysfunctional.

Maybe also this is the reason why neither the EU Charter nor its explanations mention at any place the International Labour Organisation[46] Conventions, although all 27 EU Member States are ILO members. Nonetheless, as all the EU Member States have ratified

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[41] [2007] OJ C303/17; hereafter only as the „explanations to the EU Charter". These were drafted under the authority of the Praesidium of the Convention which prepared the text of the EU Charter in 2000. The explanations have been subsequently adjusted in order to take account of further changes made to the EU Charter provisions by the European Convention in 2007 and also in order to reflect the present developments of EU law.

[42] This is declared by these explanations as such – in the third sentence of their introductory paragraph.

[43] Both of these are Council of Europe treaties opened to ratification by all members of the Council of Europe.

[44] The Revised European Social Charter has not been ratified by 9 Member States, *ie* by the Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the United Kingdom of Great Britain and Northern Ireland (according to the situation on 30th November 2012).

[45] Save for the ECHR, which has to be ratified by all EU Member States and which also contains some fundamental rights relevant for the field of social policy.

[46] Hereafter referred to as the „ILO".

the European Social Charter and also due to the fact that both – this Charter and ILO Conventions – are respected by the Court of Justice,[47] the EU Charter could at least refer to these international labour law instruments as to the means of inspiration. This could be helpful for the sake of finding a benchmark against which to compare the content of social rights contained in the EU Charter.

Bearing all this in mind it becomes crystal clear that by now the EU Charter does not provide for any real comparable rule which would ensure uniform interpretation and application of social rights contained herein.

Last but not least, the question remains whether and what influence will the EU Charter exert also on soft-law measures adopted within the social policy and employment titles of the TFEU. These non-binding and flexible instruments[48] are not legal acts *per se* within the meaning of art 288 TFEU (although some of these instruments used to be adopted as recommendation[49]). However, one can not exclude the applicability of social rights provided for in the EU Charter also on such non-legal measures – due to the wording of art 51 (1) EU Charter. But as far as the principles enshrined in the EU Charter are concerned – as these are (allegedly) present at least in Titles III and IV EU Charter[50] – art 52 (5) EU Charter undoubtedly states that they are relevant only for legislative and executive[51] acts of the EU and for acts of the MS when implementing EU law.

CONCLUSION

The above mentioned thoughts and (un)resolved questions endeavour to reveal the fact that as far as social rights and principles provided for by the EU Charter are concerned, much remains to be said, explained and established.

However, it is also indisputable that the EU Charter brings considerable social dimension to the EU primary law by elevating social rights as such among fundamental rights, whilst also encompassing some „ordinary" social rights among the core

[47] The Court of Justice has referred to their content at various occasions, *eg* in case C-438/05 I*nternational Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para. 43.

[48] These are often recalled as the Open Method of Coordination.

[49] *eg* Commission Recommendation (EC) 87/567 on Vocational Training for Women OJ [1987] L342/35. However, nowadays, they are mostly adopted as resolutions, *eg* Council Resolution (EC) 1230/2003 on Equal Access to and Participation of Women and Men in the Knowledge Society for Growth and Innovation OJ [2003] C317/6.

[50] The explanations at their last page reveal and also enumerate some articles of the EU Charter which should contain the principles; or at least a mixture of rights and principles. This statement is however not substantiated by any reasoning.

[51] It remains to be explained what instruments can be described as executive ones. The explanations to the EU Charter reveal that legislative or executive acts are those which are adopted by the EU in accordance with its powers. However, EU primary law does not use the term „executive act" at any (other) place.

fundamental ones. Hence it can be expected that such an elevation can only help the social policy and employment titles of the TFEU to gain their proper meaning and thus contribute to making the EU even more (not only) economic oriented integration project.

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INTERNATIONAL DIMENSIONS OF EUROPEAN COMPETITION LAW

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Abstract in original language

The recent trend in competition law has been towards its internationalization for a number of reasons. This paper explores the various possibilities of how globalization has affected the competition policy in the EU and how the EU has been aiming to achieve the internationalization of competition law as well as the reasoning behind the internationalization policy. Two possibilities, or approaches to the internationalization of competition law as a whole emerge throughout this paper. On one hand, we can observe said internationalization via cooperation agreements between the EU and other countries with an established competition law system. On the other hand, a number of countries with a developing market economy have a habit of emulating the competition policy of the EU, and as such, Turkey is exemplified.

Key words in original language

EU, competition law, international law, cooperation agreement

Abstract

Najnovším trendom posledných rokov v oblasti súťažného práva je jeho internacionalizácia, ktorá je nevyhnutná z viacerých dôvodov. Tento príspevok skúma rôzne možnosti, ako globalizácia vplýva na politiku hospodárskej súťaže v EÚ a ako sa EÚ snaží dosiahnuť internacionalizáciu práva hospodárskej súťaže, popri predstavení dôvodov na internacionalizáciu politiky práva hospodárskej súťaže EÚ. Sú dva varianty, alebo prístupy k internacionalizácii súťažného práva ako celku, ktoré sú preskúmané v tomto príspevku. Na jednej strane môžeme pozorovať internacionalizáciu prostredníctvom dohôd o spolupráci medzi EÚ a ďalšími krajinami, ktoré majú zavedený systém práva hospodárskej súťaže. Na druhej strane, mnoho krajín s rozvíjajúcou sa trhovou ekonomikou má vo zvyku napodobňovať politiku hospodárskej súťaže EÚ. Ako príklad tohoto prístupu je Turecko.

Key words

EÚ, právo hospodárskej súťaže, medzinárodné právo, dohoda o spolupráci

INTRODUCTION

Although competition law is regulated in each country individually, or on a more multi-national scale, when we focus on European competition law, the globalization of economy has brought the need

for a system of international regulation. The anti-competitive conduct of an undertaking or multiple undertakings can have its effect on a different geographical relevant market or a number of various markets around the globe. International competition law is a phenomenon, which has come to exist, although it is not regulated in a global scale by any organization with international authority.

I. INTERNATIONALIZATION OF COMPETITION LAW VIA COOPERATION

The current economic situation calls for cooperation between competition authorities worldwide. Currently, anti-competitive conduct is regulated on a national level as well as on the EU level. Also, bilateral or multilateral trade agreements exist between EU and third countries. Within this bundle of regulations, an effective detection of anti-competitive behavior is very difficult, and the control and constriction of such conduct has become even more intricate. Among the problems with the application of various competition rules is the under regulation or, on the other hand, overregulation in particular cases.

At this time, EU has "concluded agreements with the United States, Canada, Japan and Korea on cooperation between their respective competition agencies. These agreements include provisions on the notification of enforcement activities to the other side, coordination of investigations (for example coordinating the timing of dawn raids), positive and negative comity, and the establishment of a dialogue on policy issues. These agreements also specify that the competition agencies cannot exchange confidential information, which is protected under their respective laws. The inability to exchange confidential information severely limits the scope of cooperation between the European Commission and foreign competition authorities. This limitation can undermine the effectiveness of the Commission's competition enforcement activities, especially in investigations of competition cases that have an international dimension, such as international cartels.

This is why the Commission is trying to move beyond these "first generation" agreements and negotiate cooperation agreements, which would also include provisions allowing the parties' competition agencies to exchange, under certain conditions, information which is protected under their respective rules on confidentiality. It is currently negotiating two such "second generation" agreements, one with Switzerland and one with Canada. If these negotiations were concluded successfully, these agreements would enhance further the efficiency and effectiveness of enforcement cooperation activities."[1]

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[1]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2011 p. 22 [online] [cit.

The EU competition law is applied, when the anti-competitive conduct has an effect on trade between member states (MS). This is the diction of both Article 101 and 102 of TFEU, as well as Directive 2004/139 on merger control. Therefore, even undertakings, which are not based within the EU, are capable of infringing competition regulation under TFEU. The EC has been given the authority to review all concentrations that have any impact on the internal market of the EU.

II. COPY AND PASTE POLICY

Another significant factor in the internationalization of competition law is the fact that a number of countries with a lower degree of economic development have had to incorporate and regulate the area of competition law in recent past. Having not developed in a natural and gradual fashion, the legal provisions concerned with competition law may simply be copied from a functioning competition law system, such as the one in the EU[2]. This development may assist the future internationalization of competition law. However, could this happening be still considered internationalization, if most legal systems of competition law in a significant number of countries would have been modeled after one or two already existing, albeit effective legal frameworks?

Primarily, we have to address the issue of an effective legal framework. The various systems of law, which have "survived" in the world, differ from each other, generally because of a historical and equally importantly geographical factor. When different legal systems successfully operate in certain parts of the world, why should the legal framework within these diverse systems be almost identical, when it comes to the area of competition law? One answer that comes to mind almost instantly is that, in the light of globalization of the market economy, it would require less effort on the level of regional and international competition authorities in market regulation and prevention of anti-competitive behavior, as well as detection of this behavior and its consequent punishment.

Alternatively, as previously mentioned, a legal competition framework utilized i.e. in the EU, might not operate well in a legal system, which differs greatly from the system exercised in the EU, or in any EU member state. Therefore, this copy and paste of competition policy may in fact hinder an effective regulation of competition on an international level due to the future existence of a

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22.11.2012] Available at: http://ec.europa.eu/competition/publications/annual_report/2011/part1_en.pdf

[2]Dabbah, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594, ISBN 978-0-521-51641-9.p.3

legal competition framework, which will not correspond with all legal systems to an equal degree.

Having stated the positive as well as negative aspects of the copying and pasting competition policy into the legal system of countries with emerging market economies, we have established that various legal systems cannot share the same legal framework in a specific field of law. However, with the globalization of the market, a uniform competition framework is highly desirable. We know that there are a number of similarities between diverse competition law regimes today. We can enlist prohibition of certain types of behavior among the similar characteristics of different competition law regimes.[3] Usually, anti-competitive conduct, such as collusions between undertakings on both horizontal and vertical level, is one of the most commonly prohibited behaviors within the relevant market.

III. EU, TURKEY AND COMPETITION LAW

It is understandable and required, that competition policy and competition law of MS of the EU is in accordance with EU competition framework. If it is not the case, EU competition law always prevails. When we look at the history of accession of new MS to the EU, we can see how their competition law framework has been modeled after the EU framework for a vast amount of time ahead of their accession. A similar, but quite unique case of such actions is the case of Turkey.

Turkey has been aspiring to join the EU for an extensive period of time. When we look back to the 1990s, we can notice Turkey's efforts to emulate the framework of the EU and its competition policy. In 1994, the parliament passed Law No. 4054 on Protection of Competition and in 1997, a communiqué on Mergers and Acquisitions was issued by the government.[4] The aim of these two acts was not exactly to emulate EU framework, but to bring Turkish legal framework closer to the legal framework of the EU in the manner of future anticipation of accession to the supranational entity. Doleys provides evidence of alignment of provisions of the EU and Turkish legal documents in Articles 4, 6 and 7 of Law No. 4054. The diction of Article 4 is very similar to the wording of Article 101 of the Treaty on functioning of the EU (TFEU), as can be seen in the subtext. [5]Again, Article 6[6] emulates Article 102 TFEU, which is concerned

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[3]Dabbah, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594, ISBN 978-0-521-51641-9.p.13

[4]Doleys, T.J.: Promoting competition policy abroad: European Union efforts in the developing world, The Antitrust Bulletin Vol. 57, No. 2: Federal Legal Publications, 2012. 337-366 p., p. 338

[5] The Act on the Protection of Competition No. 4054 [online] [cit. 24.11.2012] Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=245123 Article 4- Agreements and concerted practices between undertakings, and decisions and

with the abuse of a dominant position on the relevant market by one or more undertakings. Both Article 4 and 6 strongly and closely follow the provision of TFEU under Articles 101 and 102 respectively, which are the two main pillars of EU competition law. The third similarity with EU legal framework and Turkish legal framework regarding competition law is slightly varied from the first two, due to the fact, that Article 7 mimics the diction of a secondary source of law. The

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practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. Such cases are, in particular, as follows:a)Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,b)Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,c)Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,d)Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behavior, or preventing potential new entrants to the market,e)Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied. In cases where the existence of an agreement cannot be proved, that the price changes in the market or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice. Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

[6]Ibid. Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited. Abusive cases are, in particular, as follows:a)Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,b)Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,c)Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price, d)Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,e)Restricting production, marketing or technical development to the prejudice of consumers.

diction of Article 7[7] is very analogous to the diction of the EU Merger Regulation, which demonstrates the aim to harmonize competition law.Turkey serves as a highly significant example for the globalizing impact of EU competition law due to a number of reasons. First of all, it is one of the countries attempting to be granted the right to access to the EU, albeit it is a very controversial candidate. Most of its territory does not lie on the European continent, although it's capital and hence most industry and business do, which is a significant factor for the case of competition law. On the other hand, the historical and religious background of the country varies vastly from the historical, but mostly religious background of the rest of the MS of the EU. One can argue that religion does not have any influence on the competition policy of a country, but this argument may be false, or not completely true in some cases. One of the cases may be the case of Turkey.

The Islamic law of Sharia differs from most continental legal systems, which are exercised within the EU and by the EU as a whole. This is one of the core reasons, which may be listed as a basis for a legal challenge, when it comes to Turkey's accession to the EU. However, one must bear in mind, that although it might seem unachievable for a country with such major legal diversities to by accessed to the EU, nonetheless, the same country may adopt EU"s competition law regime. The remaining question is whether and to what degree, could the adopted regime fault when applied in the same manner as it would be applied in the original environment, where it was established.

IV. ADOPTION VERSUS COOPERATION

Coming back to the original thesis, one may argue, that the adoption of EU competition law framework by i.e. the Turkish government has lead to further the internationalization of EU competition law. Still, we are faced with the same dilemma. Is it possible, and in the case that it is, to what extent, that the adoption of similar or even identical competition policies around the globe will ensure an effortless enforcement of such policies?

The current approach seems to highlight the fact, that such adoption and following adaptation of various legal regimes around the world, is in fact a suitable means to resolve the present issue of an increasingly global need for competition regulation. The approach seems

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[7] Ibid. Article 7- Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.

straightforward, due to the fact, that a number of countries with developing economies are only establishing their competition policy.

Historically, the EU has attempted to globalize and internationalize its competition policy since the mid 1990s, about the same time as Turkey's adoption, or copy-paste technique conclusion, of provision of EU competition law. In 1995, a report by a group of experts on the strengthening of international cooperation and competition rules was released by the EC. The report, which is currently 18 years old, recommended a formation of international competition rules[8], justifying its approach on the following:

-Economy globalization[9]-Lack of rules at international level[10]-Distortion between actions against anticompetitive behavior[11]-Countries extending territorial scope of competition rules[12]-Situation in developing countries[13].

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[8] Competition Policy in the new Trade Order: Strenghthening International Cooperation and Rules, Report of the Group of Experts [online] [cit. 24.11.2012] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0359:FIN:EN:PDF, p.3

[9]Ibid.p.4 Given the globalization of the economy, there are more and more competition problems which transcend national boundaries: international cartels, export cartels, restrictive practices in fields, which are international by nature (e.g. air or sea transport, etc.), mergers on a world scale, or even the abuse of a dominant position on several major markets (e.g. Microsoft case). Competition authorities therefore have a prime interest in cooperating to solve these problems together in order to enhance the effective enforcement of competition rules.

[10]Ibid. As a result of lack of rules at international level, firms which are present in several countries are sometimes subject to different national competition rules. Procedures, time limits and the criteria for taking decisions can vary considerably. It is even possible for a merger or a concerted practice to be authorized in one country and prohibited in another. These differences push up costs (more procedures, higher legal costs, etc.) and increase uncertainties and may therefore constitute barriers (sometimes major ones) to the expansion of trade and of international investment.

[11]Ibid. In some countries action against anticompetitive practices is less rigorous than in others and distortions may result. Also the anticompetitive practices tolerated by one competition authority sometimes result in access to the market concerned being closed, even though foreign forms could provide additional competition which would be beneficial to the consumers of that country.

[12]Ibid. Some countries have sought to remedy such problems by extending the territorial scope of their competition rules. However, this approach can lead to conflicts between competition authorities. In the absence of international cooperation, there are also legal and practical obstacles to seeking on foreign territory the information necessary to establish the existence of infringements. There is then a risk of a competition authority

All reasons, as are extensively described in the subtext, can be seen from today's point of view as foreshadowing the reality we live in today. The globalization of the economy has been climbing in a very fast pace, promoted by the lack of barriers in the online world. Still, after almost two decades, we are aware of the lack of rules at an international level, which had resulted in the two forms of compensation for such unmet requirement, i.e. globalization of EU rules or cooperation between established competition authorities in various part of the world.

Cooperation has somewhat limited, or has been aiming to limit the procedural costs stemming from different competition rules in different jurisdictions of countries, which have signed a cooperation agreement with the EU. As a form of internationalization of competition law, it does not globalize EU competition law framework, but it approaches the internationalization of competition law as a whole, i.e. such agreements aim to create a new set of competition rules, which have the potential to become customary competition rules for enforcing competition law mechanism on a global scale. Here, one has to ask, whether the aims of the EU are to internationalize, or globalize, enforcement of its own competition law framework, or to aid the development of a common global competition law framework, which would be a set of common rules found in the various competition law framework families around the world.

It is necessary to state another relevant factor in this discussion. Many independent countries, which have been recently establishing their competition law framework, were colonies of European countries, and hence have adapted themselves to similar lifestyle as was common in the invading countries. Therefore, it can be argued, that it is far more effortless and straightforward for these countries to simply adopt or emulate the competition law framework of the EU.

CONCLUSION

As we have established, the enforcement mechanisms of competition law in general have become increasingly more difficult to carry out, due to the ongoing globalization of the economy. This trend has been addressed by the EU almost twenty years ago, yet competition authorities have been struggling with this dilemma ever since then.

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having to abandon prosecution of the alleged infringements for lack of sufficient proof.

[13]Ibid. Developing countries in particular have an interest in ensuring effective controls on anti-competitive behavior. The worldwide lowering, in the context of the Uruguay Round, of governmental market access barriers for trade in goods and services, trade-related investment measures and intellectual property rights may leave them more exposed to the risk of anticompetitive practices. In the absence of appropriate domestic rules, they may also risk being subjected to the extraterritorial application of other countries" competition laws.

The question of internationalizing the rules of competition law has been attempted to be answered by many supranational and international authorities. Overall, we have established that currently, there are two different approaches to internationalization of competition law from the point of view of the EU. Neither one is necessarily the correct, or the most efficient way to do so, but both have aided the path to globalization of competition rules.

The significantly sophisticated labyrinth of existing competition law frameworks and developing competition law frameworks is swelling and expanding by the minute. Since there are also many possible approaches and methods to shrink and minimize the labyrinth, the main objective of all of them should be the straightening of the path to international competition law.

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