**ECLIC 6**

EU AND COMPARATIVE LAW
ISSUES AND CHALLENGES SERIES

International Scientific
Conference

# The recovery of the EU and strengthening the ability to respond to new challenges – legal and economic aspects

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CONFERENCE BOOK
OF PROCEEDINGS

PRAVOS
Hanns Seidel Stiftung
Europska komisija

**EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC) – ISSUE 6**
**ISSN (Online): 2459-9425**

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CONFERENCE BOOK OF PROCEEDINGS

In Osijek, 9-10th June 2022

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ISBN 978-953-8109-46-1

International Scientific Conference

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# FOREWORD

The extraordinary pandemic which has gripped the entire globe for the past three years has been overshadowed by yet another tragic event, the unfolding tragic and brutal aggression in Ukraine. In the immediate aftermath, as ever, the events only served to strengthen the resolve of the European Member States and our friends and partners across the world on the need to remain united and join forces in carving out the future we want for our continent.

Out of the extraordinary examples of solidarity, the European Commission released the roadmap for the future, that is REPowerEU, a plan that should help us quickly increase our energy saving, diversification of supply towards trustworthy and reliable suppliers and strong investments into renewable energy. In addition to the European Green Deal and the NextGenerationEU, Europe has vividly demonstrated that we are not taking our future for granted.

In a number of ways, the horrible events in Ukraine have acted to speed up the adjustment process, since we now know that our landscape has irrevocably changed. What is more, climate challenge remains. This is why the incredible transformation which will take place in Europe over the next few years is so incredibly important and consequential.

It also continues to prove the notion that investments into science and our own potential will be a key characteristic of our future successes, in which we all firmly believe. To quote the President of the European Commission, Mrs von der Leyen, "imperfect as it might be, our Union is both beautifully unique and uniquely beautiful. It is a Union where we strengthen our individual liberty through the strength of our community. A Union shaped as much by our shared history and values as by our different cultures and perspectives."

Therein is why we are happy to continue our cooperation with ECLIC, as the different perspectives brought out in these conference proceedings only add to the wealth and the breath of our discussions. Everyone stands to gain, especially the contributing bright minds.

Ognian Zlatev
Head of Representation of
European Commission in the Republic of Croatia

Topic 1

# EU legal challenges

UDK 349.6(4-67EU):347.51
Review article

# THE 'POLLUTER PAYS' PRINCIPLE: THE CROATIAN EXPERIENCE

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***ABSTRACT***

*The 'polluter pays' principle (PPP) is one of the four tenets of the European Union's (EU) environmental policy. Where the PPP is successfully applied, the polluter bears the cost of pollution, including the cost of prevention, control, and removal of pollution, as well as the cost it causes for the society and the respective population. The PPP is to discourage polluters from environmental pollution by holding them liable for the pollution by means of having the polluters, and not the taxpayers, bear the remediation cost.*

*This paper juxtaposes the application of the PPP in the case law of the Court of Justice of the European Union and Croatian jurisprudence. Following an overview of the PPP in EU law, the paper briefly reviews two CJEU cases (Van de Walle and Erika) that concern the question of whether liability for incidental pollution is attachable to both the manufacturer of dangerous material and the polluter. Next, the paper examines the application of the PPP in the Croatian judiciary, where – contrary to the EU environmental policy – the remediation cost being borne by the taxpayers is seemingly the norm (especially where the polluter cannot bear the remediation cost due to insolvency).*

***Keywords:*** *European Union, environment protection, liability in damage, polluter pays principle*

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project nr. IP-PRAVOS-6 „mplementation of EU Law in Croatian Legal System ".

## 1. INTRODUCTION: THE 'POLLUTER PAYS' PRINCIPLE IN EUROPEAN UNION LAW

Within the European Union's (EU) legislative framework, environmental protection is regulated by directives and regulations (the former of which allow more flexibility to the EU Member States).[1] While the EU environmental legislation does not provide for any citizen rights, it does impose obligations on both natural and legal persons and restrictions on environmentally hazardous activities.[2] The EU environmental policy is laid down in Article 191(2) Treaty of the Functioning of the European Union (TFEU). The 'polluter pays' principle (PPP), one of its four tenets, means attaching financial liability for environmental damage to those who caused it.[3]

Of the number of EU directives that embed the PPP, this paper highlights the Environmental Liability Directive (ELD).[4] The ELD deals with "pure ecological damage" and it is based on the powers and duties of public authorities ("administrative approach") that are distinct from civil liability for damages.[5] Under the ELD, "environmental damage" is damage to protected species and natural habitats, water, and land. The operators[6] of dangerous (occupational) activities, as listed under Annex III of the ELD, are subject to strict environmental liability.[7] (Strict liability does not require proof of negligence or violation of regulatory requirements.) To all other operators, a fault-based standard is applied for biodiversity damage they cause.[8] Where applied, the PPP should ensure that polluters

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1 More on the effect of directives see Rodin, S.; Ćapeta, T., *Učinci direktiva Europske unije u nacionalnom pravu,* in: Rodin, S.; Ćapeta, T. (eds.). Znanje, Zagreb, 2008

2 Ofak, L., *Utjecaj pristupanja Hrvatske Europskoj uniji na upravnopravnu zaštitu okoliša*, in: Barbić, J. (ed.), Upravnopravna zaštita okoliša, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2015, p. 123

3 OECD: Liability for environmental damage in Eastern Europe, CAUCASUS and Central Asia (EECCA): implementation of good international practices, 2012, p. 11

4 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143 from 30 Apr 2004. The European Commission (EC) supplemented Directive 2004/35/EC in March 2021 with Guidelines for a common understanding of the term 'environmental damage' as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (2021/C 118/01)

5 See: European Commission, *Environmental Liability*, [https://ec.europa.eu/environment/legal/liability/], Accessed 9 April 2022

6 Per Art. 2(6) of Directive 2004/35/EC, "operator" *means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity.*

7 *Ibid.,* n. 5

8 OECD: Liability for environmental damage in Eastern Europe, CAUCASUS and Central Asia (EECCA): implementation of good international practices, 2012, p. 14

bear the cost of pollution, including the cost of pollution prevention, control, and removal, as well as the cost it causes for the society and the respective population. Polluters are thus incentivized to avoid environmental damage and held liable for the pollution that they cause. Moreover, under the PPP, it is the polluter, and not the taxpayer, who covers the cost of remediation.[9]

Regrettably, in practice, the costs of remediation are regularly absorbed by taxpayers. EU Member States are obligated to take all necessary measures to apply the PPP. Per Ofak, the largest percentage of actions taken by the European Commission (EC) against Member States for violation of EU law concern EU environmental law infringement.[10] Per the EC's 2016 REFIT Evaluation of the Environmental Liability Directive,[11] the ELD has remained relevant, and Member States have made progress in achieving its objectives. However, it also established that certain issues, either from a policy design or implementation standpoint, hindered the efficiency and effectiveness of the environmental liability regime. These issues included (1) the lack of structurable data on ELD implementation, (2) poor stakeholder awareness of the regime, (3) unclear key concepts and definitions, (4) scope limitations due to exceptions and defenses, and (5) absence of financial security in cases of insolvency.[12] To address these issues, the EC developed the Multi-Annual ELD Work Programme (MAWP) for 2017-2020[13] and for 2021-2024.[14] The said issues are intertwined with the ELD adoption process and content. Per Pozzo, as a result of compromise with Member States, the wording of the ELD is "diplomatic". The generic terminology and the not-overly-technical legal terms create a wide margin of discretion in the implementation and application of the ELD. On the flip side, this compromises the goal of the ELD: harmonization of the environmental damage liability. Already in Article 2 of the ELD, the extremely narrow definition of the damage under seems problematic.[15] Overall,

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9 See: European Court of Auditors: Special Report 12/2021: The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions, p. 4, [https://www.eca.europa.eu/hr/Pages/DocItem.aspx?did=58811], Accessed 9 April 2022

10 Ofak, L., *op. cit.,* note 2, p. 117

11 European Commission: *Evaluation of the Environmental Liability Directive*, Brussels, 14 April 2016, SWD (2016) 121 final

12 European court of Auditors: Special Report 12/2021: The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions, pp. 24-25, Available at: [https://www.eca.europa.eu/hr/Pages/DocItem.aspx?did=58811], Accessed 9 April 2022

13 Multi-Annual Eld Work Programme (Mawp) for the Period 2017-2020, [https://ec.europa.eu/environment/legal/liability/pdf/MAWP_2017_2020.pdf], Accessed 9 April 2022

14 Multi-Annual Eld Rolling Work Programme (Marwp) for the Period 2021-2024, [https://ec.europa.eu/info/sites/default/files/eld_mawp-approved.pdf], Accessed 9 April 2022

15 Cassota, S., *Environmental Damage Liability Problems in a Multilevel Context: The Case of the Environmental Liability Directive*, Alphen an den Rijn: Kluwer Law International, 2012, p. XIV

the concept of environmental liability the ELD introduced is patently narrow and has a limited effect. Still, Member States may build upon the minimum liability introduced by the ELD, i.e., mandate a higher level of environmental protection at national level.[16]

Per the European Court of Auditors (ECA),[17] the use of public funding to remediate pollution is justifiable and necessary only in cases of orphan pollution, i.e., when the entity responsible could not be identified or made liable (due to, e.g., insolvency).[18] According to the 2021 ECA Report, there are four orphan pollution remediation projects, worth 33 million EUR (which were brought about by an insolvent polluter).[19] The ECA recommended to the EC to (1) assess the scope for strengthening the integration of the PPP into environmental legislation, (2) consider reinforcing the application of the ELD, and (3) protect EU funds from being used to finance projects that should be funded by the polluter.[20]

## 2. THE 'POLLUTER PAYS' PRINCIPLE IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Offering a sound understanding of the PPP is CJEU case law,[21] primarily in *Van de Walle*[22] and *Erika*.[23] In 1999 the oil tanker *Erika*, chartered by Total International Ltd, sank south-west of the Pointe de Penmarc'h (Finistère, France), spilling part of her cargo and oil at sea and causing pollution. The oil was being delivered to ENEL under a contract with Total and intended to be used as fuel for electricity production. To carry out the contract, Total Raffinage Distribution, sold the oil to Total International Ltd, which chartered the vessel Erika to carry it from France to Italy. In 2000, the Commune de Mesquer, a French municipality, brought

16 Hinteregger, M. (ed.), *Environmental liability and ecological damage in European law*, Cambridge University Press, Cambridge, 2008, p. 639

17 The European Court of Auditors contributes to improving EU financial management and acts as the independent guardian of the financial interests of the citizens of the Union. See more: [https://www.europarl.europa.eu/factsheets/en/sheet/14/the-court-of-auditors]

18 Report, *op. cit.*, n. 12, p. 36

19 *Ibid.,* p. 32

20 European Court of Auditors: *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 2021, p. 5, [https://www.eca.europa.eu/Lists/ECADocuments/SR21_12/SR_polluter_pays_principle_EN.pdf], Accessed 22 April 2022

21 For a comprehensive analysis of the two cases see: Bleeker, A., *Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice,* European Energy and Environmental Law Review, Vol. 18, No. 6, 2009, pp. 289 – 306

22 See: Case C-1/03 Van de Walle and Others, ECLI:EU:C:2004:490

23 See: Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd.*, ECLI:EU:C:2008:359

action against the Total companies in the Commercial Court in Saint-Nazaire, seeking inter alia a ruling that the companies be held liable for the consequences of the damage caused by the waste spread on the territory of the municipality and be ordered to pay the costs of cleaning and anti-pollution measures borne by the municipality. The action was unsuccessful, and the municipality appealed to the Court of Appeal in Rennes. In 2002, the said court confirmed the decision at first instance, taking the view that the oil did not constitute waste but was a combustible material for energy production manufactured for a specific use. Further, the court accepted that the oil spilled and mixed with water and sand formed waste, but nevertheless took the view that there was no legislation under which the Total companies could be held liable, since they were not formally producers or holders of said waste. The municipality appealed to the Court of Cassation. Since it considered that the case raised a serious problem of interpretation of Directive 75/442, the Court of Cassation decided to stay the proceedings and refer the questions to the CJEU for a preliminary ruling.[24]

*Van de Walle* and *Erika* are particularly significant for addressing the question of liability of the producer of the product from which the waste came in the event of an incidental environmental damage or disaster. In *Van de Walle*, the earlier of the two, the CJEU reasoned that causal relation or negligence was necessary for establishing liability of the producer. In *Erika*, the CJEU introduced a risk liability standard under which, in accordance with the PPP, such producers can be liable for remediation where they directly contributed to the risk of pollution. In other words, under the CJEU's most recent interpretation of the PPP, polluters can be attached with financial liability for pollution damage, but only in proportion to their contribution to the creation of that pollution.[25]

## 3. THE 'POLLUTER PAYS' PRINCIPLE IN THE CROATIAN JURISPRUDENCE

In Croatia, environmental protection is primarily regulated by the Environmental Protection Act (EPA),[26] through which the ELD was incorporated into Croatian national law. Based on the EPA, Croatia introduced the national Regulation on Environmental Damages Liability.[27] The EPA regulates the remediation of envi-

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24 *Ibid*. The relevant facts of the case are cited from the judgment, par. 24-28

25 Bleeker, A., *op. cit.,* n. 21, p. 289

26 Law on environment protection (Zakon o zaštiti okoliša), Official Gazette No. 80/13, 153/13, 78/15, 12/18, 118/18

27 Regulation on liability for environmental damage (Uredba o odgovornosti za štetu u okolišu), Official Gazette No. 31/2017

ronmental damage based on the PPP. Per Article 16 EPA, the polluter bears the cost of pollution, including the cost of environmental damage assessment, as well as the cost of assessment of the necessary pollution remediation measures. The EPA defines the *polluter* as any natural and legal person whose indirect or direct action or inaction causes environmental damage (Article 4(1) and (33) EPA). Within the meaning of the EPA, the polluter is also an operator who, in compliance with dedicated legislation, carries out or controls an activity that caused an environmental damage.[28]

Per Josipović, the liability of the polluter/operator for environmental damage should be distinguished from the liability for the damage caused to natural and legal persons as a consequence of the damages to the environment. Of the two liability categories, the former is established in administrative proceedings under the EPA as public law protection; liability to natural and legal persons is established under the Civil Obligations Act (COA) rules on tort.[29] In Croatia, protection provided for under public law is established under the EPA in administrative proceedings, and under the Criminal Act (CA) in criminal proceedings. Chapter XX of the CA defines criminal acts against the environment. These criminal acts were introduced as part of the implementation of Directive 2008/99 on the protection of the environment through criminal law.[30] Characteristic for these criminal acts is that they cause significant damage or danger to the environment and human health.[31]

Application of the PPP by administrative courts and bodies in Croatia is by and large problematic, chiefly due to the polluters' frequent inability to remediate due to their over-indebtedness or insolvency – a fact that has been discussed widely in Croatian legal literature.[32] As legal scholars and CJEU case law interpret it, in the case of insolvency, legal persons responsible for a pollution (or their legal successor(s)) remain liable both for the environmental damage they caused and the remediation, regardless of whether they caused it directly or indirectly.[33] The view that such remediation ought to be funded with public money should be fully

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28 Josipović, T., *Građanskopravna zaštita od štetnih emisija*, in: Barbić, J. (ed.), Građanskopravna zaštita okoliša, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2017, p. 73

29 *Ibid.* p. 74

30 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law OJ L 328, 6 December 2008, pp. 28–37

31 See more: Maršavelski, A., *Odgovornost pravnih osoba za kaznena djela protiv okoliša: teorijsko utemeljenje u odgovarajućoj regulaciji*, in: Barbić, J. (ed.), Hrvatska akademija znanosti i umjetnosti, Zagreb, 2017. pp. 46-49; See also: Pujo Tadić, M., *Odgovornost za »Kaznena djela protiv okoliša« u Republici Hrvatskoj*, Informator No. 6255 of 15 Februar 2014

32 See: Bodul, D.; Vuković, A., *Položaj ekoloških tražbina u hrvatskom stečajnom pravu - norma, dileme i pravci promjena*, Ius info, Accessed 27 September 2016

33 *Ibid.*

abandoned. Otherwise, it would translate to having transferred the liability for the damage from the polluter (who is profiting from incautious, but profitable operations that caused the damage) onto the state, i.e., the taxpayer. That this principle is upheld by the Croatian legislator is clear from Article 16(1) and (2) EPA: the polluter is the bearer of the remediation cost (the scope of which is clearly delineated) and not the damage caused to the environment.

The Croatian judiciary takes the same position. In one such case, which involved an accidental oil spill from a tanker and the resulting environmental damage, competent authorities were notified, and the clean-up (remediation) provided by the injured party, of which a remediation log was kept. Once remediation was completed, the injured party invoiced the remediation cost to the polluter. The polluter contested the remediation in terms of title, volume, and cost thereof. The court viewed the injured party as a hazardous waste management company that is obligated to act urgently. Remediation was inspected by the Croatian Ministry of Environmental Protection, Physical Planning and Construction between 12 and 13 January 2007. The injured party invoiced the remediation in accordance with the valid tariffs. The polluter's request for an expertise was denied. The courts found that under Article 16 EPA, the remediation cost should be borne by the polluter. The polluter was ordered to recover the remediation cost to the injured party.[34] In a similar vein, from the wording of the Croatian Water Act[35] (WA), it cannot be concluded that the polluter should bear the costs of the pollution of the water, but rather, far more specifically, as provided under Article 73(1) WA, that he should bear the remediation cost under Article 70(3) WA in conjunction with Article 59 WA.

In Croatia, state-owned companies are responsible for public goods under special acts. This follows the ELD in prescribing that competent authorities be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the damage and determine the necessary remedial measures. However, this should not imply that they are proprietors of those goods or that the damage was inflicted directly to their property. Under the ELD, the liability for damage caused to protected species and natural habitats, water, and soil is based on the public approach: the injured party is no one natural or legal person, but rather the society as a whole given the public and universal nature of damages caused to natural resources. In Croatia, in such cases, actions are ordinarily brought by public authorities to ensure remediation. This is at a remove from civil liability cases, which aim at compensation. Environmental protection authorities must ensure that responsible entities and a causal link be established, and a remediation plan and preventive and

[34] Supreme Court of the Republic of Croatia (VSRH) Revt 153/2013-2

[35] Water Law (Zakon o vodama), Official Gazette No. 66/2019

corrective measures adopted. In this regard, public authorities' actions are confined to administrative proceedings. However, it is in administrative proceedings that orders to remediate are brought (including the manner of cost bearing).

The sole claim grounded in the liability of the polluter is that for remediation cost recovery, submitted by the remediation company. Relevant literature clearly distinguishes between the position and the role of the national authorities in regard to remediation and compensation claims, which can be brought only where the same authorities had the remediation carried out in place of the polluter.[36] Obviously, if the polluter is established and made part of the remediation, he bears the remediation cost. This is in full agreement with the PPP, as well as the position that there is no grounds for transferring the polluter's liability to a third person (which would be the case were the national authority found directly liable to the remediation company and to subsequently require cost recovery from the polluter). In support of this is the exceptional case where the competent authority bears the cost only if the polluter cannot be identified or held liable (arg. *ex* Article 6 para 3 Directive 2004/35).

As Advocate General Kokott explained in her opinion[37] on *Fipa Group and Others*,[38] the PPP largely coincides with the restrictions which the objectives of the ELD impose on the application of Article 16. Member States must not undermine the PPP by identifying responsible parties in addition to or in place of the polluter. Third persons may only be secondarily liable. Per Kokott, this is in line with the principle of preventive action (PPA): where polluters are aware of the risk of damage and their full liability therefor, they are to take the necessary damage prevention measures. In general, it is the polluters who are able to take the most effective measures.

In addition, under the PPA – akin to the 'rectification at source' principle (under which damage or pollution is to be dealt with where it occurs) – measures are to be taken on polluted sites to prevent further spread of the damage irrespective of any contributions by the owners to the causes. In certain circumstances, it may also be necessary for the owner to support these measures using his better knowledge of the site. Otherwise, it would clearly be more difficult, if not impossible, to prevent such spread. On the other hand, in general neither of these principles requires that these owners should themselves be called on to carry out remediation.[39]

In this sense, grounding any transfer of liability for the remediation cost onto the national authority or state-owned company in their supposed liability for the

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[36] See: Vizjak, S., *Odgovornost za štete u okolišu*, Hrvatska pravna revija, Vol. 47, 2012, pp. 47-50, p. 49

[37] Opinion of Advocate General Kokott in Case C- 534/ 13, ECLI:EU:C:2014:2393

[38] See case C-534/13 *Fipa Group Srl. and Others*, ECLI:EU:C:2015:140

[39] *Op. cit.*, n. 38

respective public good and, in turn, the necessary prevention or remediation measures, would be tantamount to imposing the cost obligation on the possessor, and thus in direct opposition EU law.

## 4. CONCLUDING REMARKS

The complexity of environmental protection requirements is evident from the modalities of their implementation, which in turn points to the need for providing criminal, civil and administrative protection. Although the focus here was on the realization of administrative protection in Croatia as provided under the ELD, the paper also confirmed the understanding across the relevant literature on the inseparability of civil and administrative path of statutory environmental protection. Namely, public interest, which is primarily protected in administrative proceedings, is also realized in civil proceedings seeing as how public interest protection relates to the realization of a civil law claim. Under the Croatian legislative framework, which reflects equally the position of EU legislation and the relevant CJEU interpretations, polluters are to bear the costs of the pollution they cause, in accordance with the PPP. This prevents the transferring of the remediation cost onto the taxpayers. Member States are obligated to take all necessary measures to implement the PPP. Under EU law, the term 'state' implies all national authorities, including national courts of all levels. In other words, national courts are obligated to apply the PPP, even in civil law litigation.

However, the Croatian judiciary is often faced with certain doubts regarding the interpretation of the liability of the polluter and the liability for the remediation cost. This is characteristic of cases where the state, through its bodies or state-owned companies, is involved in the implementation of remediation (either as the contracting authority, or the principal, or supervising body). As this paper has shown, regardless of the state bodies' involvement in the very remediation, the sole liability undoubtedly remains the polluter's. Otherwise, regardless of the cost being formally borne by the state, the actual burden would be transferred to the taxpayers (e.g., by raising the state-owned companies' service fees). Fortunately, as has been discussed in literature, the Waste Framework Directive[40] offers a clear distinction between the liability for "practical operations or the execution of the disposal itself" and for the "bearing of the cost of those operations".[41]

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[40] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312 of 22 Nov 2008

[41] Sadeleer, N., *The polluter pays principle in EU law. Bold case law and poor harmonization* in: Pro Natura Festskrift il C.H. Bugge. Universitetsforlaget, Oslo, 2012, pp. 405-419, p. 414

A different understanding of the PPP should not be acceptable even in Croatia, where – due to frequent cases of polluter insolvency – the remediation cost is regularly transferred onto state-owned companies or government agencies. Namely, even though the actual remediator has a well-founded claim for cost recovery from the polluter, the transfer of liability to third parties for realization purposes is plainly unjustifiable. Any other interpretation would create ample room for polluters to avoid bearing high remediation cost by feigning insolvency. Without a doubt, this would effect the exact opposite of the ELD's purpose, and allow that the liability for environmental damage be linked to the action or inaction of individual factors.

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UDK 347.736:061.1(4-67EU)
Review article

# WILL THE IMPLEMENTATION OF THE DIRECTIVE ON RESTRUCTURING AND INSOLVENCY HELP THE RECOVERY OF THE CROATIAN MARKETS AND STRENGTH THE ABILITY OF THE DEBTORS TO RESPOND TO NEW CHALLENGES?*

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***ABSTRACT***

*It must be pointed out that the issue of bankruptcy proceedings in countries with a long market tradition is a dynamic area where new solutions are sought that will follow the trend of change in the international economy. The European Union, which in 2019 adopted the Restructuring and Insolvency Directive, is also making an exceptional contribution to this issue. With the adoption of the Directive, the European Union has joined the general trend of deviation from traditional, formal bankruptcy proceedings by opening a wide area to private regulation, with all the associated opportunities and risks.*

*From the current point of view of Croatian law, the Directive does not provide "revolutionary" solutions, especially in terms of preventive restructuring, given that Croatian rules on pre-bankruptcy proceedings are essentially in line with the solutions contained in the Directive. Therefore, the subject of the analysis are valid norms as well as those from the Final Proposal of the Bankruptcy Law from 2022 (February 2022) related to collective legal protection in (pre) bankruptcy proceedings, having in mind the possible consequences of incomplete and inadequate regulation on the rights and interests of participants.*

*The analysis starts from the fact that the issue of legal protection is regulated by each state independently and that such autonomy of member states is limited by EU rules. Therefore, in addition to the legal analysis of legal protection, as it is according to the existing (valid) legal framework (de lege lata), this paper also includes the question of what such protection should be in view of the requirements of European law (de lege ferenda). A limiting factor in the context of this analysis is the lack of well-established judicial practice, given that the implementation of new legislation is in process of public debate. Therefore, the analysis is not based on*

* This paper was done under the project line ZIP UNIRI of the University of Rijeka, for the project ZIP-UNIRI-130-7-20

*practical problems, but on detecting possible problems that could cause difficulties in practical implementation of (pre)bankruptcy proceedings.*

***Keywords:*** *(pre)bankruptcy proceedings, the Restructuring and Insolvency Directive, implementation, Bankruptcy Act*

## 1. SKETCHES ON THE EVOLUTION OF BANKRUPTCY LAW UNTIL ACCESSION TO THE EUROPEAN UNION AND THE ADOPTION OF THE *ACQUIS COMMUNAUTAIRE*

The legal framework, nor the practice of bankruptcy, liquidation and compulsory settlement, in the previous system did not satisfy any of the interests that should be satisfied in *laissez faire* market. Accordingly, doctrine and jurisprudence considered the introduction of new bankruptcy legislation as a necessity. The new, modern, Bankruptcy Act was passed in May 1996[1] and subsequently amended several times.[2] Adoption of the Bankruptcy Act, following the example of the German *Insolvenzordnung* from 5 October 1994,[3] and the termination of the Law on Compulsory Settlement, Bankruptcy and Liquidation[4] represented a radical change in the way bankruptcy proceedings were conducted in the Republic of Croatia. Almost all of the changes were intended to overcome "acute" problems in practice and to improve the system of bankruptcy protection by functionalizing, accelerating and reducing the costs of bankruptcy proceedings. However, as the period after the adoption of the old BA was a time of economic growth, consequently there was no awareness of the need to consider and give bankruptcy other functions than to serve, only as an instrument for collecting overdue receivables from debtors unable to meet their obligations, which ultimately resulted in their bankruptcy liquidation.[5]

### 1.1. Balance sheet of bankruptcy legislation until 2013, i.e. until EU accession

More than half of the bankruptcy proceedings were concluded due to insufficient bankruptcy estate, i.e. without distribution of funds to creditors.[6] Moreover,

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1 Official Gazette No. 44/96

2 Bankruptcy Act (*Stečajni zakon*), Official Gazette No. 44/96-45/13., hereinafter: old BA

3 See: Gallagher, A.; Wilde, J.; Dittmar, T., *The New German Preventive Restructuring Framework,* American Bankruptcy Institute, 2021, p. 50, *et seq.*

4 Law on Compulsory Settlement, Bankruptcy and Liquidation (*Zakon o prisilnoj nagodbi, stečaju i likvidaciji*), Official Gazette No. 53/91 and 54/94

5 Bodul, D., *et al., Pravnopovijesni i poredbenopravni prikaz razvoja stečajnog postupka,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 34, No. 2, 2013, pp. 911-941

6 Bodul, D., *et al.*, *Novosti i problemi u provedbi stečajnog zakonodavstva u Republici Hrvatskoj,* Ekonomski pregled – Zbornik Ekonomskog fakulteta Sveučilišta u Zagrebu, Vol. 65, No. 4, 2014, pp. 318-351

analyses confirm that creditors in bankruptcy proceedings did not collected most of their claims. The most common and largest creditors in bankruptcy proceedings are state institutions, which paradoxically have the lowest level of collection.[7] The problem is that such results of bankruptcy proceedings have significant consequences for the budget, which remained deprived of hundreds of millions of kunas. The main reason is that bankruptcy proceedings are not initiated within the deadlines provided by law or are not initiated at all. Untimely initiation of bankruptcy proceedings is related to the lack of interest of creditors and debtors, unforeseen costs of previous proceedings and unorganized documentation for submitting proposals for initiating bankruptcy proceedings. The length of insolvency and exceeding deadlines in this regard are also not in the function of meeting the defined goals. Untimely, in timely manner initiation of bankruptcy proceedings misses the opportunity to preserve the assets of the company, which is a prerequisite for a higher degree of settlement for creditors. A further, second indicator of the failure of bankruptcy proceedings is its duration.[8] It is longer than the envisaged deadlines and is conditioned by the timeliness of initiation, the manner of conclusion and the complexity of the procedure. Unresolved property legal relations, unsuccessful sales of property, procedural manipulation of appeal possibilities and accompanying litigation were among the main causes of the length of proceedings. Finally, the third performance indicator is the cost of bankruptcy proceedings. They vary significantly and, in the structure, they ranged up to 80% of bankruptcy estate. The high share of costs in the total income in bankruptcy estate is related to the duration of the proceedings, the amount of fees and the number of persons engaged in bankruptcy proceedings and the number of accompanying litigations.[9]

## 2. IMPLEMENTATION OF THE LAW ON FINANCIAL OPERATIONS AND PRE-BANKRUPTCY SETTLEMENT AND ACCESSION TO THE EUROPEAN UNION

However, frequent financial crises necessitated a radical reform of bankruptcy regulations, and since the bankruptcy technique has not made progress and bankruptcy is, as a rule, without a bankruptcy plan, there was a need for change. Therefore, at the end of 2012, in order to restructure or, if that is not possible, go

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7 *Loc. cit.*

8 Croatian Constitutional Court stated that even a nine-year bankruptcy was not too long due to the lack of the buyer's interest and complexity of the case in question. See: Croatian Constitutional Court, Decision No. U-IIIA - 2978/2009

9 *Loc. cit.* and Šverko Grdić, Z.; Radolović, J.; Bagarić, L., *Solventnost poduzeća u Republici Hrvatskoj i u Europskoj uniji,* Ekonomski pregled, Vol. 60, No. 5-6, 2009, pp. 250-266

bankrupt, the Government of the Republic of Croatia implemented the Law on Financial Operations and Pre-Bankruptcy Settlement.[10] It entered into force on 1 October 2012 with the introduction of an alternative out-of-court insolvency procedure - the pre-bankruptcy settlement procedure, reminiscent of the former institute of out-of-bankruptcy court compulsory settlement,[11] thereby significantly influencing Croatian insolvency law. As comparative legal analyses have become a necessary precondition for mutual dialogue and harmonization of national insolvency systems, it is important to point out that in the last decades, developed European economies have started to implement models similar to Chapter 11 of the US Bankruptcy Code (Art. 1101-1174. Chapter 11), thus encouraging the process of restructuring insolvent companies through a "pre-pack" and a "pre-negotiated" plan which is an alternative for the survival of the company.[12]

### 2.1. Balance sheet of pre-bankruptcy settlements from the Financial Operations and Pre-Bankruptcy Settlement Act

Statistical analysis of aggregate data from the system of Financial Agency (hereinafter: Fina) on pre-bankruptcy settlements for the period 01.10.2012 to 29.09.2017. has no pretensions or ability to provide a comprehensive analysis. However, from the that data we can see that it was realistic to expect that the pre-bankruptcy settlement procedure will be used by many debtors as cheaper way out through bankruptcy because in case of unsuccessful completion of the procedure, FINA submits a proposal to initiate bankruptcy proceedings free of charge. The data also points to another problem: the reality of the envisaged measures and the sustainability of the debtor's operations after the settlement is adopted. The presented results of pre-bankruptcy settlements should therefore be taken with great caution, as most of the plans from that period have only just begun to be implemented and potential problems with meeting the obligations under the settlement will only arise later (later date is not available). We emphasize this

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10 Law on Financial Operations and Pre-Bankruptcy Settlement (*Zakon o financijskom poslovanju i predstečajnoj nagodbi*), Official Gazette No. 108/12, 144/12, 81/13, 112/13, 71/15 and 78/15, hereinafter: ZFPPN

11 For older regulations see: Politeo, I., *Vanstečajna prinudna nagoda,* Hrvatsko štamparsko društvo, Zagreb, 1923; Walter, R., *Prinudna nagodba izvan stečaja de lege lata i de lege ferenda,* Bankarstvo, Zagreb, Beograd, Ljubljana, 1925

12 Bankruptcy Code, Pub. L. 113-86, (except 113-79), pp. 1101-1174, [http://www.law.cornell.edu/uscode/text/], Accessed 12 February 2022., See: Warren, E.; Westbrook, J. L., *The Success of Chapter 11: A Challenge to the Critics*, Michigan Law Review, Vol. 107, 2009, pp. 603, 606; McCormack, G., *Corporate Restructuring Law – A Second Chance for Europe?* European Law Review, Vol. 42, 2017, pp. 532, 542.; Stanghellini, L.; Riz, M., *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law*, Wolters Kluwer, 2018

as important because anecdotal evidence indicated that an increasing number of entities had their assets frozen immediately after the pre-bankruptcy settlement was completed and were facing or are in bankruptcy liquidation proceedings. The reason for this was the fact that for the most business entities, whose restructuring plan was approved by the Ministry of Finance, the first payment for priority claims proved to be an insurmountable step after the successful completion of the pre-bankruptcy settlement.[13] In the pre-bankruptcy settlement procedure, immediately after the acceptance of the plan, priority claims are collected, including, for example, workers' salaries. In most cases, workers block the account of (their own) company immediately after the pre-bankruptcy settlement because they are not paid within the legal deadline. Another problem, for which there are no statistics, is the problem of the position of related parties and the possibility of re-voting of bankruptcy creditors by related parties.[14] On a few occasions the courts to which a dubious settlement proposals were submitted justly found that voting rights cannot be exercised with respect to false claims.[15]

## 3. BANKRUPTCY LAW REFORM FROM 2015 AND 2017 IN THE CONTEXT OF THE EUROPEAN ACQUIS

Although the adoption of the ZFPPN in 2012 significantly changed the bankruptcy procedure in the Republic of Croatia, its practical application identified a number of problems in the interpretation and effects of certain provisions and institutes, which legislator tried to eliminate by adopting the new Bankruptcy Law in 2015. The new Bankruptcy Law enters into force on September 1, 2015.[16] The fact that there are no more advertisements in the Official Gazette will be noticed first, but all announcements go through the *e*-bulletin board of the courts, and the change in question is motivated by reducing the costs of conducting bankruptcy proceedings. Furthermore, the issue of advancing the costs of the proceedings has been resolved differently, in such a way that in case of blocking the account, funds for bankruptcy management will be partially reserved, and if such funds are not available or are insufficient, the debtor's responsible persons may be ordered to pay the costs. Few practical problems have also been eliminated, *exempli gratia,* legislator introduced an option to issue the OIB to the bankruptcy and liquida-

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13 Bodul, D., *et al.*, *Analiza učinaka predstečajnih nagodbi – Izvješće Ministarstva financija Republike Hrvatske od lipnja 2014,* Novi informator, No. 6310-6311, 2014, pp. 8-10; Bodul, D., *et al., „Završna bilanca" postupaka predstečajnih nagodbi,* Pravo u gospodarstvu, Vol. 4, No. 579, 2018, pp. 651-675

14 *Loc. cit.*

15 See, for instance, High Commercial Court of the Republic of Croatia, Ruling No. No. Pž 8613/13-4 of 25 November 2013

16 Bankruptcy Act (*Stečajni zakon*), Official Gazette No. 71/15 and 104/17

tion estate. Also, as it has been noticed in practice that enforcement proceedings initiated and conducted by separate creditors take a long time, which prolongs the duration of bankruptcy, the right of a separate creditor to initiate enforcement proceedings after bankruptcy has been abolished i.e. now such proceedings are dismissed and they are referred to the commercial courts. With regard to the rules on bankruptcy trustees, it is stipulated that in bankruptcy proceedings they will be determined on the basis of automatic assignment in accordance with the list of trustees, but it is also stipulated that they will be removed from the list if they are dismissed in more than two bankruptcy proceedings. In addition, bankruptcy trustees will need to have a professional liability insurance policy. The institute of pre-bankruptcy settlement is regulated in such a way that it is conducted in full before the court, but the debtor can use this possibility only until the presumption on the basis of which bankruptcy proceedings must be initiated has been fulfilled. This was the result of the Recommendations on a New Approach to Bankruptcy and Insolvency of Entrepreneurs adopted by the European Commission in 2014, which laid down a set of general principles for national insolvency proceedings to encourage sustainable entrepreneurs to restructure at an early stage in order to prevent insolvency and to continue their business activities.[17] However, given that the requirements regarding the responsibility of the debtor for the orderliness of the proposal are very high and the rule on the majorities required for voting has been changed, it is not to be expected that many pre-bankruptcy agreements will be adopted in practice. Due to that, the possibility was returned to the creditors to vote on the bankruptcy plan after the opening of the bankruptcy procedure, as it was before the last amendment. However, in practice, perhaps the most important change is Fina's obligation to file for bankruptcy, if the legal entity has recorded unfulfilled payment bases in the Register of Order of Payment Bases for an uninterrupted period of 120 days. Also, through the rules on international bankruptcy in BA, the solutions of Council Regulation (EC) no. 1346/2000 of 29 May 2000 on bankruptcy proceedings were implemented.[18] However, given that the Regulation in question is legally above the BA, it was already in force.

However, in almost two years of application of the BA, the number of initiated pre-bankruptcy proceedings was found to be relatively small (273 initiated proceedings), with only 58 cases accepting the restructuring plan and confirming the

[17] Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency, Official Journal L 74/65, pp. 65-70

[18] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160, 2000, pp. 1–18, no longer in force

pre-bankruptcy agreement.[19] Therefore, the aim of the Law on Amendments to the Bankruptcy Law, which entered into force on 2 November 2017, is primarily to facilitate pre-bankruptcy proceedings by prescribing realistic deadlines for taking certain actions in the proceedings.[20] Also, following ten years of application of the 2000 Regulation, the need of its reform has emerged, so a new Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings was adopted and published on 5 June 2015 in the Official Journal and entered into force 20 days after that publication (Art. 92, par. 1).[21] The new solutions have been implemented in the 2017 amendment to the BA: Exceptions are: a) Art. 86, which deals with the provision of information on national insolvency law and the insolvency law of the EU, and will apply from 26 June 2016; b) Art. 24, par. 1, relating to the establishment of national insolvency registers, shall apply from 26 June 2018; and c) Art. 25, relating to the European networking of national insolvency registers, which will apply from 26 June 2019 (Art. 92, par. 2, fig. a.-c.). It should be noted that the Republic of Croatia has designated only bankruptcy proceedings as the type of insolvency proceedings to which the Decree will apply, both with regard to the 2000 Decree (Annexes A and B) and with regard to the reformed 2015 Decree (Annexes A and B). In other words, the Regulation does not apply to previous pre-bankruptcy settlement proceedings as well as to current pre-bankruptcy proceedings.[22]

### 3.1. Analysis of qualitative and quantitative indicators of BA

The analysis of commercial court cases by their types shows that the largest part in the total number of received cases also refers to bankruptcy cases. However, the resolution rate of over 100% is recorded in bankruptcy cases, which means that more cases are resolved than new ones are received. Both for unresolved cases and for resolved cases, one of the most important indicators is the duration of resolved cases. At the same time, the DT indicator (indicator of case resolution time) indicates that commercial courts need the most days to resolve bankruptcy cases, which require an average of 360 days. Compared to the previous year, there is an increase in the time required to resolve bankruptcy cases from 308 to 360 days,

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19 See: Hausemer, P., *et al.*, *Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law,* Publications Office of the European Union, 2017

20 Bankruptcy Act *(Stečajni zakon),* Official Gazette No. 71/15 and 104/17

21 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Official Journal L 141, 2015, pp. 19–72

22 See: Ghio, E., *Case Study on Cross-border Insolvency and Rescue Law: An Analysis of the Future of European Integration*, Irish Journal of European Law, Vol. 20, No. 1, 2017

which is still within the acceptable range of 1 year.[23] This was certainly the result of the *Covid 19* pandemic as well as the earthquake that hit Zagreb.[24] It should be noted that the Law on Intervention Measures in Enforcement and Bankruptcy Proceedings for the duration of special circumstances [25] was in force from 1 May 2020 until 18 October 2020, and in accordance with the provisions of Art. 6 of the said Act, the bankruptcy reasons arising during the duration of special circumstances in the sense of that Act were not a precondition for submitting a proposal for opening bankruptcy proceedings. Therefore, the President of the Supreme Court in his Report points out that there are problems in the economic sector as a result of the pandemic, so it is to be assumed that in 2021 there will be a certain increase in the number of bankruptcy cases. The report also showed the inflow of bankruptcy cases. The inflow of items includes received items in the observed period. However, analysing the Report, it was not clear whether the inflow of cases has grown from year to year.[26] Furthermore, one of the important parameters in the analysis is the number of judges working on bankruptcy cases. In general, the same number of bankruptcy cases was resolved in 2020 compared to 2019, but it is not clear whether there was an increase or decrease in the number of judges working on bankruptcy cases, because then if we look at the average number of resolved cases per judge, the statistics would be different. Furthermore, as numerical indicators do not give a complete picture of the bankruptcy issue, the author also included qualitative indicators, which were obtained by analysing the content of final judgments. The analysis of the verdicts indicated the consistency and unambiguity of the argumentation, so the analysed sample of cases suggests a high quality of the substantive aspects of the verdicts. However, there were fears that this will change as a result of the announcements of the Ministry of Justice to increase the norm of judges (Framework Criteria for the Work of Judges). The doctrine indicates that second instance judges will often look for any (not necessarily strong enough) reason to revoke / annul a first instance decision, in order to save time needed to analyse the merits of the case.[27]

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23 Bodul, D., *Pogled na Izvješće Predsjednika Vrhovnog suda i stanje stečajnih predmeta*, Novi informator, No. 6688-6689, 2021, pp. 1-4

24 See: Madaus, S., Javier Arias, F., *Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring Law,* European Company and Financial Law Review, Vol. 17, 2020, p. 318

25 Law on Intervention Measures in Enforcement and Bankruptcy Proceedings for the Duration of Special Circumstances (*Zakona o interventnim mjerama* u ovršnim i stečajnim postupcima u vrijeme trajanja posebnih okolnosti), Official Gazette No. 53/20

26 See: High Commercial Court of the Republic of Croatia, *Statistics,* [https://sudovi.hr/hr/vtsrh/o-sudovima/statistika], Accessed 12 February 2022

27 Bodul, D., *Pogled na Izvješće Predsjednika Vrhovnog suda …op. cit.,* note 23, p. 1-4

## 4. WHAT'S NEW IS THE RESTRUCTURING AND INSOLVENCY DIRECTIVE

On June 26, 2019 Restructuring and Insolvency Directive (hereinafter: the Directive) was published in the EU OG[28] laying down rules on: frameworks for preventive restructuring at the disposal of debtors in financial difficulties if there is a likelihood of insolvency, with the aim of preventing insolvency and ensuring the sustainability of debtors; procedures leading to debt relief for insolvent entrepreneurs or natural persons (so-called second chance); measures to increase the efficiency of restructuring, insolvency and debt relief procedures, in particular as regards to their shorter duration. Member States had two years (from the entry into force on 17 July 2019) to transpose its provisions into national law, but may, on "particular difficulties", as Art. 34(2) of the Directive puts it, request an additional year from the Commission for implementation. Finally, that most Member States of the EU have failed to implement the Directive in time. One of the interesting reasons mention in doctrine is the fact that many Member States have difficulties to keep pace with the EU.[29] In other words, the combination of a multitude of legal acts, the complexity of regulations, and short implementation deadlines seems to overwhelm many national governments. It is difficult to understand why the Commission is exerting such massive time pressure on such an important and complex issue.

In any way, the aim and essential content of the Directive are in line with the European Commission's Proposal from 22 November 2016. On the other hand, the Proposal was based on the European Commission's Recommendation from 12 March 2014 (A New Approach to Business Failure and Insolvency). The Directive primarily seeks to reduce the greatest obstacles to the free movement of capital arising from differences between Member States' restructuring and insolvency frameworks and to strengthen a culture of remediation within the EU based on the principle of second chance. All of this should lead to a reduction in barriers to trade and investment.[30] The new rules also seek to reduce the share of non-

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28 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

29 Reinhard, B., *Adopting the Directive: Member States "in particular difficulties",* INSOL Europe, Eurofenix - The journal of INSOL Europe, [file:///D:/Users/Dejan/Downloads/Eurofenix_84_Summer_2021.pdf] Accessed 4 April 2022; See also: Reinhard, B., *Harmonization of Insolvency Laws: a possible undertaking?,* 2022, [https://www.law.ox.ac.uk/business-law-blog/blog/2022/02/harmonisation-insolvency-laws-possible-undertaking], Accessed 4 April 2022.

30 Garrido, J., *et. al., IMF working paper WP/21/152 on Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive,* dated May 2021 [https://www.imf.org//media/Files/

performing loans in banks' balance sheets and prevent their accumulation in the future. The Directive also seeks to strike the right balance between the interests of debtors and creditors. Namely, the adoption of the Directive for the first time creates a single legal framework for the preventive restructuring of companies out of bankruptcy proceedings throughout the European Union. Preventive solutions are a growing trend in insolvency law with aim to make it easier for sustainable companies in financial difficulties to access frameworks for preventive restructuring by allowing for early-stage structural adjustment to avoid insolvency and, in this regard, laying off employees. In addition, providing a second chance to honest insolvent or over-indebted natural persons/entrepreneurs is necessary in order to rehabilitate them faster and thus preserve their accumulated entrepreneurial experience for future economic endeavours.[31]

## 5. A LOOK AT THE FINAL DRAFT BANKRUPTCY LAW WITH REGARD TO THE IMPLEMENTATION OF THE SOLUTION OF THE DIRECTIVE

### 5.1. Some legal novelties in general provisions

In accordance with the Directive, the Draft provides access to early warning systems because the sooner a debtor can detect its financial difficulties and take appropriate action, the more likely it is to avoid imminent insolvency or, in the case of permanently impaired operations, a more orderly and efficient liquidation process. In order to increase support for workers and their representatives, it is necessary to provide workers' representatives with access to relevant and up-to-date information on the availability of early warning tools and to familiarize them with procedures and measures related to debt restructuring and debt relief. The Draft stipulates that an employer with imminent insolvency or pre-bankruptcy proceedings must inform workers at least once a year about news regarding early warning tools as well as procedures and measures related to debt restructuring and debt relief (Art. 7a). The author is sceptical about this measure since no sanctions for non-compliance are prescribed.

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Publications /WP/2021/English/wpiea2021152-print-pdf.ashx], Accessed 21 January 2022; Zhang, D., *Preventive Restructuring Frameworks: A Possible Solution for Financially Distressed Multinational Corporate Groups,* European Business Organization Law Review, Vol. 20, 2019, pp. 285, 286

31 Volberda, H., *Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023,* Utrecht Law Review, Vol. 17, No. 3, 2021, pp. 65–79.; Henriques, S., *The Duties of Directors When There Is a Likelihood of Insolvency and the Proposal for a New Directive,* European Company Law Journal, Vol. 16, No. 2, 2019, p. 50 *et seq.*

The Directive also stipulates that the application of the latest information and communication technologies requires clear, up-to-date and concise information tailored to users on available preventive restructuring procedures and that debtors have access to one or more clear and transparent early warning tools which could lead to the possibility of insolvency and which can signal to them that it is necessary to act without delay (Art. 3 (1) of the Directive). Therefore, there is an obligation of the Ministry of Finance, the Tax Administration and the auditor to warn the debtor of the negative development in his payment that they noticed in the course of their activities. The employer is obliged to inform the employees once a year regarding the early warning tools, while the debtors and the public will have access to relevant and updated information on the *e*-Bulletin board (Art. 7a). Such decisions are the result of the fact that even a cursory insight into the bankruptcy proceedings initiated so far shows that almost no bankruptcy cases have been initiated within 21 days from the day when bankruptcy reason occurred. This conclusion is supported by the legislator decision to implement in BA 2015, the institute according to which FINA has the obligation to submit a proposal to open bankruptcy proceedings, under certain conditions. Moreover, although the obligation to initiate bankruptcy is defined and although the amendment to the BA 2017 (Art. 109) determines who can submit the proposal for the opening of bankruptcy proceedings and there is already a criminal offense of "causing bankruptcy", new provisions on duties of directors or management of companies in case of probability of insolvency are certainly step forward to achieve the goal of timely initiation of bankruptcy (Art. 20a).

Furthermore, the dynamics of bankruptcy statistics in the Republic of Croatia has not been sufficiently researched, due to structural instabilities and frequent reforms of the bankruptcy system. This has resulted in the fact that in the Republic of Croatia it is still impossible to link the number of bankruptcies to any economic variables and that the analysis of bankruptcy statistics is reduced to a simpler form of observing the frequency of bankruptcies. Therefore, the new decision on data collection by the Ministry of Justice regarding the number of proceedings, their duration, costs, collection, number of lost jobs (Art. 20b) may serve as a quality solution for more precise changes or ultimately less frequent changes in bankruptcy regulations.

## 5.2. Legal novelties in the pre-bankruptcy proceedings

### 5.2.1. *Redefining the objectives of pre-bankruptcy proceedings*

The main goal is the same - to preserve financial discipline through the security of collection of receivables and to prevent further deterioration of companies for

which are concluded that it is possible to preserve them, or which have the perspective and purpose of continued existence. However, at the beginning of the Novella we see an explanation of the objective of pre-bankruptcy proceedings, i.e. how the objective now includes the prevention of insolvency, which is in line with the objectives of the Directive and the tendency to preserve business continuity by applying various legal or economic measures.

### 5.2.2. *Submission of a proposal for opening pre-bankruptcy proceedings*

The decision according to which the opening proposal is authorized to be submitted by the debtor or the creditor, if the debtor agrees with the proposal (consent must be submitted with the proposal) has been amended and now only / exclusively the debtor can submit a proposal for opening (Art. 25). Regarding the documents related to the proposal for opening pre-bankruptcy proceedings, the change was made, so if the restructuring plan was not submitted with the proposal for opening pre-bankruptcy proceedings, the plan must be submitted to the court no later than 21 days from the day the decision on established and disputed claims becomes final or on delivery of the decision of the second instance court on the appeal against the decision on determined and disputed claims (Art. 26).

#### 5.2.2.1. *Restructuring plan proposal*

The debtor has the right to submit a restructuring plan (Art. 26a) and the proposal of the restructuring plan must be amended (Art. 27) in such a way that the proposal of the restructuring plan is extended.

Separate creditors can participate in the restructuring plan only if they explicitly and voluntarily agree to it. The restructuring plan must not infringe on the right of separate creditors to settle from cases in which there are separate settlement rights, unless otherwise expressly provided by that plan (Art. 38). Thus, it is now possible to encroach on the rights of separate creditors, stipulating that the rights of separate creditors may be limited by a restructuring plan without their consent, but they must not be put in a worse position than they would be if there was no plan and bankruptcy proceedings have been opened. Unless otherwise specified in the restructuring plan, it shall be specified for separate creditors in which part their rights are reduced, for how long the settlement is postponed and which other provisions of the restructuring plan apply to them. However, the method of filing claims for separate and exclusive creditors has not changed.

The article regulating the position of workers and former debtor's workers is deleted as unnecessary (Art. 37.) because pre-bankruptcy proceedings do not encroach on

workers' rights and if the debtor is more than 30 days late in pre-bankruptcy proceedings with payment of wages the pre-bankruptcy proceedings are suspended.

It is also clarified that creditors affected by pre-bankruptcy proceedings can realize their claims against the debtor only in pre-bankruptcy proceedings (Art. 39.).

### 5.2.3. *Prerequisites for the appointment of commissioners*

The preconditions for the appointment of a commissioner in pre-bankruptcy proceedings remain the same as the preconditions for the appointment of a Trustee/ Bankruptcy manager, with the difference that now the appointment of a commissioner is an obligation and not a possibility of a court (Art. 33). This is a good solution because if the court does not appoint a commissioner in the pre-bankruptcy decision there is no legal impediment to appointing a commissioner subsequently, which could greatly slow down the pre-bankruptcy proceedings and jeopardize compliance with deadlines within which the proceedings must be completed (Art. 23.). However, the rule that the applicant is obliged to advance the costs of pre-bankruptcy proceedings in the amount of 5,000.00 HRK has not been changed, so the question arises as to how the costs will be covered, especially the remuneration of the commissioner who has a much more active role in the proceedings.

### 5.2.4. *The role of the court and the determination of claims*

The role of the court is clarified by stipulating that the court manages the examination hearing and does not examine the reported claims (Art. 46) because claims reported within the prescribed time are considered established if they have not been disputed by the debtor, trustee or creditor (Art. 47). By removing or modifying existing or introducing new solutions into legislation, the aim was to overcome certain problems in practice and to reduce the administrative role of the court and strengthen its judicial function. However, it is not uncommon for the "same" claim to be reported by the creditor and the guarantor and / or guarantors who guaranteed the creditor's claim. Problems will arise if the reported guarantor's claim is not disputed by an authorized person within the legal deadline. A valid legal solution may reduce creditors' rights and significantly damage creditors by outvoting non-debtor guarantors alone or with other creditors when deciding on a restructuring plan proposal, but this only increases the obligation of trustees and creditors to determine their basis after filing claims and whether there are grounds for disputing them.

Until the Draft, the legislator did not distinguish between claims for which the creditor has an enforceable document from claims for which there is no enforce-

able document, so it would follow that the creditor is always referred to litigation if the claim was disputed by the debtor. Therefore, now if there is an enforceable document for the disputed claim, the court will refer the disputant to the litigation to prove the merits of its challenge (Art. 48). The Draft elaborates the manner in which the determination of the claim in litigation may be requested (Art. 50), so in litigation the determination of the claim may be requested only on the basis and in the amount indicated in the application or at the examination hearing. In addition to the request to determine the merits of the disputed claim for which there is no enforceable document, the creditor may request the settlement of the claim to the extent determined by the approved restructuring plan, if the litigation is initiated after confirmation of the restructuring plan. If the disputed claim for which there is an enforceable document, the litigation may require determination of the merits of the dispute on the basis of the enforceable document which is the subject of the claim and in the amount specified in the application or at the hearing. If the appellant fails in the litigation, the creditor of the disputed claim may, on the basis of the enforcement document which was the subject of the dispute, request enforcement to the extent determined by the confirmed restructuring plan. If the litigation is initiated after the suspension of the pre-bankruptcy proceedings, the creditor may demand the fulfilment of the claim in full.

### 5.2.5. *Voting and classifying creditors*

If the proposal of the restructuring plan does not include all determined and disputed claims, the debtor is obliged to submit the restructuring plan to the court no later than 21 days from the day the decision on determined and disputed claims becomes final that is, from the day of delivery of the decision of the second instance court on the appeal against the decision on determined and disputed claims, submit to the court a restructuring plan which includes all determined and disputed claims (Art. 52). Thus, it is now clearly stated that the proposed restructuring plan must cover all identified and disputed claims. In fact, given that it is difficult to expect from the debtor to submit an accurate restructuring plan proposal before the decision on established and disputed claims becomes final, it can be expected that debtors will submit restructuring plan proposals as a rule no later than 21 days after the decision on determined and disputed claims becomes final, i.e. from the day of delivery of the decision of the second instance court on the appeal against the decision on determined and disputed claims. However, if the complete restructuring plan is submitted to the court before the decision on established and disputed claims is made, the court will publish it on the e-Bulletin Board website within three days of receipt. If the debtor does not submit the restructuring plan within the prescribed deadlines, the court will suspend the proceedings.

The legislator encourages restructuring by stipulating that creditors will be considered to have voted for the restructuring plan if they by the beginning of the voting hearing do not submit a voting form or submit a form from which it is not possible to determine unequivocally how they voted (Art. 58) which is contrary to the existing decision according to which if creditors do not submit a voting form or submit a form from which it is not possible to determine unequivocally how they voted by the beginning of the voting hearing, they will be considered to have voted against the restructuring plan proposal.

The rules on the classification of participants in the bankruptcy plan shall apply accordingly to the classification of creditors in the restructuring plan. Creditors will be deemed to have accepted the bankruptcy plan if in each group the majority of creditors voted for the plan and the sum of the claims of creditors who voted for the plan exceeds twice the sum of claims of creditors who voted against the plan (Art. 59, see also Art. 330, par. 1 in conjunction with Art. 56). In this context, the rules on required majorities are also being refined nomo technically (Art. 59, see also Art. 308, par. 1 in conjunction with Art. 56). A new article is added, Art. 59a which regulates the provisions on the majority decision of a group of creditors in such a way that if the required majority is not reached in a certain group of creditors, and all other preconditions for approving the restructuring plan are met, at the proposal of the debtor or with his consent, the group will be deemed to have accepted the plan and the court will approve the restructuring plan if the following conditions are met: 1. the creditors of that group are not put in a worse position by the restructuring plan than they would be in the absence of the restructuring plan; 2. the creditors of that group participate appropriately in the economic benefits that should be due to the participants under the restructuring plan; and 3. the majority of creditors' groups have accepted the restructuring plan with the required majority who are holders of shares or groups of creditors with claims of lower payment orders (of course in the sense of Art. 139).

### 5.2.6. *Deciding on the approval of the restructuring plan*

The rules on the postponement of the hearing do not change, except for the title: "Postponement of the hearing to discuss and vote on the restructuring plan" (Art. 60). It is important to mention that the decision on the approval of the restructuring plan is being revised. Namely, after the creditors accept the restructuring plan, the court will decide whether to approve the restructuring plan. Furthermore, the Draft prescribes the situations when the court will *ex officio* or upon the proposal from creditors, debtors, shareholders and holders of other founding rights, legal entities, deny confirmation of the restructuring plan (Art. 61). New provision

regulates the court's decision on the restructuring plan, in such a way that if the preconditions for confirming the restructuring plan are not met, the court will deny the confirmation of the restructuring plan and suspend the pre-bankruptcy proceedings (Art. 61a). Legislator also regulates the right and conditions for filing an appeal against the decision approving the restructuring plan or denying the approval of the restructuring plan (Art. 61b).

### 5.2.7. *Duration and suspension of pre-bankruptcy proceedings*

The Draft changes the duration of the pre-bankruptcy proceedings, so instead of 300 days the pre-bankruptcy proceedings must be completed within 120 days, and exceptionally the court may, at the proposal of the debtor, creditor or trustee, allow an extension of 180 days if it deems it expedient for the conclusion of the pre-bankruptcy procedure and if progress has been made in the negotiations on the restructuring plan. However, the court may suspend the pre-bankruptcy proceedings if the debtor has contributed to the longer duration of the pre-bankruptcy proceedings than the stated deadlines. In order to prevent reasons for abuse of pre-bankruptcy proceedings, the same article stipulates that the court, at the request of the debtor, creditor or trustee, will lift the ban on enforcement and security proceedings against debtors and suspend pre-bankruptcy proceedings if it becomes apparent that part of the creditors that could prevent the restructuring plan does not support the resumption of negotiations on the restructuring plan (Art. 63). With the same goal, the reasons for the court to suspend the pre-bankruptcy proceedings are expanded (Art. 64).

There is also a new regulation on Fina's actions with the grounds for payment after the opening of pre-bankruptcy proceedings. The changes are related to the fact that in accordance with the amendments, the appointment of a commissioner has been determined as mandatory, and to the change of the provisions on claims that are not affected by the pre-bankruptcy proceedings (Art. 69).

### 5.2.8. *The issue of temporary financing in pre-bankruptcy proceedings*

In accordance with the Directive, the provisions relating to the assumption of new cash borrowing are amended. A new article stipulates that: the debtor may, with the written consent (given at the latest at the hearing on the restructuring plan) of creditors, who together have more than two thirds of legally established claims, take over new debt in cash from existing or new creditors for temporary financing that is justified and urgently needed to ensure business continuity and increase the value of assets during pre-bankruptcy proceedings. After submitting the consent, the court will examine whether the consent was given by the required number of

creditors and whether the temporary financing is justified and urgently needed, and if it finds the above, it will issue a decision; the debtor may envisage in the restructuring plan new financing by the existing or new creditor, which is necessary for the implementation of the restructuring plan and does not unduly harm the interests of the creditor, where the creditor is included in the restructuring plan; if bankruptcy proceedings are subsequently opened against the debtor, the claims of creditors on the basis of temporary financing and the claims of creditors on the basis of new financing shall be settled before other bankruptcy creditors, except creditors of the first higher payment order; if the debtor is subsequently declared bankrupt, temporary financing and new financing cannot be challenged and the providers of such financing are not liable on the grounds that it harms the creditor's overall credibility, unless it is established that it would violate certain legally prescribe principles (Art. 62a).

Also, in accordance with the Directive, a new provision is added which regulates the protection of other transactions related to restructuring. According to the said provision, without prejudice to the rules on temporary and new financing, if bankruptcy proceedings are subsequently opened against the debtor, transactions that are justified and urgently needed for negotiations on the restructuring plan, implementation of the restructuring plan and are in accordance with the restructuring plan, cannot be refuted on the grounds that they harm the totality of creditors, unless it is a criminal offense, violation of the principles of conscientiousness and honesty and conflict of interest of the opposing party. Transactions that are considered justified and urgently needed are, for example: fees and costs related to negotiations, fees and costs for professional advice closely related to restructuring...*et seq*. (Art. 62b).

#### 5.2.9. *Conclusion of pre-bankruptcy proceedings*

The new provision on the conclusion of pre-bankruptcy proceedings stipulates that the court will issue a decision on the conclusion of pre-bankruptcy proceedings as soon as the decision on the confirmation of the restructuring plan becomes final. This is important because the question was asked - in what way does the court end the pre-bankruptcy proceedings and continues the bankruptcy proceedings as if a proposal for opening bankruptcy proceedings had been submitted (Art. 74a).

### 5.3. Novelties in the field of bankruptcy trustee profession

Following the guidelines of the Directive, the legislator reintroduces a list of bankruptcy trustees (hereinafter: BT) parallelly changing the conditions for entry on the List (Art. 79), while the Minister responsible for justice department issues a

decision on entry and deletion from the BT list (Art. 83). In parallel, a new article (79.a) *"List of highly qualified BTs"* is added for the area of jurisdiction of all courts, which regulates the qualifications, expertise and previous achievements that the BT must meet in order to be included in the list of qualified BTs.

Art. 79.b under the heading *"BT Company"* regulates the provisions of who and under what conditions may establish an BT company and which types of BT companies may be established. In accordance with the new provisions, two or more BTs registered on the BT list may establish an office with the status of a legal entity (BT company).

A more significant change is the manner in which the BT is dismissed (Art. 91), according to which the court would be able to dismiss the BT *ex officio* if he does not act on the order of the court or at the request of the creditors 'committee or the creditors' assembly, if he fails to perform its duties successfully or for other important reasons. Thus, the existing provision according to which BT should liquidate the bankruptcy estate within a year and a half from the reporting hearing is repealed for objective reasons (it was especially problematic in situations where the debtor had a larger bankruptcy estate). Also, the existing regulation according to which the dismissed BT has no right to appeal, but only the court allows him to comment, unless important reasons require otherwise, has been amended. Thus, the Board of Creditors and every bankruptcy creditor who voted for the proposal for dismissal of the BT have the right to appeal against the decision on dismissal of BT. It is also clarified when the BT ceases to perform its duties (Art. 91). However, it is not answered when the active BT ceases to perform its duties because the bankruptcy proceedings can be concluded and suspended in several ways, which results in deleting the bankruptcy debtor from the court register, so it can be said that deleting the bankruptcy debtor from the court register terminates the bankruptcy trustee function. However, it is not uncommon for the bankruptcy trustee to continue to represent the bankruptcy estate even after deleting the debtor from the court register. Moreover, after the conclusion of the bankruptcy proceedings, the bankruptcy trustee is obliged to represent the bankruptcy estate (Art. 89).

## 5.4. Novelties in bankruptcy proceedings

### 5.4.1. *Textual improvements and fillings of legal gaps*

With regard to filing claims (Art. 257), the State Attorney's Office of the Republic of Croatia is authorized to represent creditors in bankruptcy proceedings on the basis of claims from the budget, institutes or funds in accordance with special regulations.

Enforcement proceedings and securing of separate creditors that are in progress at the time of opening bankruptcy proceedings shall be terminated regardless of when the enforcement proceedings were initiated unless a decision on settling the separate creditor has already been made in the enforcement proceedings (Art. 169).

The article regulating legal remedies and legal consequences of refuting the legal actions of the bankruptcy debtor is completely changed, so the bankruptcy creditors and the bankruptcy trustee are authorized to refute the legal actions of the bankruptcy debtor on behalf of the bankruptcy debtor. A lawsuit to refute legal actions may be filed within two years from the opening of bankruptcy proceedings, and the legal actions of the debtor may be challenged by raising an objection in the litigation without a time limit. The bankruptcy trustee may file a lawsuit to challenge legal actions only with the approval of the bankruptcy judge (Art. 289.).

### 5.4.2. *Bankruptcy plan*

In 2015, the rules on the bankruptcy plan were significantly changed, in a way that legislator returned almost all the possibilities that creditors had until 2012 and implemented new ones. Therefore, it was already then stated exhaustively what can be done through the bankruptcy plan, and the Draft adds and determines other appropriate activities (Art. 303). Thus, measures of an economic, financial, legal and organizational nature (there is no *numerus clausus*) will provide a far greater number of opportunities for a bankruptcy debtor to emerge from the crisis and settle its creditors in an acceptable way, which is in line with the Directive's objectives.

#### 5.4.2.1. *Filing a bankruptcy plan*

With regard to the submission of the bankruptcy plan, the manner and persons authorized to submit the plan are changed, so that the debtor can submit the bankruptcy plan together with the proposal for opening bankruptcy proceedings. After the opening of the bankruptcy proceedings, the bankruptcy trustee and the individual debtor have the right to submit the bankruptcy plan to the court. The bankruptcy plan submitted to the court after the final hearing will not be taken into account.

#### 5.4.2.2. *New rules on required majorities*

Due to ambiguities in practice, the rules on required majorities are changed, so creditors will be considered to have accepted the bankruptcy plan if in each group the majority of creditors voted for the plan and the sum of the claims of creditors

who voted for the plan exceeds twice the sum of the claims of creditors who voted against the plan (Art. 330). In this context, the rules on prohibition of obstruction have been changed, so that the voting group will be considered to have accepted the bankruptcy plan, although the required majority has not been reached under law prescribe conditions.

### 5.5. Novelties in the procedure of release from remaining obligations

It should certainly be pointed out that the legal position of an individual's bankruptcy debtor is different from the legal position of the debtor who is a legal entity. The effects of the opening of bankruptcy proceedings do not apply to the entire assets of the individual debtor. If bankruptcy proceedings are conducted over the property of an individual debtor, the bankruptcy estate does not include the property of the individual debtor on which enforcement against him could not be carried out according to the general rules of enforcement proceedings. Thus, the individual debtor is in the same position as any debtor (natural person) in the enforcement proceedings. The individual debtor from the Bankruptcy Law 2015 is no longer just a sole trader and a craftsman, but any natural person who performs some economic, professional or other activity and who is liable to pay income tax or profit tax and he can be exempted from his obligations to bankruptcy creditors that remained unsettled in the bankruptcy proceedings through the rules of the Bankruptcy Law. The precondition for exemption is the initiation of liquidation bankruptcy which means liquidation of the property of an individual debtor and settling creditors to the extent possible thus leaving unsettled claims of bankruptcy creditors. In addition, the debtor is required to make all his seizure income from subsequent period (3 years by the Draft) available for collections to the bankruptcy creditors.

## 6. HOW REALISTIC IT IS TO EXPECT BETTER INDICATORS OF THE INSOLVENCY PROCEDURES

Recognizing the fact that the issue of bankruptcy proceedings in countries with a long market tradition is a dynamic area in which new solutions are sought that will follow the trend of changes in the international economy, the question of expediency and the need to implement amendments to insolvency law remains extremely topical. Generally speaking, comparative doctrinal research shows that there are different understandings of procedural doctrine and legislation about bankruptcy models.[32] Different models of bankruptcy proceedings, whether judi-

[32] Rasekh, A., Rosha, A., *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive, IMF Working Papers*, Vol. 152, 2021, A001, [https://www.elibrary.imf. org/view/

cial or administrative models of bankruptcy protection, have led today to modern legal systems offering different conceptions of bankruptcy proceedings that oscillate between a concept similar to court decision-making, on the one hand, and purely administrative models, on the other, and between them there are several different transitional or combined models. Moreover, neither the Organization for Economic Cooperation and Development, the International Monetary Fund, the World Bank, the United Nations Commission on International Trade Law, the American Law Institute or the International Institute for the Unification of Private Law that analyses bankruptcy regulations, do not have a clear view of which model is most suitable for practical application. Thus, it indicates how the law regulates specific societies. These societies have their own traditions and problems. So, what can one expect from the Directive now? It certainly achieves its goal to establish preventive restructuring frameworks throughout Europe. But the only binding requirement is that Member States must provide a pre-insolvency restructuring framework with certain instruments; the concrete form of these instruments and of the whole procedure is subject to individual decisions of the national legislators. Therefore, although the Republic of Croatia has the general goal of transforming its law in accordance with EU law, it still faces individual challenges. The statistics now available usually show only half of the truth - it reveals the number and type of submissions, but say nothing about the failure of rescue negotiations, the impact of insolvency on third parties or individual communities, or the long-term success or failure of pre-bankruptcy plans. Moreover, statistics do not reveal what is most important: how pre-bankruptcy proceedings works in practice, very specifically whether the debtor has duly fulfilled his obligations to creditors and whether, if he has not fulfilled his obligations, has bankruptcy proceedings been initiated as a last resort. Ultimately, although the pre-bankruptcy procedure implemented in 2015, amended in 2017 represents a serious shift in the Croatian economy, especially as a *conditio sine qua non* of thorough and necessary restructuring of the existing real sector, we believe that the final performance assessment is still not entirely possible no matter what methodological approach we have chosen. Coming down to the practical and empirical level, we see that the adoption of the BA in 2015 significantly changed the bankruptcy procedure in the Republic of Croatia. However, in its many years of practical application, a number of problems have been noticed in the interpretation and effects of certain provisions and institutes, which has been tried to overcome by implementing the novelties in 2017 and now in 2022. In principle, we can say that the Republic of Croatia has a complete framework for the implementation of bankruptcy reorganization, which in addition to the bankruptcy plan includes a hybrid informal

journals/001/2021/152/article-A001-en.xml], Accessed 15 May 2022

pre-bankruptcy procedure. Although it is difficult to say for now what results the new model of pre-bankruptcy proceedings will yield, the indicative method of establishing the facts shows that the first experiences will not be satisfactory and are primarily the result of an inadequate institutional framework for insolvency proceedings. Thus, starting from the point of view that the reform is a radical redefinition and redesign of the rules of procedure, in order to improve key bankruptcy procedural parameters (higher creditor settlement, lower costs and shorter duration of proceedings), it is difficult to say that the reform of insolvency law in 2022 and implementation of the aforementioned Directive will be called reformistic. Furthermore, laws of systemic importance, such as the BA, are not desirable to be changed frequently, as this is contrary to the principle of legal certainty. Also, if the authorities recognized by the scientific and professional public do not participate in their preparation, which is also the case, then it is not unusual for controversial results and a short life of such laws to occur. Experience to date shows that the rules on insolvency proceedings are often changed without a specific analysis of the problem while ignoring the profession, but also that creditors in whose interest the bankruptcy proceedings are conducted are all influenced by daily politics, which greatly complicates the quality of insolvency proceedings and positions of creditors. This leads to another problem. Namely, the BA is only one of the laws governing insolvency proceedings, and the rules on ownership, enforcement, taxes, litigation and the existence of clear registers of assets and changes in the subject assets are important for the successful conduct of proceedings. Therefore, the duration of bankruptcy proceedings in the Republic of Croatia depends on the issues of determining assets and resolving the issue of ownership and registration of the debtor's assets in the appropriate registers. However, it is not enough to constantly change the rules on bankruptcy proceedings, but the rules related to the conduct of bankruptcy proceedings should be systematically applied in order to provide a second chance to honest entrepreneurs, and prevent the others from further damaging their business. In conclusion, we strongly believe that the modernization of Croatian insolvency law should be done in the direction of its "Europeanization", which must be understood as a process more serious than simply transplanting legal institutes, because the legal system consists not only of "European" regulations but also of its appropriate national application. Moreover, group of experts on restructuring and insolvency law submitted a proposal for the further harmonization of insolvency laws by the end of June 2022.[33] For those who are familiar with

[33] On 11 November 2020, the European Commission – based on the new Capital Markets Union Action Plan of 24 September 2020 – published the initiative *Enhancing the convergence of insolvency laws - Inception Impact Assessment Initiative Enhancing the convergence of insolvency laws,* [https://ec.europa.eu/info/law/betterregulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws-], Accessed 4 April 2022

the field of insolvency this is an impressive and it is probably safe to say that this might be perceived as being rather ambitious. As prof. Reinhard B. said …*for the avoidance of doubt, harmonization in this field of law deserves support! However, we all know, haste makes waste*….[34]

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UDK 342.56:004.7]:614.4
Original scientific paper

# REMOTE JUSTICE IN CORONAVIRUS CRISIS – DO THE MEANS JUSTIFY THE ENDS, OR DO THE ENDS JUSTIFY THE MEANS?*

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***ABSTRACT***

*The coronavirus related crisis affected severely all aspects of life and judiciary is no exception. The world has been confronted with new challenges. New circumstances have created significant impact on the functioning of access to justice. New ways of administrating the legal system were introduced in the last decade, allowing for the use of the means of electronic communication, reducing certain stages of court procedures, opting for solutions for peaceful dispute settlement and promoting out-of-court dispute resolution. However, the coronavirus caused, beyond any doubt, severe delays in court proceedings and even shut down courts in some European Union Member States, Croatia included. Thus, additional efforts were required in order to ensure remote justice to citizens and businesses. More importantly, it called for a swift response, issuing and applying emergency measures, to safeguard the right to access courts and provide for effective administration of justice.*

*The paper thus seeks to explore the ways in which European Union Member States responded to emerging challenges and the consequences these challenges had on administration of justice. Croatian example will be introduced specifically due to obvious struggles in handling the coronavirus caused difficulties in national judiciary system. Along with the analysis of measures taken, there are several questions, which need to be answered. What was the level of readiness of the Member States' judiciaries for providing justice by means of electronic communications,*

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project nr. IP-PRAVOS-10 „The contemporary trends in development of Croatian civil judiciary"

*with Croatia in focus? What are the effects of measures taken in Croatian judiciary system? Should it be left to the courts or other competent bodies to take actions on a case-to-case basis in order to provide the necessary protection of procedural rights to parties? In terms of the effect of the emergency measures, do they allow for the same or similar quality of remote justice?*

*In conclusion, the paper will try to answer the aforementioned questions, deliberate on the efficiency of measures taken in response to the coronavirus crisis, with Croatia in focus and possibilities of future improvements.*

***Keywords:*** *access to justice/courts, Covid-19 court proceeding measures, electronic communication, functioning of judiciary, remote justice*

## 1. INTRODUCTION

The coronavirus-related crisis has undoubtedly affected life within the *new normal*. Today, individuals, families, states and their internal organizational units are adapting to such circumstances. The judiciary is no exception to adapting to life in conditions where *desperate times call for desperate measures*. On the one hand, states must ensure that parties are afforded their constitutionally guaranteed rights of access to justice, continuity of court proceedings and effective legal protection, while taking into account human health and adapting to the challenges, which emerged during the pandemic. The authors conducted an analysis of the measures implemented in the EU Member States, with special emphasis on Croatian system. The available legal literature concerning the issues this paper discusses is poor, dispersed and deals with various aspects of the pandemic. Even with regard to the impact of the pandemic on the justice system, there is no comprehensive overview of the problems faced. In the situation of the ongoing pandemic, this comes as no surprise, since relatively few in-depth scientific analysis and researches have been conducted. However, in order to detect the errors, learn from the examples of measures that have proven effective and prepare for future challenges, it is necessary to discuss the experience of different EU Member States' judicial systems in tackling these issues. An analysis of available sources revealed similar challenges in connection to limited access to court, postponement of hearings and failure to ensure timely execution of procedural actions in many Member States. It also demonstrated the need for a more harmonized approach to the overall problem of ensuring proper functioning of the legal systems during any similar crisis in the EU in the future.

The aim of this paper is to contribute to identifying the most common problems within one Member States' legal system and evaluate the approach to resolving them.

The Croatian example showed the lack of rapid and effective response to extraordinary conditions during the pandemic. Despite the fact that were some well-con-

ceived measures, the pandemic emphasized the existing, and imposed new challenges in Croatian judicial system. Namely, the analysis reveals that the measures taken within the judicial system were not well-balanced. They resulted in disproportionate limitations to the right to court and the right to legal representation. Since amendments to the procedural law framework have been prepared only recently, the final part of the paper will take into account whether the changes to the procedural rules take into account the experience and the lessons learned during the pandemic and encompass measures that would enable courts to administer justice more effectively in case of similar future circumstances.

## 2. DESPERATE TIMES BREED DESPERATE MEASURES1

### 2.1. A general overview of Member States' approaches

With the beginning of the coronavirus crisis during early spring 2020 there was a lockdown of all activities in Member States, including those in the judiciary. This meant that courts and other competent bodies were in need of emergency measures that would define how they would proceed. Parties to the proceedings were in demand for clear rules on how to access court, whether in order to seek information on rescheduling proceedings or in order to attend court hearings. Debtors were uncertain whether the orders on execution against their property would be issued and executed without delay.

An overview of the Member States' approaches shows divergent paths taken in national legal systems in dealing with these issues. According to the Information collected by the European Commission DG Justice[2] some Member States decided not to introduce measures directed at legal proceedings, in order to preserve the independency of the courts (Sweden, Denmark, Finland, Germany, Lithuania). In such cases the courts were free to assess on a case-to-case basis, what measures should be taken. In addition, the courts were allowed to prioritize urgent cases in which hearings were held, actions were undertaken in written or by means of electronic communication (videoconference). All of these countries emphasized that the courts continued to operate without disruption (according to Sweden, as

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1 A quotation by William Shakespeare (Romeo and Juliet)

2 All comparative research regarding the emergency measures introduced in civil proceedings in legal systems of EU Member States presented in the paper is quoted from European Commission DG Justice and Consumers Comparative Table on Covid-19 Impact on Civil Proceedings, available at: [http://www.vss.justice.bg/root/f/upload/27/Comparative-table-Covid-Impact-on-civil-judicial-coop_3_EU_en1.pdf], Accessed 22 February 2022, (Hereinafter: EC Table on Covid-19 Impact). See also Krans, B. *et al.*, Civil Justice and Covid-19, Septentrio Reports, No. 5, 2020, available at: [https://septentrio.uit.no/index.php/SapReps/issue/view/465], Accessed 22 February 2022, [https://doi.org/10.7557/sr.2020.5]

effective as possible). However, there was a different level of readiness of the courts of Member States to use the means of electronic communication in these cases. Although for the most part, courts continued with their activities, the proceedings slowed down significantly. Non-urgent court hearings where oral hearing is mandatory and/or necessary were adjourned, cancelled or postponed. According to the Member States' judiciary, different categories of cases were considered urgent. Civil cases concerning the court's permission to extend involuntary hospitalization, involuntary treatment, the removal of the child from an unsafe environment or cases provided by the CPC (Lithuania); cases which are by law time-bound or are particularly intrusive (Denmark) and international legal assistance (Finland). The most liberal approach was taken by Germany that relied on the existent measures of the German civil procedure law and enabled the courts and judges to react flexibly to the situation.[3]

Quite opposite to the first approach, the second category of Member States decided to order a general shutdown of some of their courts (Austria), suspend judicial activity, except for urgent cases (Romania, Italy, Cyprus, Greece, Slovenia), postpone all court hearings (Czechia) or close the Courts of Justice and registries (superior, inferior and appellate court) and suspend time limits until the Order for closure of the Courts is lifted (except for urgent cases) (Malta). Again, there is a diversity concerning the types of cases considered urgent. In some Member States, these are urgent interim measures and proceedings dealing with restrictions to personal freedom (such as detention in a psychiatric institution) (Cyprus). In other States payment deadlines, forced psychiatric admission and imminent danger for safety or personal freedom or irretrievable damages (Austria). In some States adoption of children, unaccompanied minors, foster care, compulsory health treatment VTP, provisional enforceability and all matters entailing a risk of serious prejudice to the parties (Italy) and cases determined by a decision of a national body (Romania) were considered urgent. In Slovenia, matters considered urgent are security matters (such as securing evidence, withholding the payment, execution of forbidding of certain actions), civil enforcement regarding child custody and alimony, non-contentious matters regarding detention in psychiatric establishments and claims regarding publishing of correct information. The use of means of electronic communication was encouraged in these Member States as well. In some Member States the means of electronic communications were used in order to enable the courts to proceed in such cases, by way of hearing through videoconference,

[3] On 27th March 2020 Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht (*eng*: Act for Mitigating the Consequences of the COVID-10 Pandemic in Civil, Insolvency, and Criminal Law) Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 14, ausgegeben zu Bonn am 27 März 2020

sending documents to the parties by electronic means and transfer of files between courts (Romania) or by way of written procedures and the use of the means of electronic communication (Italy). In one Member State, a telephone and email were used only in order to provide basic information (Czechia). Other Member States in this category enabled physical access to court, at least to a certain extent, where it was deemed necessary (Malta, Czechia, Italy).

The last category of Member States attempted to uphold the activity of the courts and to continue to proceed with handling cases (Belgium, Bulgaria, Croatia, Estonia, France, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia and Spain). However, hearings and actions in non-urgent cases have been postponed and many judges, court officials and staff were ordered the mandatory use of the annual leave. The use of the annual leave way organized in such a manner in order for the court staff to be at disposal once the special circumstances end, so the backlog could be cleared (Croatia).

### 2.2. Court proceedings - organisational challenges

Organisation of court proceedings during the coronavirus crisis was a challenging task. Efforts were made in order to ensure a balance between introduced emergency measures and maintaining court activities. In civil matters, deadlines in judicial proceedings were in most cases extended, except for the urgent matters. In some Member States, proceedings were conducted only in writing (where possible, and if the parties did not oppose) (Belgium, Croatia, Estonia, Hungary and Ireland). Almost all Member States from the category relied on the means of electronic communication, such as video conferences, email for written correspondence and delivery of documents, telephone and other similar means of remote communication.

Concerning enforcement of judgments, the relevant information show that fewer Member States notified of the measures employed. Nevertheless, Member States that decided to do so, in most cases applied a similar approach. The limitation periods and time limits for enforcement of judgments were suspended or postponed (Poland, Croatia, Slovenia), enforcement of eviction judgements in tenancy matters has been suspended (residential (Portugal) along with residential and commercial leases (Luxembourg). An exception is provided under Portuguese law according to which the enforcement will not be suspended if it causes irreparable damage or endangers the creditor's livelihood. In Croatia and Slovenia, enforcement of maintenance claims has not been suspended. The same was also provided in Slovenia, in cases of damages for lost maintenance because of the death of the providing person. Public sales and coercive seizures of possession, announced by

public and private enforcement agents in some Members States have been suspended automatically (Bulgaria) and in others a stay of forced auction of movable and immovable property was only possible if the debtor faced economic difficulties due to the pandemic, or in case of eviction the debtor would become homeless (Austria).

One would expect that the transfer of court hearings to video conference was immanent and came naturally, in those national legal systems, where there was an appropriate infrastructure already in place. However, this is not necessarily the case. In certain Member States the pandemic brought a true (trans)formation of the concept of providing justice and introduced a paradigm shift for the 21 century. In these Member States the process of digitalization of the justice systems, which was underway, has accelerated due to the coronavirus crisis. In general, this is positive trend. However, it is inevitable to consider the potential ramifications on the quality of legal protection provided by way of 'remote justice' in this period, due to the lack of necessary knowledge, means and experience with handling cases remotely. The overview of the measures presented in Member States provides for certain general conclusions.[4] They will be further tested by means of a comparison with the results of an in-depth analysis of the measures implemented in one national legal system.

### 2.3. Courts vs. other state institutions - pandemic adjustment comparison in Croatia

In order to obtain an insight and understanding of the effectiveness of measures implemented in Croatian judicial system, the authors will compare them to those applied by several Croatian state institutions (FINA, Ministry of Interior, Tax Administration, Social Welfare Center, Croatian Pension Insurance Institute). The Ministry of the Interior and the Police Stations and Departments informed the parties that in-person visits are allowed in cases of emergency and advised them to use the services available on the electronic platform provider (e-Services). The parties were invited to check the working hours in case an in-person visit to the police stations or the public administration offices was necessary.[5] It was also possible for the parties to arrange an in-person visit by phone or e-mail.[6] The Tax Administration also encouraged citizens to avoid in-person visits and to submit

[4] For more on the measures taken in the Member States before the Commercial Courts see Domhan, S., *Online Hearings in Proceedings before International Commercial Courts*, Juridica International, Vol. 30, 2021, pp. 49-58

[5] Provjerite način rada upravnih poslova svoje policijske uprave, available at: [https://mup.gov.hr/vijesti/provjerite-nacin-rada-upravnih-poslova-svoje-policijske-uprave/286653], Accessed 22 February 2022

[6] *Ibid.*

their requests through the e-Citizens, eTax, mTax services and the "Write to us" service.[7] In case of an in-person visit, the website of the Tax Administration listed the working hours of individual branches. The Financial Agency's (FINA) website also provided instructions to service users concerning their operation during the pandemic.[8] Users were urged to use as many services as possible through digital services and to limit visits to branches only to exceptional cases and emergencies. The working hours were adjusted and users were invited to check them prior to their visit on the official FINA website.[9]

Social welfare institutions also adapted to pandemic conditions, which was necessary given the vulnerability of users accessing them. The emphasis was on reducing the number of users in the building, arranging meetings at certain time, the use of protective equipment in the premises (masks, disinfectants), but the users were also invited to contact Social Welfare Centers by phone or e-mail.[10] Some Social Welfare Centers, however, allowed only emergency visits.[11] The Croatian Pension Insurance Institute also focused on digital services through the e-Citizens system and responding to inquiries by e-mail.[12] In-person visits were avoided, but no restrictions on in-person visits were imposed.[13] It is evident that none of the presented institutions prevented in-person access of the users and beneficiaries to their service.[14]

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7 Porezne informacije vezane uz izvanredno stanje izazvano širenjem virusa COVID-19, available at: [https://www.porezna-uprava.hr/Stranice/COVID_19_informacije.aspx], Accessed 22 February 2022

8 Fina provodi mjere kontroliranog ulaska klijenata u poslovnice, available at: [https://www.fina.hr/novosti/-/asset_publisher/pXc9EGB2gb7C/content/fina-provodi-mjere-kontroliranog-ulaska-klijenata-u-poslovnice?_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_pXc9EGB2gb7C_assetEntryId=416558], Accessed 22 February 2022

9 Novo, privremeno radno vrijeme poslovnica zbog aktualne situacije uzrokovane pojavom koronavirusa, privremeno se prilagođava rad poslovnica, available at: [https://www.fina.hr/novosti/-/asset_publisher/pXc9EGB2gb7C/content/novo-privremeno-radno-vrijeme-pojedinih-poslovnica?_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_pXc9EGB2gb7C_assetEntryId=417508], Accessed 22 February 2022

10 Obavijest korisnicima o novoj organizaciji rada, rasporedu rada i radnog vremena CZSS Osijek, available at: [https://czss-osijek.hr/obavijest-korisnicima-o-novoj-organizaciji-rada-rasporedu-rada-i-radnog-vremena-czss-osijek/] Accessed 22 February 2022, Obavijest u svrhu sprječavanja pojave epidemije oboljenja od COVID-19, available at: [http://www.czss-dubrovnik.hr/novosti/covid-19/], Accessed 22 February 2022, Obavijest za korisnike, available at: [https://www.czss-zadar.hr], Accessed 22 February 2022, Obavijest, available at: [https://www.czssvz.hr/download/planovi-i-izvjestaji/obavijestkoronavirus.pdf], Accessed 22 February 2022

11 Obavijest, available at: [https://www.czssvz.hr/download/planovi-i-izvjestaji/obavijestkoronavirus.pdf], Accessed 22 February 2022

12 Poslovanje HZMO-a za vrijeme epidemije COVID-19, available at: [https://www.mirovinsko.hr/hr/poslovanje-hzmo-a-za-vrijeme-epidemije-covid-19/1448], Accessed 22 February 2022

13 *Ibid.*

14 On the e-government system in other European countries see Hodžić, S.; Ravselj, D.; Jurlina Alibegović, D., *E-Government Effectiveness and Efficiency in EU-28 and COVID-19*, Central European public

By the decision of the National Civil Protection Headquarters of the Republic of Croatia (hereinafter: Civil Protection Headquarters) dated 16 November 2021 on a measure of obligatory testing for SARS-CoV-2 virus was introduced. This measure applied to the following groups: a) officials, civil servants and employees, b) civil servants and employees in public services, c) civil servants and employees in local and regional self-government d) employees of companies and institutions founded by the Republic of Croatia, local and regional self-government units or the Republic of Croatia or local and regional self-government units have a majority share in them and d) employees of companies that are majority owned by companies in which the Republic of Croatia or local and regional self-government units have a majority share. In the premises of the mentioned institutions, the EU digital COVID certificate was required upon entrance.

In comparison, parties and lawyers who present a summons to appear before court were allowed to enter court buildings without an EU digital COVID certificate.[15]

It is obvious that the presented state institutions used a more diversified approach to their services than courts or other judicial authorities. The measures introduced in the presented institutions encompassed the use of various digitalized systems, recommendations for emergency arrivals only and adjusted working hours. The measures employed in the judicial system, were more restrictive. With the guarantee of access to justice significantly reduced during the pandemic, the question arises, whether it could have been improved, if the courts had resorted to using video conference tools and other technical means of distance communication, in the similar vein to other state institutions?

## 3. ONE MEMBER STATE'S APPROACH – CROATIA AT FOCUS

### 3.1. Constitutional framework

The Government of the Republic of Croatia has not declared a state of emergency in accordance with Article 17 Constitution of the Republic of Croatia (hereinafter: the Constitution).[16] According to the Constitution, freedoms and rights can be restricted only by law to protect the freedom and rights of others and the legal order, public morals and health and must be proportionate to the nature

administration review, Vol. 19, No. 1, pp. 159-180

[15] Guidelines for the conduct of courts in a pandemic Covid-19 from 15 November 2021, Su IV-422/2021 available at the website of the Croatian Bar Association: [https://www.hok-cba.hr/hok/uputa-vrhovnog-suda-rh-i-ministarstva-pravosuda-i-uprave-rh-o-nacinu-provedbe-sigurnosne-mjere-obveznog-testiranja-na-sudovima/], Accessed 22 February 2022

[16] Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (Constitution)

of the need for restriction assessed in each case (*arg.* Article 16 Constitution). Furthermore, the Constitution states that in times of war or imminent threat to the independence and unity of the state, and major natural disasters, certain freedoms and rights guaranteed by the Constitution may be limited (*arg.* Article 17 Constitution).[17] In this particular case, therefore, the fundamental question arose as to whether the coronavirus pandemic was the basis for the application of Article 16 or 17 Constitution.[18]

The Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Court) has taken the position that it is within the competence of the Croatian Parliament to choose the manner of restricting human rights and fundamental freedoms within its constitutional powers.[19] The state thus decided to activate the Civil Protection System Act and the Infectious Diseases Protection Act and formed a body called the Civil Protection Headquarters (Article 22 of the Civil Protection System Act).[20] The Constitutional Court examined the legitimacy of this body in the implementation of measures and activities in pandemic conditions and confirmed the constitutionality and legality of the powers granted to it.[21] In extraordinary circumstances, state and public law bodies have broader powers than those provided by legal norms, but all these powers must be exercised in the spirit of the law and the Constitution.[22]

The European Convention for the Protection of Human Rights and Fundamental Freedoms[23] (hereinafter: the ECHR) also regulates extraordinary circumstances such as wartime or other public threats to the survival of the people, emphasizing

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17 The Croatian Parliament decides on this by a two-thirds majority of all deputies, and if the Croatian Parliament cannot meet, at the proposal of the Government and with the co-signature of the Prime Minister, the President of the Republic (Art. 17 of the Constitution)

18 Nastić, M., *Odgovor države na bolest Covid-19: na primjerima Hrvatske i Srbije,* Pravni vjesnik, Vol. 36, No. 3-4, 2020, p. 75

19 *Ibid.*, p. 76

20 Civil Protection System Act (Zakon o sustavu civilne zaštite) Official Gazette No. 82/15, 118/18, 31/20, 20/21; Law on the Protection of the Population from Infectious Diseases (Zakon o zaštiti pučanstva od zaraznih bolesti), Official Gazette No. 79/07, 113/08, 43/09, 130/17, 114/18, 47/20, 134/20, 143/21

21 Decision of the Constitutional Court of the Republic of Croatia, U-I-1372/2020, U-I-1999/2020, U-I-2075/2020, U-I-2233/2020, U-I-2161/2020, U-I-2234/2020 from 14 September 2020, available at: [https://sljeme.usud.hr/Usud/Praksaw.nsf/C12570D30061CE54C12585E7002A7E7C/%24FILE/U-I-1372-2020%20i%20dr.pdf], Accessed 23 February 2022

22 Ofak, L., *Pravna priroda mjera usmjerenih na suzbijanje pandemije Covid-a 19*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 58, No. 2, 2021, p. 460

23 Convention for the Protection of Human Rights and Fundamental Freedoms (Konvencija za zaštitu ljudskih prava i temeljnih sloboda), Official Gazette, International agreements No. 18/97, 9/99, 14/02, 13/03, 9/05, 1/06, 2/10

that the restriction must strictly meet the needs of those extraordinary circumstances (*arg.* Article 15 para 1.). The previous case law of the European Court of Human Rights (hereinafter: ECtHR) has determined the criteria for public danger: the danger must be real or immediate, its effects on the whole nation, there is a threat to the continuity of the organized community in the sense that the measures permitted by the ECHR are insufficient.[24] Over the past few years, the case law of the ECtHR has been limited to a few decisions that address issues related to the consequences of the coronavirus pandemic.[25]

### 3.2. Civil litigation

The coronavirus related crisis affected the work of all levels of Croatian civil courts. However, there was no unified approach to the operation of courts during the period of special circumstances. In the first period (14 March till 1 April 2020) the Ministry of Justice of the Republic of Croatia recommended that the judicial authorities continue to operate. The main hearings and other actions were to be conducted only in urgent proceedings, court staff was to work from home (where appropriate) and communication between court and other participants to the proceedings was to be conducted in writing by means of electronic communication.[26] At the same time, the Supreme Court of the Republic of Croatia (hereinafter: SCRC) found that there would be no negative consequence if the parties and other participants do not participate actively in the proceedings. More significantly, SCRC emphasized that the presidents of courts are entitled to organize the operation of the courts autonomously. It was this recommendation that led to implementation of different work organization at civil courts in Croatia.[27]

Based on the SCRC recommendation, Municipal civil court in Zagreb, as the largest first instance civil court in Croatian judicial system, advised judges and court advisers to assess, if conditions were met for the hearings to be postponed in each case. In addition, courts were obligated to inform the parties and their representatives by regular post, telephone or means of electronic communication of their decision. Communication between court and the parties, lawyers and public notaries was to be conducted via means of electronic communication or

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24 Nastić, *op. cit.*, note 18, p. 73

25 Kamber, K.; Kovačić Markić, L., *Administration of justice during the COVID-19 pandemic and the right to a fair trail*, in: Duić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, 2021, p. 1066

26 Ministry of Justice of the Republic of Croatia, Recommendations for conduct, class number: 710-01/20-01/135, reference number: 514-04-02/1-20-01, 13 March 2020

27 Supreme Court of the Republic of Croatia, Su-IV-125/2020-2, 13 March 2020

telephone.[28] On 27 April 2020, a new decision was brought and it enabled for the court proceedings, which satisfy certain criteria, to be held after 11 May 2020. The judges are to assess if the proceedings are urgent, have priority or otherwise require to be conducted immediately. Remaining proceedings were postponed until further notice. All other communication continued as previously described.[29] The most recent decision, from 1 June 2020 repealed previous decisions and allowed all court activities to proceed normally.[30]

In a similar vein, Municipal court in Osijek in a decision from 7 May 2020 allowed only urgent proceedings to be conducted and continued all communications, including the delivery of written submissions with parties and participants to the proceedings via means of electronic communication or regular post.[31] The decision from 28 May 2020 repealed previous decisions and enabled the court to proceed normally.[32] In comparison, Municipal court in Rijeka on 28 May 2020 brought a decision to conduct all proceedings normally. At the same time, lawyers, public notaries and legal persons were to deliver all written submissions via an application (called eCommunication). In specific enforcement proceedings, lawyers, parties and public notaries were allowed to approach court and submit their written submissions.[33]

It is obvious that the courts had different approach towards organization of their operation during and immediately post-coronavirus related crisis. The communication with the courts in general was especially difficult. The courts applied different criteria for delivery of written submissions and deadlines. In addition, restrictions to the free movement of people, including lawyers were imposed and disabled them to provide services to their parties outside their place of residence. The introduced emergency measures created problems for all legal practitioners, but particularly for the State Attorney's office and the lawyers.[34]

With the problems already faced in court practice in mind and anticipating other similar problems, Croatian Bar Association presented their Proposal of the Act on emergency measures in court and administrative proceedings due to the CO-

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28 Municipal Civil court in Zagreb, 3Su-677/2020, 13 March 2020

29 Municipal Civil court in Zagreb, 3Su-677/2020-9, 27 April 2020

30 Municipal Civil court in Zagreb, 3Su-677/2020-12, 1 June 2020

31 Municipal court in Osijek, 2Su- 230/2020-31, 7 May 2020

32 Municipal court in Osijek, 2Su- 230/2020-32, 7 May 2020

33 Municipal court in Rijeka, 3Su-481/20-199, 7 May 2020

34 The communication from the Croatian Bar Association available at: [http://www.hok-cba.hr/hr/obavijest-o-poduzetim-radnjama-hok-vezano-uz-covid-19-i-potres-u-zagrebu.], Accessed 23 February 2022

VID-19 coronavirus epidemic.[35] Similar approaches, with more or less successful outcomes, were also advocated in different Member States (Denmark, Italy, Austria, Portugal, France, Slovenia).[36]

The Proposal of the Act on emergency measures in court and administrative proceedings addressed several procedural aspects, which directly affect civil proceedings. According to the Proposal, time limits in proceedings should seize to run, including the time limit for submitting a constitutional claim (arg. *ex* Article 3). Although proceedings before Constitutional court are not considered as civil proceedings, since the Constitutional court is not a part of Croatian judiciary, Croatian Bar Association included the time limits for submitting a constitutional claim in the Proposal. [37] This was to insure that the Proposal is in accordance with the principle of legality and ensures the protection of human rights of all parties to the proceedings, including the proceedings before the Constitutional court.[38] The reasoning here seems both justified and convincing. However, the question remains whether special circumstances allow the national legislator to act outside the limits, which the division between judiciary and the Constitutional court imposes. Namely, the Constitutional Act on the Constitutional Court[39] contains provisions on procedures before Constitutional court, including the Constitutional claim (arg. *ex* Article 1 Constitutional Act on the Constitutional court). It seems thus more appropriate for the proposal on seizing time limits for initiating Constitutional claim during special circumstances, to be introduced in the Constitutional Act on the Constitutional court, instead of the Act on emergency measures in court and administrative proceedings.

According to the Proposal of the Act on emergency measures in court and administrative proceedings, main hearings are to be held only in urgent proceedings, and the judge is entitled to exclude the public from the proceedings in case there is a

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35 Proposal of the Act on emergency measures in court and administrative proceedings due to the COVID-19 coronavirus epidemic, available at: [http://www.hok-cba.hr/hr/obavijest-o-poduzetim-radnjama-hok-vezano-uz-covid-19-i-potres-u-zagrebu], Accessed 23 February 2022. The proposed measures were to be applied until 1 June 2020, according to its Art. 2 para 1. It was model based on the Slovenian Zakon o začasnih ukrepih v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljiv ebolezni SARS-CoV-2 (COVID-19), Ur. list RS, št. 36/20 in 61/20

36 Croatian Bar Association, 2226/20, 18 March 2020. See Proposal of the Act on emergency measures in court and administrative proceedings due to the COVID-19 coronavirus epidemic, *op. cit.*, note 35

37 Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, sedmo izdanje, 2004, p. 67

38 Proposal of the Act on emergency measures in court and administrative proceedings due to the COVID-19 coronavirus epidemic, explanation of Art. 3 para 2.

39 Constitutional Act on the Constitutional court (Ustavni zakon o Ustavnom sudu), Official Gazette No. 99/99, 29/02, 49/02

threat to security or a health threat (arg. *ex* Article 4 para 1, 3). Which civil proceedings are considered as urgent should be decided according to laws governing specific subject matter (*lex specialis) (*arg. *ex* Article 5 para 1). Along with the provisions of the laws governing specific subject matter, the priority of conducting certain civil proceedings stems from Article 122 para 2 Court Rules of Procedure[40]. By way of derogation from Article 5 para 1, the president of the court at the proposition of the judge or the president of the court council, taking all of the circumstances of the case and the measures relating to coronavirus epidemic, may decide that the specific proceedings in question are not urgent (arg. *ex* Article 5 para 2). Given the nature of proceedings such as maintenance proceedings, labour proceedings and proceedings for issuing provisional measures, which are considered urgent under Article 122 para 2 Court Rules of Procedure, it is questionable, if the president of the court should be allowed to decide against conducting these proceedings due to coronavirus related crisis. Again, there seems to be a collision between the principle of legality and the right to *access to justice* and the solutions intended to protect the health and safety of all participants during the special circumstances.

Communication between court, the parties and other participants is to be conducted via regular post or means of electronic communication (arg. *ex* Article 4 para 2). The courts would not allow for the submission of any written documents in person (arg. *ex* Article 4 para 2).

In March 2020, the Ministry of Justice did discuss the possibility to introduce systematic legal solutions concerning civil proceedings during the specific situation, similar to that of the European Court of Human Rights (hereinafter: ECtHR), but obviously the idea was abandoned and the Proposal of the Croatian Bar Association was not accepted.[41] Instead, the courts relied on the decision of the SCRC and introduced solutions, which in most cases differed significantly. In addition, the Ministry of Justice vigorously encouraged the use of means of electronic communications. Legal practitioners faced many problems and obstacles while performing their tasks, especially because some courts insisted in receiving documents via the means of electronic communications. However, this system is in use since recently in Croatian judiciary and it still did not function properly in all parts of the country. The infrastructure is poor and there were difficulties with transfer of large documents via the interoperable information system within the judiciary. In

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40 Court Rules of Procedure, (Sudski poslovnik), Official Gazette No. 37/2014, 49/2014, 8/2015, 35/2 015, 123/2015, 45/2016, 29/2017, 33/2017, 34/2017, 57/2017, 101/2018, 119/2018, 81/2019, 12 8/2019, 39/2020, 47/2020

41 Minister Bošnjaković in the "Topic of the Day" of HRT on the impact of the current crisis situation on the work of the judiciary, Ministry of Justice of the Republic of Croatia on 26 March 2020, available at: [https://pravosudje.gov.hr/print.aspx?id=21728&url=print], Accessed 26 March 2022

addition, according to current legislation, the use of means of electronic mail is not allowed for submitting a claim and some other types of submissions. Hence, either the party or its representative have to submit such documents in person. Even the SCRC advocated for the amendments to the Judiciary Act[42] (Law on courts) and introduction of the possibility to submit a claim and initiate court proceedings via electronic mail, but the proposal failed. [43] A number of judges, including the president of the SCRC warned of the consequences of the decision not to suspend time limits for actions in court proceedings. [44] In a situation of a limited possibility to access court, for a number of reasons, due to no suspension of time limits, the parties faced the possibility to lose a right to initiate specific court proceedings or to suffer loss of proceedings already pending before court.

Since the end of 2021 was marked by a significant increase in coronavirus patients, the President of the SCRC issued new guidelines for the organization of the work of courts.[45] These guidelines were aimed at holding hearings "online" where possible, banning hearings if a distance of more than two meters cannot be ensured, postponing all hearings attended by a large number of people, organizing work from home and even a total ban of entry to the courts (*arg.* para 8). It does not seem that such drastically conceived measures of the SCRC have been applied. Moreover, the guidelines could not be found on the official website of the SCRC on the day this paper was written, but the authors were able to obtain them privately. The guidelines did not consider whether the parties have resources to participate in "online" litigation. Nor did they take into account whether such a rather drastic approach to the organization of court work was justified. The guidelines also do not rely on information on the number of courts, which meet the necessary requirements for holding online hearings and are able to implement the measure of holding hearings "online". They merely entrusted the implementation of the measures and the final organization of the work to the Presidents of the courts.[46] However, such an approach did not provide for a uniform organization of work or equal access to justice for all parties.

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42 Judiciary Act; Law on courts (Zakon o sudovima), *Official Gazette* No. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19

43 Raić Knežević, A., *Zbog korone i potresa ljudi ne mogu do odvjetnika ni sudova, a rokovi teku; hoće li procesi propadati?* Available at: [www.telegram.hr/politika-kriminal/zbog-korone-i-potresa-ljudi-ne-mogu-do-odvjetnika-ni-sudova-a-rokovi-teku-hoce-li-procesi-propadati/], Accessed 23 February 2022

44 *Ibid.*

45 Guidelines for the conduct of courts in a Covid-19 pandemic from 12 January 2022, Su IV-422/2021-14

46 Court Rules of Procedure (Sudski poslovnik), Official Gazette No. 37/2014, 49/2014, 8/2015, 35/20 15, 123/2015, 45/2016, 29/2017, 33/2017, 34/2017, 57/2017, 101/2018, 119/2018, 81/2019, 128 /2019, 39/2020, 47/2020

### 3.3. The impact of the measures on practitioners and parties - Is the right of access the court threatened?

Since extraordinary measures implemented during the pandemic relied largely on the use of technologies and provided for remote justice, it seems noteworthy to examine whether such administration of justice can be considered as a restriction of the right to access the court. In this context, consideration should be given to whether measures taken by the Contracting States to the ECHR in exceptional circumstances, such as the use of technologies that enable hearings to be held online, could be considered a justified restriction of the right of access to court according to Article 15 of the ECHR.[47] The basic principles of civil procedure prescribed by the Article 4 of the Croatian Civil Procedure Act (hereinafter: CPA) as well as the provision of Article 6 of the ECHR in the spirit of the exercise of the right to a fair trial should be considered.[48]

The case law of the ECtHR does not require an oral hearing or presence of a party as a necessary requirement for exercising the right to a fair trial, especially in civil cases. [49] Although it is a procedural standard in national civil litigation, the pandemic required reconsidering its significance and scope. The ECHR (Article 6/1) and the Constitution of the Republic of Croatia (Article 29) prescribe the right to a fair trial, which requires that the parties have at their disposal an effective legal remedy.[50] The right of access to court is not absolute and may be limited under certain conditions (Article 16 of the Croatian Constitution and Article 6/1 of the ECHR).[51] However, the restriction of rights must be legitimate and proportional

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47 Art. 15 of the ECHR prescribes that in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law

48 Civil Procedure Act (Zakon o parničnom postupku), Official Gazette No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14, 70/19. Art. 4 of the Croatian CPA prescribes oral, direct and public hearings. Article 6/1 of the ECHR prescribes that In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. See also: Lovrić, M., *Pravo na pristup sudu kao esencija vladavine prava*, Financije i pravo, Vol. 7, No. 1, 2019, pp. 37-38

49 See also Kamber, Kovačić Markić, *op. cit.*, note 25, pp. 1049-1078

50 Guide to Article 6 of the European Convention on Human Rights, Right to a Fair Trial (civil aspect), available at: [https://www.echr.coe.int/Documents/Guide_Art_6_HRV.pdf], Accessed 7 April 2022

51 Lovrić, *op. cit.*, note 48, p. 42.;. Šarin, D., *Pretpostavke za pristup sudu - pravna stajališta i praksa Europskog suda za ljudska prava*, Pravni vjesnik, Vol. 32, No. 1, 2016, p. 268 ; Guide to Article 6 of the

to the reason for the restriction (Article 15 ECHR; Articles 16 and 17 Constitution of the Republic of Croatia).[52]

The introduced measures, which limited the right to access to court for parties, also influenced the ability of lawyers to provide services. In comparison to 2019, there has been a significant decline of the number of hearings before courts (ie Municipal court in Osijek), even up to 80%.[53] The analysis of the information collected in oral interviews with lawyers confirms this conclusion. The Croatian Bar Association undertook certain actions in order to mitigate the effects of the pandemic on legal services, but without significant success.[54]

At the time this paper was written, the pandemic seemed to be approaching the end. Nevertheless, the effect of the emergency measures implemented since 2020 in Croatian judicial system is still obvious. This is in large part due to the one-track approach of the introduced measures, which focused entirely on preventing physical contact by slowing down and postponing court proceedings. Although there was a legitimate interest in employing such measures, the shortcomings of the chosen approach seems to be overlooked. Namely, not only were the parties and their lawyers denied or severely limited in the right to access the court during the pandemic, but due to the backlogs created before Croatian courts, obstacles in providing justice will remain long after the pandemic ends. [55]

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European Convention on Human Rights, Right to a Fair Trial (civil aspect) available at: [https://www.echr.coe.int/Documents/Guide_Art_6_HRV.pdf], Accessed 7 April 2022

52 Šarin, *op. cit.*, note 51, p. 100

53 Letter from the Osijek Bar Association to the President of the Municipal Court in Osijek from 18 January 2021.; newspaper article from lider.hr: *Trgovački sudovi-koronavirus zaustavlja 80 posto postupaka* available at: [https://lider.media/korona-i-biznis/trgovacki-sudovi-koronavirus-zaustavlja-80-posto-postupaka-130802], Accessed 23 February 2022

54 Decision of the Croatian Bar Association from 23 March 2020, available at: [https://www.hok-cba.hr/ostalo/obavijest-o-poduzetim-radnjama-hok-vezano-uz-covid-19-i-potres-u-zagrebu/], Accessed 23 February 2022

55 The ways in which some of the courts organized their work and the measures taken were determined by the following decisions: Municipal court in Zadar, decision number Su-494/2020 from 15 October 2020 and 03 November 2020; Municipal court in Osijek, decision number Su-230/2020 from 10 December 2020 and 03 November 2020; Municipal court in Dubrovnik, decision number Su-440/2020 from 15 November 2020; Municipal court in Rijeka, decision number Su-272-2021 from 04 November 2020, 15 March 2021, 15 November 2021 and 03 December 2021; Municipal court in Slavonski Brod, decision number Su-232/2020 from 03 November 2020 and 31 May 2021; Municipal court in Vinkovci, decision number Su-163/2020 from 03 November 2020 and Su-539/2021 from 16 November 2021; Municipal court in Pula, decision number Su-185/2020 from 04 November 2020; Municipal Civil court in Zagreb, decision number Su-677/2020 from 15 November 2020; instructions from Commercial court in Split available on website: [https://sudovi.hr/sites/default/files/priopcenja/2020-11/Odluka_3.pdf] and [https://sudovi.hr/hr/tsst/priopcenja/obavijest-covid-19], Accessed, 25 February 2022; Commercial court in Split, decision number Su-442/2021 from 15 No-

A lack of a functional system that enables the parties to access court during extraordinary circumstances such as the pandemic (remote hearings, using technological equipment, etc.) seems to cause more denial or severe limitation of the right to a fair trial than the use of technologies which enable parties to access court remotely. In this sense, the issues highlighted above should not be disregarded in the course of future amendments to the Croatian legislative framework.

## 4. FUTURE OF REMOTE JUSTICE IN CROATIAN CIVIL PROCEDURE

### 4.1. Current perspective

Is there any room in the existing Croatian procedural regulatory framework to adapt to pandemic or any other potential extraordinary circumstance? The relevant provisions of the CPA provide for remote hearings and the taking of evidence by means of prescribed technologies - audiovisual devices (Article 115 of the CPA). There is no detailed information on the extent to which these technologies have so far been applied in the course of civil proceedings. Given that conducting a remote hearing requires a certain level of technological equipment of the courts on the one hand, and the ability of participants to use such technologies in civil proceedings on the other, a high level of the use of technologies is not to be expected.

A procedural legal mechanism that could have proven useful during the pandemic is a suspension of civil proceedings. However, the existing provision of Article 186 g CPA does not address the issues that have arisen in the course of the pandemic in the satisfactory manner. The suspension would have solved the problems of expiring deadlines for taking certain actions in the course of the proceedings. In comparison, in case of failure to take a certain action related to the legal deadline the administrative courts allowed the parties to rely on the motion to restore a prior status, allowed in the existing regulatory framework (Article 117 of the CPA).[56] On the other hand, no potentially useful regulatory interventions have been undertaken in the substantive legal framework, such as the regulation of the course of statutes of limitations and statutory default interest (Articles 29 and 237 of the Civil Obligations Act). [57]

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vember 2021; Commercial court in Rijeka, decision number Su-78/2020 from 15 November 2020 and 02 April 2021; Commercial court in Osijek, decision number Su-191/2020 from 03 November 2020

[56] Brlek Vezmar, I., *Uloga Visokog upravnog suda Republike Hrvatske u vrijeme pandemije COVID-19*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 58, No. 2, 2021, p. 480

[57] *Ibid.*

New Amendments to the CPA are under way.[58] The planned changes however, do not seem to reflect any notion of the issues which have arisen during the pandemic before Croatian civil courts. There are no proposed changes to the CPA, which find support in a detailed analysis of the effectiveness of the digitalization of court proceedings either. The Draft Amendments to the CPA, in the form available at the time of drafting this paper, do not introduce any legislative solution specifically shaped for emergency situations such as a pandemic There are minor changes to Article 115 CPA, which allow for the use of audiovisual devices and an alteration of provision of Article 186 CPA which some legal practitioners find problematic.[59]

Although it is illusory to expect the legislative framework to transform and adapt completely to the challenges of the recent or any other future extraordinary situation, it is surprising that the experience of the last two years made almost no impact and inspired no real change. It is also clear that significant changes cannot be expected, if there was no prior analysis of the issues that have arisen or a critical assessment of the limitations of the existing system. Unfortunately, until now, no such efforts or great progress can be seen either.

### 4.2. What is the future of remote justice in Croatia?

How should remote justice be understood? The goal of 'online' litigation is to transfer proceedings from the physical framework of courtroom to the online space, to enable participation in the proceedings without appearing before court in-person, or simplified - online dispute resolution.[60] The main goal of such proceedings is to guarantee and enable realization of the right of access to court.[61] However, when considering remote justice in general, it is not enough to take into account only the legal aspects and their effects in the functioning of the judicial system. There is also room for analysis of the sociological, psychological and economic positions of participants in court proceedings, including parties, lawyers and judges. The court, as well as other state and public services, have a pronounced human factor, in terms

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58 E-savjetovanje, Nacrt Prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku, available at: [https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=3184], Accessed 22 February 2022

59 The Croatian Bar Association participated in the e-consultation and published its remarks on the Draft Amendments to the Civil Procedure Act, which are available on the website of the Croatian Bar Association: [https://www.hok-cba.hr/hok/savjetovanje-o-nacrtu-prijedloga-zakona-o-izmjenama-i-dopunama-zakona-o-parnicnom-postupku/], Accessed 22 February 2022

60 Toy-Cronin, B.; Irvine, B.; Nichols, D. M.; Cunningham, S. J; Tkacukova, T., *Testing the Promise of Access to Justice through Online Courts*, International Journal of Online Dispute Resolution, No. 1-2, p. 39

61 *Ibid.* p. 40

of thinking and emotion, which are often neglected.[62] It is also necessary to analyze the availability of technical means of distance communication in the judicial system.

Legal literature when discussing remote justice argues that working out of court, in a non-traditional manner was commendable, because it helped preventing the spread of disease during the pandemic.[63] Although, numerous advantages of introducing technology in the judiciary are highlighted, positive aspects of human contact in court corridors and asserting judicial authority in courtrooms are also detected.[64] The courtrooms were empty over a period of time, but that does not mean that they are no longer necessary, since the digital world is not pleasant for all participants in court proceedings.[65] The process of socialization in informal interaction among lawyers, especially less experienced ones, as opposed to practicing law from the kitchen, should also not be neglected.[66] The human factor in courts and other state and public services is significant. The court is defined not only as a service or place, but also as the embodiment of legal power and the preservation of the rule of law.[67]

On the other hand, researches are beginning to focus more on the conditions that will allow online litigation to become dominant over traditional litigation. A research into the system of Northern Ireland shows among other, that in-person hearings are not necessarily guarantees of the right under Article 6 ECHR.[68]

The advantage of the use of technologies in court proceedings are seen in the possibility of easier access to court for those who may find it difficult to physically access court (the elderly, people living far from court, people with disabilities, etc.), availability of court decisions online and increased transparency due to the availability of legal documents.[69] On the other hand, the negative aspects of the

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62 Allsop, J., *Technology and the future of the courts*, University of Queensland Law Journal, Vol. 38, No. 1, 2019, p. 2

63 Hecht, N.; McCormack, B.; Rosenthal, L.; Wood, D.; Levi, D. F., *Coping with COVID: Continuity and Change in the Courts*, Judicature, Vol. 104, No. 2; Pallmeyer, R. R., *Preparing for the next Pandemic: COVID-19's Lessons for Courts*, University of Chicago legal forum, Vol. 2021, 2021, p. 5

64 *Ibid.*, Pallmeyer, p. 8 and 13

65 *Ibid.*

66 *Ibid.*, p. 13

67 Allsop, *op. cit.*, note 62, p. 3

68 McKeever, G., *Remote Hearings: LIPs and Participation in court Processes*, CJC Rapid Consultation: *The Impact of COVID-19 measures on the civil justice system*, May 2020, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604185], Accessed 23 February 2022. However, such considerations refer to court hearings in a legal system different from the Croatian one and in one phase of the procedure (online hearing), so the results can hardly be applied in Croatian conditions.; Toy-Cronin *et al., op. cit.*, note 60, p. 57

69 Allsop, *op. cit.*, note 62 p. 12; Legg, M., *The Covid-19 pandemic, the courts and online hearings: maintaining open justice, procedural fairness and impartiality*, Fedreal Law Review, Vol. 49, No. 2021, p. 7 and 21

use of technologies in the judiciary should be considered. Among such aspects, the way the data is managed online, the costs of introducing modern technologies, neglected interaction among participants, the effect of the inability of parties to interact in the courtroom and the ability of parties to access user software and technology infrastructure should be taken into account.[70] The work model of the court, as well as the significance of the role and the authority of judges should not be disregarded. In the legal literature, following obstacles are considered significant in the context of implementation of technologies in court proceedings: the type of proceedings, the type of case before the court, the willingness of parties to accept the use of technologies before courts, the availability of data, the flexibility of contractual relations between courts and technologies companies, the issues concerning intellectual property and level of costs for poorer world countries.[71] The issues of the quality of such court proceedings, the level of ensuring the right of access to court, the quality of evidence presented online, the protection of the rights of vulnerable groups, the protection of the court electronic databases remain open issues which are to be further analyzed.[72] Although some legal authors support digitalization of court proceedings, they also take into account the disadvantages.[73] The analysis of the available literature shows that there is no uniform position on the future of remote justice. Different outcomes are conceivable, depending whether legal, social or economic reasons are predominant or a balance acceptable to all is found. From the perspective of Croatian legal system, the future of remote justice does not seem promising. There are suggestions that the idea of online proceedings seem unattainable and difficult to accept for now.[74]

In Croatia, technology is currently used in court proceedings, as stated in the introductory part of the paper, through the e-communication system. However, the research into the traditional model of court operation is still the focus, regardless

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70 Allsop, *op. cit.*, note 62, p. 9; *Ibid.*, Legg, p. 19 and 20

71 Allsop, *op. cit.*, note 62, p. 10; Bakaianova, N.; Polianskyi, J.; Svyda, O., *Information tehnology in the litigation due to the pandemic COVID-19,* Cuestiones Politicas, Vol. 38, No. Especial (2da parte), IEP-DP-Facultad de Ciencias Juridicas y Politicas - LUZ, 2020, p. 496; Golubeva, N.; But, I.; Prokhorov, P., *Access to justice due to the Covid-19 Pandemic*, Revista de Derecho, Vol. 9, No. 11, 2020, p. 60; also see: Legg, *op. cit.*, note 69, p. 24

72 Pallmeyer, *op. cit.*, note 63, p. 15; Sourdin, T.; Li, B.; McNamara, D. M., *Court inovations and access to justice in times of crisis*, Health Policy Technology, Vol. 9, No. 4, 2020, p. 13

73 For example: China, Canada, the Great Britain, Australia, the United States of America, Singapour the Netherlands *etc.*; Allsop, *op. cit.,* note 62, pp. 4-6; Golubeva *et. al.*, *op. cit.*, note 71, p. 60; Legg, *op. cit.*, note 69, pp. 23 -24

74 Uzelac, A., *Sudski postupak nakon Korone: Transformacija ili kapitulacija*, Suvremena trgovina, Vol. 45, No. 4, 2020, p. 15, 16 and 19

of the introduced novelties.[75] The pandemic has left plenty of room to actually start implementing online trials and testing our capabilities, but we do not seem to have taken advantage of it.

The use of technology in Croatian judicial system should be considered as means of improvement of the right of access to court.[76] Technological solutions should be provided as an alternative to the traditional court proceedings.[77] The autonomy of will of parties in the application of technology in each proceedings should be of relevance. At the same time, it is necessary to respect the role of judges and the court. In this sense, only if legal experts such as judges and lawyers work together with IT on the development of technology, relevant solutions which offer protection of databases and information could be provided.[78]

## 5. CONCLUDING REMARKS

The analysis in the paper reveals that, while some countries have managed to implement emergency measures in courts proceedings and provide online hearings in order to ensure the right of access to court in a pandemic, others were less successful. In this sense, it is interesting to note that, while it was less challenging for the countries with a modernized and digitalized judiciary to adapt to new circumstances; it seems that countries with a more traditional orientation could actually benefit more from the pandemic. Namely, the dread of digitalization and the hesitation towards introducing more flexibility in administration of justice were promptly set aside by the pandemic, which required the national systems to act fast and take all measures necessary to ensure access to court for the parties.

However, the adjustment of the Croatian judiciary to emergency measures was not an example of an effective system. In comparison, other Croatian institutions have managed to provide access to their services more efficiently. Although the nature of the services these institutions provide cannot be compared to administration of justice, still, at the organizational level, some good practices they introduced are noteworthy. For one, the uniform approach that was applied in the institutions, but seemed not to have found way to the judicial system. Namely, entrusting each president of the court with the decision on how to precede with organization of work, resulted in different approach, and ultimately, to different possibility of accessing justice for the parties. Moreover, while in other Member States, the ability

75 A review of the application of technology before Croatian courts was also presented. Uzelac, *op. cit.*, note 74

76 Bakaianova; Polianskyi; Svyda, *op. cit.,* note 71, p. 495

77 Bakaianova; Polianskyi; Svyda, *loc. cit.*, note 71

78 Bakaianova; Polianskyi; Svyda, *loc. cit.*, note 71

of the courts or other competent bodies to take actions on a case-to-case basis, in order to provide the necessary protection of procedural rights to parties during the pandemic, resulted in almost full functioning of the courts, in Croatia, a similar approach led almost to a complete shutdown. Concerns for the health of both court staff and the parties are the most obvious reason for minimizing activities of Croatian courts. However, numerous other factors, such as the lack of necessary digital infrastructure, which would allow for the remote administration of justice, necessary knowledge and experience as well as protocols in place for extraordinary circumstances, should also be attributed to the reluctance of presidents of courts to allow judges to proceed without limitations.

The research has shown that technology has proven to be a good alternative to providing justice before courts. Unfortunately, during the last two years, Croatia has not done much to implement technology in court proceedings in response to the challenges of the pandemic. The lessons learned seem not to have sparked any ambition for change. The current legislative intervention into CPA does not contribute to the development of remote justice. No steps have been taken in order to improve the usage of technology before courts. No education of judges and court staff on usage of technologies has been planned either. An in-depth research and analysis into the experience of court staff, legal practitioners and parties concerning administration of justice during the pandemic has not been undertaken. Under such circumstances, it should not be expected for remote justice to make any significant progress in Croatia in the near future. Returning to the question in the title of the paper it seems that for Croatian judiciary, the means justify the ends, if the means are understood as traditional methods of administering justice before courts, which the Croatian system persisted to employ, even during the pandemic. The ends in this context are understood as consenting to the final result, which meant failure to provide it efficiently, for the most part. However, without reversing to the ends justify the means approach, the role envisaged for the judiciary in case of similar extraordinary circumstances in the future will not attainable.

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UDK 347.763(4-67EU):504
Review article

# FIT FOR 55 – DOES IT FIT ALL? AIR AND RAIL TRANSPORT AFTER COVID – 19 PANDEMIC*

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***ABSTRACT***

*The main principle of sustainability means being able to meet the needs of today's society without compromising the ability of future generations to meet their own needs. Sustainable development implies the interdependence of its main components: society, economy, and ecology. The prosperity of a society depends on economic progress and the development of new technologies, but in a way that the natural environment is protected and preserved.*

*This concept is inextricably linked to the concept of ecology and, consequently, to all types of transport, given that transport is considered one of the main pollutants of the ecosystem. Due to its rapid development through history, and as the youngest and safest type of transport, air transport is particularly subjected to the environmental impact assessment. At the same time, air transport affects the global economy due to its connection with other sectors, which in turn enables faster mobility of people, services, and goods. This was especially evident with the increased need for faster medical supplies and protective equipment delivery during the COVID-19 pandemic.*

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-5 "Challenges and threats of modern transport and new legal solutions"

*The European Union's transport policy is geared towards sustainable development by linking all environmental and social goals in a balanced way. Considering the negative long-term impact of COVID-19 on the air transportation sector, the question posed in this paper is whether this can be done in an appropriate way.*

*As part of the European Green Deal, the "Fit for 55" package is a set of proposals to revise and update EU legislation with the purpose of introducing new initiatives regarding the climate goals agreed by the Council and the European Parliament.*

*Regarding air transport, the emphasis is on contributing to reducing $CO_2$ emissions and noise pollution and their impact on other sectors and competitiveness. The EU Commission White Paper: "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system" emphasizes that the EU aviation industry should become a front-runner in the use of low-carbon fuels to reach the set targets, as well as that the majority of medium-distance passenger transport should go by rail by 2050. There are also initiatives that aviation taxes should subsidize high-speed rail (HSR), which potentially may cause a decrease in the air transport and benefit an increase the rail transport.*

*The paper will also address the questions as to whether existing legislation, measures, and proposals are appropriate, considering that aviation is one of the industry sectors that is most affected by COVID-19 and could be most affected by the "Fit for 55" package, as well what impact this duopoly might have on the market for travel served by air transport.*

*Does really "Fit for 55" fit air transport?*

***Keywords:*** *air transport, COVID-19 pandemic, ecology, rail transport, sustainability*

## 1. INTRODUCTION

The development of transport in the 20th, and especially in the 21st century, has significantly contributed to the increase of negative environmental impacts. Traffic has a detrimental effect on air, water, soil, noise production and represents a significant burden in terms of space and transport infrastructure. However, with many NGOs pointing to the problem of environmental pollution, the legislators and participants in transport systems are becoming aware of the enormous pressure of transport on the environment as well as the need to manage this problem. Solving the problem of environmental pollution is a global task that requires the action of all stakeholders, raising global awareness of the importance of this problem as well as the implementation of effective measures and actions with appropriate legal regulations.

When talking about modes of transport, we can say that some are more environmentally friendly (inland waterway transport, rail transport) than others. Air transport is particularly subject to the environmental impact assessment. Still, its positive impact on the world economy should not be overlooked. We have witnessed huge problems as well as enormous financial losses in all modes of transport caused by the COVID-19 pandemic. This was especially evident in air transport

when some fleets were completely grounded. However, it should not be forgotten that air transport played a key role in delivering the necessary medical materials and equipment during the worst periods of the pandemic.[1]

The European Union's transport policy is focused on sustainable development by linking all social and environmental goals in a balanced way. Considering the negative long-term impact of COVID-19 on the air transport sector, we will try to answer the question of whether this can be done in air transport.

The EU Commission White Paper: "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system"[2] emphasizes that the EU aviation industry should become a frontrunner in the use of low-carbon fuels to reach the set targets, as well as that the majority of medium-distance passenger transport should go by rail by 2050.

In the year 2019 European Commission published the European Green Deal[3], the package of policy initiatives that intend to set the EU on the tracks to a green transition, with the final goal of reaching climate neutrality by 2050. The European Green Deal is also a response to the COVID-19 pandemic, therefore the paper will also show the impact of the COVID-19 pandemic on air and rail transport.

European Union climate and energy policies date from the early 1990s. It should be reminded that, although numerous, the adopted communications are not binding.

In 2021, the EU adopted the European Climate Law (Regulation (EU) 2021/1119), which legally sets the EU's target to become climate-neutral by 2050.[4] According to Article 1 of the Regulation it "establishes a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law" and emphasizes that it sets a binding objective of climate neutrality in the Union by 2050.

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1 See Vasilj, A.; Činčurak Erceg, B.; Perković, A., *Air Transport and Passenger Rights Protection during and after the Coronavirus (Covid-19) Pandemic*, EU and comparative law issues and challenges series (ECLIC), J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Vol. 5, 2021, pp. 293-325

2 White Paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' [2011] COM/2011/144 final

3 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal [2019] COM/2019/640 final

4 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 [2021] OJ L 243 ('European Climate Law')

In the same year, European Commission presented a series of legislative proposals – the "Fit for 55" package. It is the EU's plan to realize the climate goals of the European Green Deal, and includes a number of proposals for the revision of EU legislation, including transport. This paper will analyse the most important provisions of these documents. The aim of this paper is not to analyse in detail the European Green Deal or "Fit for 55" package, but to present basic documents and changes in environmental objectives related to air transport, compare it with rail transport as a more environmentally friendly solution and express an opinion on whether and how these objectives can be achieved in these modes of transport. The paper also refers to multimodal transport as a more environmentally friendly form of transport and a possible solution to achieve environmental goals.

The paper will also discuss whether existing legislation, measures, and proposals are appropriate for air transport. Namely, air transport is one of the most affected sectors by pandemic COVID-19 and could be significantly affected by the "Fit for 55" package. The paper will also present the relationship between air and rail transport, especially considering the environmental benefits of multimodal transport.

## 2. SUSTAINABLE DEVELOPMENT AND SUSTAINABLE TRANSPORT

In the past 40 years, a widespread word is sustainability, which most often comes as sustainable development. Sustainable transport, sustainable cities, sustainable economy, sustainable production, and sustainable agriculture are also mentioned very often.

The term sustainable development is defined in different ways, most often the definition from the Brundtland Report, also known as "Our Common Future" of 1987, according to which "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[5] Agenda 21 shows that the concept of sustainable development covers three areas: environment, economy and community.[6] Sustainable development strikes a balance between demands to improve the quality of life (economic component), achieve social welfare and peace for all (social component), and the requirements for the preservation of components the environment

[5] *Report of the World Commission on Environment and Development: Our Common Future*, p. 41. [https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf], Accessed 14 March 2022

[6] Omejec, J., *Uvodna i osnovna pitanja prava okoliša*, in: Lončarić - Horvat, O. (ed.), Pravo okoliša, Ministarstvo zaštite okoliša i prostornog uređenja i Organizator, Zagreb, 2003, p. 31

as a natural asset on which both present and future generations depend.[7] However, the literature points out that the principle of sustainable development is not clear enough in terms of content.[8] However, regardless of its huge popularity in the last two decades of the 20th century, "the concept of sustainable development proved difficult to apply in many cases."[9]

Furthermore, defining the concept of sustainable transport is challenging. Sustainable transport is transport that does not endanger public health or ecosystems and consistently meets transport demand by a) rational use of natural renewable energy; b) rational use of non-renewable energy at a rate less than the speed of development and production of new replacement fuels.[10] Zelenika and Nikolić, by sustainable transport mean environmentally friendly processes production of transport services using environmentally friendly means of work (i.e., transport infrastructure and transport superstructures) that are in the function of human enrichment, space and all development resources, ensuring the greatest possible difference between positive and negative external effects.[11] According to Green and Wegener, when we talk about sustainable transport, threats to sustainability include: "1) degradation of the local and global environment (excessive rates of consumption of renewable resources); 2) consumption of non-renewable resources that appear to be essential to the quality of life of future generations; 3) other institutional failures that exacerbate the previous two problems (e.g., excessive traffic congestion which not only increases pollution and fuel consumption but also generates demand for more infrastructure and all its consequences, such as further urbanization of land and still more vehicle travel)".[12]

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7 Padjen, J., *Održivi razvoj i razvoj prometa*, Suvremeni promet, Vol. 20, No. 1–2, 2000, pp. 11.–14

8 Omejec, *op. cit.*, note 6, p. 32; Cifrić, I., *Okoliš i održivi razvoj: ugroženost okoliša i estetika krajolika*, Razvoj okoliša Biblioteka časopisa „Socijalna ekologija", Filozofski fakultet, Zagreb, 2002, pp. 49-52; Črnjar, M., *Ekonomika i politika zaštite okoliša: ekologija, ekonomija, menadžment, politika*, Ekonomski fakultet Sveučilišta u Rijeci i Glosa, Rijeka, 2002, p. 188; Kuhlman, T.; Farrington, J., *What is Sustainability?,* Sustainability, vol. 2, no. 11, 2010, pp. 3436-3448. Omejec concludes that the modern approach to the environment, which is based on sustainable development, is inherent in trying to achieve three goals: protection of ecosystems and conservation of the originality and biological and landscape diversity of natural communities in their entirety; protection and rational use of natural energy sources and achieving their ecological stability; protection from harmful influences, preservation and restoration of cultural and aesthetic values of the landscape. Omejec, *op. cit.*, note 6, p. 32-33

9 Britannica, *Sustainable development*, [https://www.britannica.com/topic/environmental-law/Sustainable-development#ref224618], Accessed 14 March 2022

10 Vasilj, A.; Činčurak Erceg, B., *Prometno pravo i osiguranje*, Sveučilište Josipa Jurja Strossmayera u Osijeku, Pravni fakultet Osijek, Osijek, 2016, p. 56

11 Zelenika, R.; Nikolić, G., *Multimodalna ekoligija – čimbenik djelotivnornoga uključivanja Hrvatske u europski prometni sustav*, Naše more, Vol. 50, No. 3-4, 2003, p. 142

12 Green, D. L.; Wegener, M., *Sustainable transport*, Journal of Transport Geography, Vol. 5, No. 3, 1997, pp. 178

Padjen states that transport development can be considered sustainable if it develops within the framework of renewable natural resources, meets the requirements of optimality and economic efficiency in the use of available resources, and contributes to improving living conditions and harmonizing relations within the human community.[13]

It is said that traffic has a detrimental effect on all components of the environment, and in the context of this paper, we especially highlight air[14] and noise[15]. The vigorous development of industry and energy use significantly pollutes the air. Since the middle of the 20th century, attempts have been made to regulate the air's protection from pollution completely.[16] Hence, today, many international treaties regulate various aspects of protection against air pollution. Regulations regulating air protection are closely related to many other regulations that primarily do not regulate the protection of air from pollution, which is particularly expressed in regulations relating to transport and which set quality standards for certain products.

The impact of traffic on the level of air pollution is enormous. The most significant impact of transport on the environment is the result of the use of energy in the form of fossil fuels. "Today, transport emissions represent around 25% of the EU's total greenhouse gas emissions, and these emissions have increased over recent years."[17] The most important greenhouse gas is $CO_2$, which participates with about 60%[18] in creating the greenhouse effect, and its main source is the combustion of fossil fuels. According to statistics in 2019, 31% of the final energy consumption,[19] 25.8% of greenhouse gas emissions[20], and 31.1% of $CO_2$ emissions[21] in the EU-27 came from transport. Share of greenhouse gas emissions from

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13 Padjen, *op. cit.*, note 7, p. 12

14 See more Lončarić - Horvat, O.; Cvitanović, L.; Gliha, I.; Josipović, T.; Medvedović, D.; Omejec, J.; Seršić, M.; *Pravo okoliša*, Organizator, Zagreb, 2003; Herceg, N., *Okoliš i održivi razvoj*, Synopsis, Zagreb, 2013; Črnjar, M., *Ekonomika i politika zaštite okoliša: ekologija, ekonomija, menadžment, politika*, Ekonomski fakultet Sveučilišta u Rijeci i Glosa, Rijeka, 2002

15 See more Črnjar, *op. cit.*, note 14, p. 39

16 Medvedović, D., *Zaštita nekih dijelova okoliša u hrvatskom pravnom sustavu*, in: Lončarić - Horvat, O. (ed.), Pravo okoliša, Ministarstvo zaštite okoliša i prostornog uređenja i Organizator, Zagreb, 2003, p. 145

17 European Commission, *Transport and the Green Deal*, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/transport-and-green-deal_en], Accessed 31 March 2022

18 Črnjar, *op. cit.*, note 14, p. 131

19 European Commission, *EU Transport in Figures - Statistical Pocketbook 2021*, Publications Office, 2021, p. 120, [https://data.europa.eu/doi/10.2832/733836.], Accessed 31 March 2022

20 *Cf. ibid.,* p. 127

21 *Cf. ibid.,* p. 143

transport, by mode of transport, are as follows: road transportation 71.1%, total civil aviation 13.4%, total navigation 14.1%, railways 0.4%, and other 0.5%.[22] According to Communication "Fit for 55", the EU's share of global $CO_2$ emissions is only 8%.[23]

The European Environment Agency's (EEA) annual "Air quality in Europe" assessments consistently show that air pollution still poses a danger to human health and the environment since the air pollution levels still exceed the EU's legal limits and the World Health Organization's guidelines for the protection of human health.[24] Lockdown measures introduced in 2020 due to the COVID-19 pandemic caused reduced activity in the road, air, and shipping transport, which led to decreases in emissions of air pollutants.[25] However, according to EEA despite reductions in emissions, in 2020, "96% of the EU's urban population was exposed to levels of fine particulate matter above the latest health-based guideline set by the World Health Organization."[26]

Noise is also a type of environmental pollution. Dangerous and harmful noise[27] is generated, among other things, in traffic. The majority of total noise comes from road traffic but is also a problem for the people living near airports and railways. According to EEA Report, air and rail transport are the second and third environ-

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22 *Cf. ibid.,* p. 135

23 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality [2021] COM/2021/550 final

24 EEA, *Improving air quality improves people's healthand productivity*, [https://www.eea.europa.eu/signals/signals-2020/articles/improving-air-quality-improves-people2019s], Accessed 2 April 2022

25 EEA, *Vast majority of Europe's urban population remains exposed to unsafe levels of air pollution*, [https://www.eea.europa.eu/highlights/vast-majority-of-europes-urban?utm_medium=email&utm_campaign=Air%20quality%20status%202022&utm_content=Air%20quality%20status%202022+CID_1857e6a51b5c485b39334ceca8eef049&utm_source=EEA%20Newsletter&utm_term=Find%20out%20more], Accessed 5 April 2022

26 EEA, *Europe's air quality status 2022*, [https://www.eea.europa.eu/publications/status-of-air-quality-in-Europe-2022/europes-air-quality-status-2022], Accessed 5 April 2022

27 Extensive literature on the harmful effects of noise on health is available, and we single out e.g. Münzel, T., Sørensen, M., Daiber, A., *Transportation noise pollution and cardiovascular disease*, Nature Reviews Cardiology, vol. 18, 2021, pp. 619–636; Monrad, M., Sajadieh, A., Christensen, J. S., Ketzel M., et al., *Residential exposure to traffic noise and risk of incident atrial fibrillation: A cohort study*, Environment International, Vol. 92–93, 2016, pp. 457-463; Huss, A., Spoerri, A., Egger, M., Röösli, M., *Aircraft Noise, Air Pollution, and Mortality From Myocardial Infarction*, Epidemiology, Vol. 21, Issue 6, 2010, pp. 829-836; Seidler, A. L., Hegewald, J., Schubert, M., Weihofen, V. M., et. al., *The effect of aircraft, road, and railway traffic noise on stroke - results of a case-control study based on secondary data*, Noise Health, vol. 20, 2018, pp. 152-161, Fuks, K. B., Weinmayr, G., Basagaña, X., Gruzieva, O., et. al*., Long-term exposure to ambient air pollution and traffic noise and incident hypertension in seven cohorts of the European study of cohorts for air pollution effects (ESCAPE)*, European Heart Journal, vol. 38, issue 13, 2017, pp. 983-990

mental noise sources in Europe.[28] The impacts of air traffic mostly occur during landing and take-off while rail has an impact during the entire route.[29] The Environmental Noise Directive (Directive 2002/49/ EC)[30] sets the general framework for environmental noise management in the EU. For rail Commission Regulation (EU) No 1304/2014 of November 26th 2014 on the technical specification for interoperability relating to the subsystem' rolling stock — noise'[31] is in force. Annex 16 "Environmental Protection" (Volumes I and II) of the Convention on International Civil Aviation deals with the protection of the environment from the effect of aircraft noise and aircraft engine emissions.[32] As Medvedović points out, strict international rules have been created since airplanes make noise worldwide.[33] In 2001 the International Civil Aviation Organization (ICAO) Assembly adopted the Balanced Approach to Aircraft Noise Management, that identifies four elements[34] to address noise around airports. It looks at a specific airport and analyses measures to reduce noise individually. In 2014, Regulation (EU) No 598/2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC was adopted in the EU.[35] "Aircraft today are, on average, 20 decibels quieter than thirty years ago, leading to a 75 percent reduction in noise annoyance around airports."[36] Despite various conditions and

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28 EEA, *Report No 19/2020, Train or plane?,* Transport and environment report 2020, p. 26, [https://www.eea.europa.eu/publications/transport-and-environment-report-2020], Accessed 5 April 2022

29 *Ibid.* As stated in the Report, according to the WHO „the number of people exposed to air traffic noise is smaller than for rail, but the annoyance response to air traffic noise is larger than for rail noise."

30 Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise - Declaration by the Commission in the Conciliation Committee on the Directive relating to the assessment and management of environmental noise [2002] OJ L 189

31 Commission Regulation (EU) No 1304/2014 of 26 November 2014 on the technical specification for interoperability relating to the subsystem 'rolling stock — noise' amending Decision 2008/232/EC and repealing Decision 2011/229/EU [2014] OJ L 356

32 ICAO, The Convention on International Civil Aviation, Annexes 1 to 18, [https://www.icao.int/safety/airnavigation/nationalitymarks/annexes_booklet_en.pdf], Accessed 5 April 2022

33 Medvedović, D., *op. cit*., note 16, p. 173

34 These are: reduction at source, land-use management and planning, noise abatement operational procedures, and operating restrictions. ICAO, *Environment, Aircraft Noise*, [https://www.icao.int/environmental-protection/pages/noise.aspx], Accessed 5 April 2022

35 Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC [2014] OJ L 173

36 Gudmundsson, S. V., *European Air Transport Regulation: Achievements and Future Challenges*. Available at SSRN: [https://ssrn.com/abstract=2621815] or [http://dx.doi.org/10.2139/ssrn.2621815], Accessed 31 March 2022, p. 28

measures aimed at reducing air traffic noise, it is still high due to high air traffic intensity.

Although traffic has a harmful effect on the environment, its positive impact on the economy is undeniable. Črnjar emphasizes that traffic has a dual and opposite function: it is important for the integration of the economy of various countries, but also causes great social costs (environmental damage).[37] Transport employs more than 10 million people in Europe and contributes around 5% to EU GDP.[38] So, decision makers have to balance between actions developing and promoting transport along with increasing mobility, and on the other side reduce its negative effect on air quality and environment.

## 3. EUROPEAN ENVIRONMENT PROTECTION DOCUMENTS

European Union documents related to transport modes and their impact on the environment cover different areas such as alternative fuels, emission standards, fuel efficiency, etc. According to Činčurak Erceg and Jerković "new regulations, documents, strategies, and measures are being continuously adopted. However, the European Union, as well as all the Member States, has a difficult path for the realization of the planned objectives."[39]

Among numerous documents, there are:

- White Paper "European transport policy for 2010: time to decide"[40] of 2001 that highlights the need for integration of transport in sustainable development. It additionally emphasises the need for shifting between modes, from road to rail, sea, and inland waterways; revitalising the railways; eliminating bottlenecks; taking care of transport users, establishing a balance between air traffic growth and the environment, etc.

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37 Črnjar, *op. cit.*, note 14, p. 39

38 European Commission, *Transport and the Green Deal*, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/transport-and-green-deal_en], Accessed 31 March 2022. Air transport is one of the key drivers of mobility in the European Union as well as the development of its economy. According to estimates, 0.4 million people were employed in the European Union in the aerospace industry in 2018, and 1.2 billion passengers were transported in the same year. The share of the aerospace industry in 2017 in the GDP of the European Union was 2.1%. Proposal for a Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport [2021] COM(2021) 561 final

39 Činčurak Erceg, B.; Jerković, E., *Sustainable Transport – Legal and Financial Aspects*, 6th SWS International Scientific Conference on Arts and Humanities, Florence, Italy, Conference Proceedings, Vol. 6, Issue 2, 2019, p. 87

40 White Paper 'European transport policy for 2010: time to decide' [2001] COM (2001) 370 final

- White Paper "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system"[41] of 2011 aims at reducing by 60% greenhouse gas (GHG) emissions from transport by 2050, measured with respect to 1990 levels,[42] by limiting the increasing level of road congestions and building efficient intermodal connections. It also highlights that transport has become more energy-efficient but still depends on oil and oil products for 96% of its energy needs.[43] Thus, this White Paper calls for reducing the oil dependence of transport. For that reason, alternative fuels and the appropriate infrastructure are of great importance. One of the White Paper's goals is that the majority of medium-distance passenger transport should go by rail by 2050. It was stated in the White Paper that "the EU aviation industry should become a frontrunner in the use of low-carbon fuels to reach the 2050 target."[44] However, as stated in Communication "Clean power for transport: A European alternative fuels strategy":[45] "for certain modes of transport, in particular long-distance road freight and aviation, limited alternatives are available."

In the year 2019 European Commission published the European Green Deal that includes initiatives covering the environment, climate, transport, energy, industry, agriculture, and sustainable finance.[46] It is "an integral part of this Commission's strategy to implement the United Nation's 2030 Agenda and the sustainable development goals." The European Green Deal represents the EU's greater climate ambition for 2030 ("to increase the EU's greenhouse gas emission reductions tar-

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41 White Paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' [2011] COM/2011/144 final

42 *Cf. ibid.,* p. 3

43 *Cf. ibid.,* p. 4

44 *Cf. ibid.,* p. 7
Benchmarks for achieving the 60% GHG emission reduction target: low-carbon sustainable fuels in aviation; moving 30% by 2030, and by 2050 more than 50% of road transport of goods over distances longer than 300 km to other modes of transport; connecting all core network airports to the rail network by 2050; creating a fully functional and EU-wide multimodal TEN-T core network by 2030

45 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Clean power for transport: A European alternative fuels strategy' [2013] COM (2013) 17 final

46 See more: Krämer, L., *Planning for Climate and the Environment: the EU Green Deal*, Journal for European Environmental & Planning Law, Vol. 17, No. 3, 2020, pp. 267-306.; Fleming, R.; Mauger, R., *Green and Just? An update on the 'European Green Deal'*, Journal for European Environmental & Planning Law, Vol. 18, No. 1-2, 2021, pp. 164-180.; Skjærseth, J. B., Towards a European Green Deal: The evolution of EU climate and energy policy mixes, International Environmental Agreements: Politics, Law and Economics, vol. 21(1), 2021, pp. 25-41

get for 2030 to at least 50% and towards 55% compared with 1990 levels")[47] and 2050 ("no net emissions of greenhouse gases in 2050"; to achieve climate neutrality by 2050). It emphasizes the need to accelerate the transition to sustainable and smart mobility. It stresses that transport accounts for a quarter of the EU's greenhouse gas emissions, and still increasing. So, to reach climate neutrality, a 90% reduction in transport emissions is required by 2050.[48] However, it should not be forgotten that the European Green Deal is "a policy or an instrument of the EU soft-law".[49]

As was stated in the Communication "Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people" (the 2030 EU Climate target plan) "all transport sectors - road, rail, aviation and waterborne transport - will have to contribute to the 55% reduction effort."[50] In the Communication "Sustainable and Smart Mobility Strategy – putting European transport on track for the future", it was proposed that the use of electricity in rail transport should be increased and when this is not possible, the use of hydrogen.[51] It is warned that air and waterborne transport will have "greater decarbonisation challenges in the next decades, due to current lack of market ready zero-emission technologies, long development and life cycles of aircraft and vessels, the required significant investments in refuelling equipment and infrastructure, and international competition in these sectors."[52] Many studies point that traffic growth will cause increasing emissions from aircrafts in spite of technological developments.[53]

After many soft law instruments the European Climate Law (Regulation (EU) 2021/1119) was adopted in 2021. It creates a binding commitment of the

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47 As Skjærseth states EU commited to 8% emissions reduction from the Kyoto Protocol's first commitment period (2008–2012), plan have increased to 20% emissions reduction by 2020 and 40% by 2030 (compared to 1990 levels), and in the end the European Council raised the 2030 target to 55%. Skjærseth, J. B., Towards a European Green Deal: The evolution of EU climate and energy policy mixes, International Environmental Agreements: Politics, Law and Economics, vol. 21(1), 2021, p. 26

48 The European Green Deal, *op. cit.*, note 3, p. 10

49 See more in Sikora, A., *European Green Deal – legal and financial challenges of the climate change*, ERA Forum, Vol. 21, 2021, pp. 688-689

50 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people [2020] COM/2020/562 final

51 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Sustainable and Smart Mobility Strategy – putting European transport on track for the future [2020] COM/2020/789 final

52 *Ibid*

53 D'Alfonso, T.; Jiang, C.; Bracaglia, V., *Air transport and high-speed rail competition: Environmental implications and mitigation strategies*, Transportation Research Part A, Vol. 92, 2016, p. 261-262

Member States to achieve of climate neutrality in the Union by 2050 compared with 1990 and contains a qualitative objective to improve adaptation to climate change.

The initiative included in the European Green Deal is "Fit for 55" package[54] adopted in 2021. To achieve the goal and become climate neutral by 2050, current greenhouse gas emission levels must drop. "The Fit for 55" package is a set of proposals to revise and update EU legislation and to put in place new initiatives with the aim of ensuring that EU policies are in line with the climate goals agreed by the Council and the European Parliament."[55] Among other things, the package includes: a revision of the rules for aviation emissions, ReFuelEU Aviation for sustainable aviation fuels[56], a revision of the Directive on the deployment of alternative fuels infrastructure.[57] In the Communication "Fit for 55", Commission proposed that by 2030 sectors covered by the revised EU Emissions Trading Scheme have to reduce their GHG emissions by 61%, compared to 2005 levels.[58]

The Commission is additionally proposing carbon pricing for the aviation sector, which benefited from an exception until now. "It is also proposing to promote sustainable aviation fuels – with an obligation for planes to take on sustainable blended fuels for all departures from EU airports."[59] If we consider that sustainable aviation fuels (advanced biofuels and electro-fuels) represent only 0.05% of

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54 'Fit for 55', *op. cit.*, note 23
The following activities were adopted: Proposal for a carbon border adjustment mechanism (CBAM) for selected sectors; Revision of the Regulation on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry (LULUCF); Revision of the EU Emissions Trading System (ETS); Revision of the Energy Tax Directive; Amendment to the Renewable Energy Directive; Amendment of the Energy Efficiency Directive; Revision of the Directive on deployment of alternative fuels infrastructure; Revision of the Regulation setting $CO_2$ emission performance standards for new passenger cars and for new light commercial vehicles. European Parliament *Legislative train schedule Fit for 55 package under the European Green Deal*, [https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/package-fit-for-55], Accessed 8 April 2022

55 European Council, Council of the European Union, *Fit for 55*, [https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/], Accessed 1 April 2022

56 The ReFuelEU Aviation initiative promotes sustainable aviation fuels, and theirs suppliers are becoming increasingly obliged to combine them with existing fuel for jet engines supplying aircraft at EU airports; in addition, the use of synthetic fuels will be encouraged

57 European Council, Council of the European Union, *op. cit.*, note 55
Still, Schlacke, Wentzien, Thierjung and Kösterx emphasize that "Commission's timetable for the legislative process can only be qualified as ambitious and justifies the prognosis that it is almost impossible to meet." Schlacke, S., Wentzien, H., Thierjung, E.-M., Kösterx, M., *Implementing the EU Climate Law via the 'Fit for 55' package*, Oxford Open Energy, vol. 1, 2022, p. 11

58 'Fit for 55', *op. cit.*, note 23

59 European Commission, *Delivering the European Green Deal*, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en], Accessed 31 March 2022

total jet fuel consumption,[60] the question arises as to how and whether aviation will succeed in implementing these measures. Recently some airlines supported by IATA have been lobbying against EU climate plans trying to influence European Commission to implement ICAO Carbon Offsetting and Reduction Scheme rather than EU-s carbon policies.[61] European biofuels obligation could undermine the position between European and non-European airlines because European airlines are burdened by aviation tax, EU Emission Trading System (ETS), and as well with CORSIA, while non-EU airlines operate under completely different environmental standards and obligations.[62] Taxation is not the only solution to deal with environmental challenges. IATA also warned that the „reliance on taxation as the solution for cutting aviation emissions in the EU's 'Fit for 55' proposal is counter-productive to the goal of sustainable aviation."[63] The aviation industry is determent to „go green" and to reach net-zero emissions by 2050 on its own, however, the European Green Deal needs a reboot considering the COVID-19 impact on aviation, especially since the „Fit for 55" proposal does not include specific measures to reduce sustainable aviation fuels (SAF) costs or to incentivize production and the use of alternative fuels. Aviation must be looked at globally, not only from the EU standpoint. An unbalanced tax system makes higher taxes on aviation and shipping, affecting technological development as well.[64]

In our opinion it necessary to find the common ground to implement joint agreements like CORSIA, because different measures will only open new discussions and postpone results. Instead of taxation, it is needed to implement and revise different measures but primarily to support the development of the new technologies such as electric, hydrogen or hybrid aircraft. All income from taxation and carbon pricing schemes must be transparently invested into developing those measures.

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60 European Commisision, *Sustainable aviation fuels – ReFuelEU Aviation*, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12303-Sustainable-aviation-fuels-ReFuelEU-Aviation_en], Accessed 9 April 2022

61 Vaughan, A., *European airlines have been lobbying against EU climate plans,* New Scientist, 2021, [https://www.newscientist.com/article/2280172-european-airlines-have-been-lobbying-against-eu-climate-plans/], Accessed 12 April 2022

62 *Ibid.*

63 IATA, *Tax is not the answer to aviation sustainability*, [https://www.airlines.iata.org/analysis/tax-is-not-the-answer-to-aviation-sustainability], Accessed, 5 May 2022

64 Ovaere, M.; Proost, S., Cost-effective reduction of fossil energy use in the Eeuropean transport sector: An assessment of the Fit for 55 package, Working Papers of Faculty of Economics and Business Administration, Ghent University, Belgium, 21/1031, 2021, p. 24

## 4. IMPACT OF THE COVID-19 PANDEMIC ON AIR AND RAIL TRANSPORT

At the end of 2019 several cases of nonspecific pneumonia were reported in Wuhan, Hubei province in China.[65] Rapid spread of the virus later named SARS-Cov-2, led to World Health Organisation (WHO) to declare coronavirus pandemic on March 11th 2020.[66]

The COVID-19 pandemic took our society by surprise and affected all travel sectors in a way that passenger transport within European Union (EU) member states was partially or entirely closed. Since the pandemic's beginning, countries worldwide and in the EU have taken various measures to limit coronavirus spread. "The pressure on organizations during this coronavirus pandemic has shifted from moving citizens to keeping a core transportation system operational with a skeleton workforce to ensure freight and key essential workers can continue to move."[67]

### 4.1. Impact of the COVID-19 pandemic on rail transport

The COVID-19 pandemic has significantly affected rail transport as well. Partial or complete shutdown of several rail activities caused by imposed lockdown measures led to a drop in passenger demand, causing a significant economic impact on the rail sector.[68] Although lower cases of disruption characterized rail services at the beginning of the pandemic than the other transport modes, in the fourth quarter of 2020, there was a decrease in rail transport in EU states, around 45% percent on average

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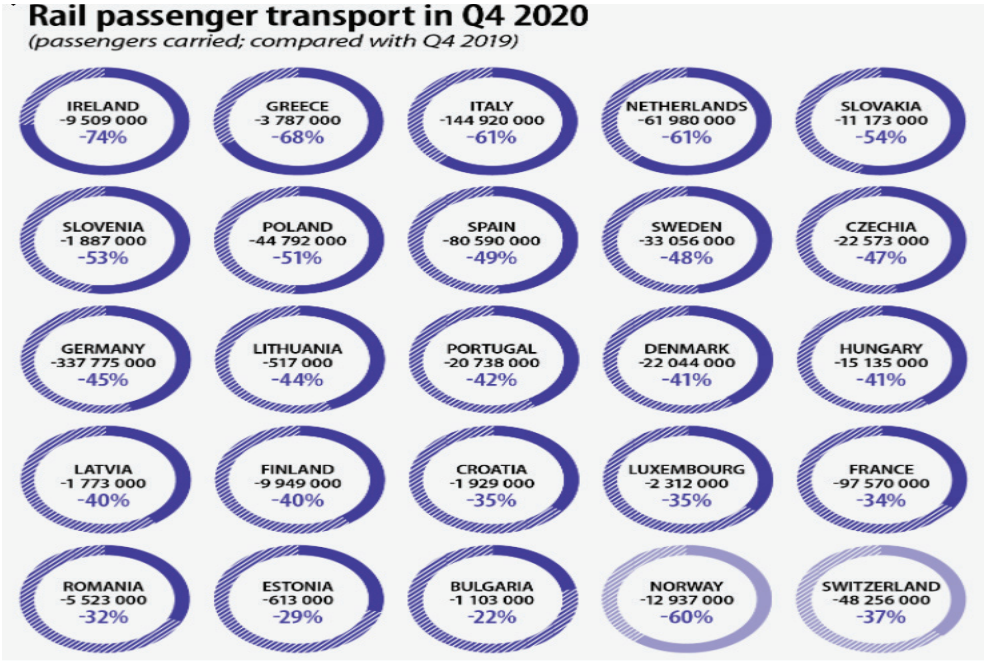
65 World Health Organisation, Regional Office for Europe, *Coronavirus disease (COVID-19) pandemic*, [https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov], Accessed 6 February 2022

66 *Ibid.* See Vasilj, Činčurak Erceg, Perković, *op. cit.*, note 1

67 Deloitte, *Understanding COVID-19's impact on the transportation sector, COVID-19's growing impact on the transportation sector,* [https://www2.deloitte.com/us/en/pages/about-deloitte/articles/covid-19/covid-19-impact-on-transportation-sector.html], Accessed 13 February 2022

68 Independent Regulator's Group-Rail, *Impact of the COVID-19 crisis and national responses on European railway markets in 2020,* [IRG-Rail__2021__5_____Covid_publication_2021.pdf URL -MwGiT6rl-wyt6PZyeAm0], Accessed 19 February 2022

**Figure 1.** Decrease in rail transport in fourth quartal 2020.




*Source*: Eurostat, *Impact of the COVID-19 pandemic on rail passenger transport in Q4 2020*, [https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210518-1], Accessed 7 February 2022

To counteract the negative economic effects of the COVID-19 outbreak, temporary and permanent financial measures were adopted:

- adjustments regarding charging principles: postponing of the invoicing, discounts, loosening of cancellation charges and reservation penalties;
- state aids: compensation of loss of revenue including incentives;
- higher public subsidies;
- convenient Public Service Obligation (PSO) contracts.[69]

On October 7th, 2020, the European Parliament and the Council of the European Union adopted a Regulation EU 2020/1429 establishing measures for a sustainable rail market in view of the COVID-19 outbreak.[70] This Regulation provides measures regarding the impact of COVID-19 on the rail sector, addressing the Member States to authorize infrastructure managers to lower, postpone or

[69] *Ibid.*

[70] Regulation (EU) 2020/1429 of the European Parliament and of the Council of 7 October 2020 establishing measures for a sustainable rail market in view of the COVID-19 outbreak [2020] OJ L 333

remove specific charges prescribed in Directive 2012/34/EU establishing a single European railway area.[71]

This Regulation substitutes the actual regulation framework; considering Article 31 of Directive 2012/34/EU, a partial or full waiver of track access charges is recommended in order to alleviate the impact of COVID-19. Under Article 32 of the same Directive, it is allowed for the Member States to levy mark-ups if the market can bear them. However, Regulation EU 2020/1429 prescribes that the Member States can authorize infrastructure managers to reassess their ability to bear mark-ups and to reduce the amounts due considering the impact of the COVID-19 pandemics.[72] Reservation charges intended to incentivize the efficient use of capacity are not considered relevant as well for the period of the pandemic.[73]

On December 15th 2020, the European Parliament approved a proposal by the European Commission[74] to designate 2021 as the European Year of rail. The main goal was to promote rail transport as safe and sustainable as stated in the Proposal for a decision of the European Parliament and of the Council on a European year of rail: "Rail, therefore, needs a further boost to become more attractive to travellers and businesses as a mean of transport that meets both their daily and more long distance mobility needs."[75] The year's main goal was to encourage passengers to choose rail over more polluting transport modes like air travel.[76] As the impact of the COVID-19 pandemic postponed and disrupted planned activities in 2021 many rail associations require that European Commission prolong the European Year of rail to the end of 2022.[77]

Although the COVID-19 crisis has significantly reduced travel in general, rail has demonstrated a certain way of resilience with the opportunity even to strengthen its position and competitiveness. It is important to underline that there is no change in the trend toward public financing in rail transport, and subsidy levels will stay permanent in the future years. With The European Year of the rail, new programs are set to reduce the pandemic's impact and encourage a shift from other

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71 Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L 343

72 *Ibid.*

73 *Ibid.*

74 Proposal for a Decision of the European Parliament and of the Council on a European Year of Rail [2021] COM/2020/78

75 *Ibid.*

76 Goulding Carroll, S., Rail and aviation set for showdown over 2022 'European Year of' status, 2021, [https://www.euractiv.com/section/railways/news/rail-and-aviation-set-for-showdown-over-2022-european-year-of-status/], Accessed 24 February 2022

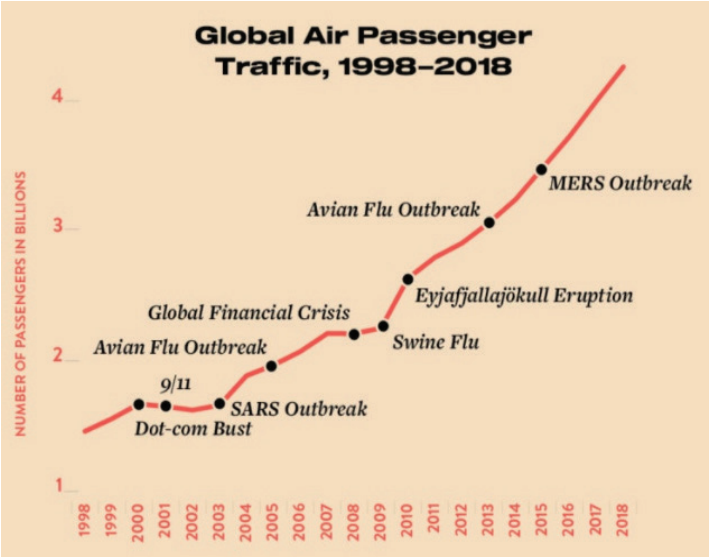
77 *Ibid.*

transport modes, especially air.[78] Despite challenges, the impact of the pandemic has created a fertile ground for the development of rail transport with some favorable conditions set for winning the market share during the recovery period, strengthening competitiveness with the increase of its modal contribution.[79]

### 4.2. Impact of COVID-19 on air transport

Since the beginning of the 21st century, the aviation sector has been affected by many crises: SARS outbreak, H5N1 influenza, global financial crisis, H1N1 pandemic, the eruption of Iceland's Eyjafjallajökull[80], Ebola, MERS, Zika virus and finally COVID-19.

**Figure 2.** Impact of the crisis on global air passenger traffic




*Source:* Sehl, K., *How the Airline Industry Survived SARS, 9/11, the Global Recession and More, APEX, 2020*, [https://apex.aero/articles/aftershocks-coronavirus-impact/], Accessed 5 March 2022

Worsening of the epidemiological situation around the world at the beginning of 2020 significantly affected air transport making it one of the hardest-hit industries

[78] International Union for Railwas, Mobility post - Covid: An opportunity for railways, 2021, [https://uic.org/IMG/pdf/mobility-post-covid-an-opportunity-for-railways.pdf], Accessed 25 February 2022.

[79] The World Alliance of Tourist Trams and Trains, Mobility post-Covid: an opportunity for rail transport.(UIC), 2022, [https://uic.org/IMG/pdf/mobility-post-covid-an-opportunity-for-railways.pdf], Accessed 26 Ferbuary 2022

[80] Sehl, K., How the Airline Industry Survived SARS, 9/11, the Global Recession and More, APEX, 2020, [https://apex.aero/articles/aftershocks-coronavirus-impact/], Accessed 5 March 2022

by COVID-19.[81] Only in March 2020, there was a decrease in air transport by more than 60% on average compared to 2019.

**Figure 3.** Air passenger transport in March 2020 (% change compared with March 2019)


*Source:* Eurostat, *Impact of COVID-19 on air passenger transport,* [https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20200616-2], Accessed 27 February 2022

COVID-19 pandemic caused disruption like nothing before, facing aviation with an unprecedented crisis. By the end of 2020, the economic impact of COVID-19 on the aviation sector was more significant than 30 SARS outbreaks, with the projection of financial shock "three times greater than the steepest downturn of the 2008 global financial crisis."[82] The aviation sector is closely intertwined with tourism facilitating 87.7 million jobs worldwide,[83] and in Europe, there is more than 3.3% of all employment supported by aviation.[84] According to the latest International Air Transport Association (IATA) research, the severe decline in air transport caused by the COVID-19 pandemic might result in the loss of 44.6 million aviation-supported jobs.[85] The recovery projections are not promising since the return to pre-COVID global passenger traffic levels is not expected before

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81 Bao, X.; Ji, P.; Lin, W.; Perc, M., Kurths, J.; *The impact of COVID-19 on the worldwide air transportation network,* Royal society open science, Vol. 8, 2021, [https://doi.org/10.1098/rsos.210682], Accessed 27 February 2022

82 *Ibid.*

83 Airlines, New figures highlight potential job losses, 2021, [https://www.airlines.iata.org/news/new-figures- highlight-potential-job-losses], Accessed 6 March 2022

84 Air Transport Action Group (ATAG), Aviation benefits beyond borders, [https://aviationbenefits.org/media/166711/abbb18_full-report_web.pdf ], Accessed 10 March 2022, p. 44

85 Airlines, *op. cit.*, note 83

2024.[86] To boost air transport and to contribute to the recovery, there is an initiative to the European Commission to declare 2022 the European Year of Aviation and to provide "a unique opportunity to reflect on the present and, above all, the future of an innovative and research-intensive sector, fully committed to embrace and address the challenges of sustainability and digitalization and to contribute to the growth and well-being of European citizens."[87]

From the beginning of the pandemic, the main focus of the aviation industry has been to mitigate the impact on safety and to ease passenger concerns regarding safe travel by implementing various measures to reduce the possibility of disease transmission. Previously developed health standards developed by World Health Organization, IATA, and International Civil Aviation Organization (ICAO) were accepted and implemented by national regulations. Most countries also have implemented strict measures such as travel restrictions, border closures, quarantines, and social distancing, which significantly impact aviation.

European Union Aviation Safety Agency (EASA) together with the European Centre for Disease Prevention and Control, published special guidance: COVID-19 Aviation Health Safety Protocol – Operational guidelines for the management of air passengers and aviation personnel in relation to COVID-19 pandemic, a document that provides best practices and procedures with the purpose of protecting public health and preventing the spread of SARS-Cov-2.[88]

Due to the reduced number of flights, there was a challenge to deliver humanitarian aid and medical supplies. Therefore EASA has issued a temporary permit for airlines to transport this specific cargo in the passenger cabin[89] as exemptions under Article 71(1) of Regulation 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency.[90]

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86 IATA, Recovery delayed as international travel remains locked down, 2020, [https://www.iata.org/en/pressroom/pr/2020-07-28-02/], Accessed 10 March 2022

87 Aviation24.be, 2021, The Sky & Space Intergroup of the European Parliament calls on European Commissioto declare 2022 European Year of Aviation, [https://www.aviation24.be/organisations/european-parliament/the-sky-space-intergroup-of-the-european-parliament-calls-on-european-commission-to-declare-2022-european-year-of-aviation/], Accessed 14 March 2022

88 Vasilj, Činčurak Erceg, Perković, op. cit., note 1, p. 302

89 See: EASA, Guidelines transport of cargo in passenger compartment - exemptions under article 71(1) of Regulation 2018/1139 (The Basic Regulation), [https://www.easa.europa.eu/downloads/113496/en], Accessed 12 March 2022

90 Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 [2018] OJ L 212

At the end of 2020 IATA highlighted four important segments where government assistance is needed to assist airlines in recovery:

1. Extending the waiver from the 80-20 use-it-or-lose-it rule in the Worldwide Airport Slot Guidelines offering more flexibility to airline operators to plan schedules,
2. Continued financial assistance,
3. Extensions to wage subsidies and corporate taxation relief measures,
4. Avoiding increases in charges and fees.[91]

Unlike rail transport, there were no temporary and permanent financial measures adopted at the EU level to counteract the negative economic effects of the COVID-19 outbreak. However, it was left to the governments to implement certain measures.[92]

The European Commission has published Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with COVID-19[93] which "aim at clarifying how certain provisions of the EU passenger rights legislation apply in the context of the Covid-19 outbreak, notably with respect to cancellations and delays."[94] These Interpretative Guidelines also apply to Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. According to Article 8 of the Regulation (EC) No 261/2004 passengers have the right to reimbursement within seven days of the full cost of the ticket at the price at which it was bought, a return flight to the first point of departure at the earliest opportunity.[95] The prescribed obligation to compensate passengers in the event of flight cancellation generated high costs for the airlines.

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91 IATA, *Continued Government Relief Measures Needed to get Airlines through the Winter,* [https://www.iata.org/en/pressroom/pr/2020-06-16-01/], Accessed 13 March 2022

92 See: Deloitte, *Global COVID-19 Government Response,* 2020, [https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/corporate-finance/deloitte-global-covid19-government-response-070420.pdf], Accessed 13 March 2022

93 Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 [2020] OJ C 89I

94 *Ibid.*

95 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement

Due to the pandemic, many passengers even cancelled their flights. The legislation does not cover this situation, but in order to keep their passengers, the airlines offered a voucher with a new travel date. In order to minimize the costs for reimbursement, twelve[96] European countries required the European Commission to suspend the prescribed obligation to offer a full refund for canceled flights and allow airlines to choose how passengers are reimbursed. The European Commission adopted Recommendation (EU) 2020/648 on vouchers offered to passengers as an alternative to reimbursement[97] but in a way that passengers can choose between cash and voucher, stating that airlines should make vouchers more attractive so that consumers will accept them instead of the reimbursement.[98]

According to the IATA data from March 2022, there's a significant increase in air travel,[99] unfortunately, some airports like Amsterdam Schiphol Airport supported by the Dutch competition regulator decided to raise airport charges by 37% in the next three years.[100] In this way aviation sector, airlines and passengers are more burdened, and this is not the way to incentivize and support aviation after the COVID-19 pandemic. Decisions like this on a national level will further drain airline resources to invest in new technologies and fleet renewal to reach Net Zero goals.

## 5. MULTIMODAL TRANSPORT

Using multimodal transportation[101], as modern mode of transport has a significant role in the ecology. According to Zelenika and Nikolić, the multimodal transport

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96 Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Latvia, Malta, the Netherlands, Poland and Portugal. Morgan, S., *Twelve countries demand passenger rights suspension*, EURACTIV, 2020, [https://www.euractiv.com/section/aviation/news/twelve-countries-demand-passenger-rights-suspension/], Accessed 14 March 2021

97 Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125 [2020] OJ L 151/10

98 Vasilj, Činčurak Erceg, Perković, *op. cit.,* note. 1, p. 314

99 IATA, *Passenger Traffic Recovery Continues in March*, 2022, [https://www.iata.org/en/pressroom/2022-releases/2022-05-04-01/], Accessed 20 May 2022

100 Dunn, G., *Why sparks are flying over airport charges post-pandemic,* 2022, [https://www.flightglobal.com/networks/why-sparks-are-flying-over-airport-charges-post-pandemic/148373.article], Accessed 22 May 2022

101 „The multimodal transport definitions in the legal sense are most often related to the characteristics of multimodal transport, as stated in the United Nations Convention on the Multimodal Transportation of Goods of 1980." Erceg, A.; Činčurak Erceg, B.; Kilic, Z., *Multimodal Transportation – Economic and Legal Viewpoint from Croatia and Turkey*, Proceedings of the 20th International Scientific Conference Business Logistics in Modern Management (Dujak, D., ed.), Faculty of Economics in Osijek, Osijek, 2020., pp. 48. According to Article 1(1) of the Convention on the Multimodal Transportation of Goods „international multimodal transport means the carriage of goods by at least two different

is considered the ecological and modern form of traffic because it offers an effective, fast and secure way of transportation of goods, and it also protects the human environment to significant extent. Therefore, the development of multimodal transport with the application of modern transport technologies and certain and concrete environmental protection measures should be of dominant importance in all developed economies of the world.[102] As the main advantages of multimodal transport Sładkowski states: fuel savings, reduction of harmful emissions, higher energy efficiency, fewer external costs, less noise, reducing climate change, etc.[103]

The development of multimodal transport technologies is part of the European transport policy. It has been included in the main strategic documents of the EU: The White Paper of 1992 on the future development of common transport policy, the White Paper of 2001, "European transport policy for 2010: time to decide" and the White Paper of 2011 "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system". The 2011 Transport White Paper states that all core network airports should be linked to the railway network , preferably high-speed by 2050.

The European Commission tried to raise the importance of multimodality for EU transport during the 2018 "Year of Multimodality". As was stated by Erceg, Činčurak Erceg and Kilic, "it appears that these actions are more focused on promoting multimodal transport and highlighting its advantages, which will ultimately lead primarily to a reduction of pollution, congestion, and costs rather than they aimed at passing legislation."[104]

The main advantages of multimodal transport consist of: saving costs and time by using each mode of transport optimally; better utilisation of the capacity as a result of optimal use of each mode; lower energy consumption; reduction of the harmful effect of transport on the climate and the environment.[105] Therefore, in connection with the development of sustainable transport, many states are

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modes of transport based on a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country." United Nations Treaty Collection, United Nations Convention on International Multimodal Transport of Goods, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en], Accessed 4 April 2022

102 Zelenika R., Nikolić, G., *Multimodalna ekologija – čimbenik djelotvornoga uključivanja Hrvatske u europski prometni sustav*, Naše more, Vol. 50, No. 3-4, 2003, p. 138

103 Pencheva, V., Asenov, A., Sladkowski, A., Ivanov, B., Georgiev, I., *Current Issues of Multimodal and Intermodal Cargo Transportation* in: Sładkowski, A. (ed.), Modern Trends and Research in Intermodal Transportation, Studies in Systems, Decision and Control, Vol. 400, Springer, 2022, p. 74

104 Erceg, Činčurak Erceg, Kilic, *op. cit.*, note 101, p. 51

105 Pencheva, Asenov, Sladkowski, Ivanov, Georgiev, *op. cit.*, note 103, p. 61

promoting multimodal transport development through the use of rail and water transport. "These sustainable options are developing as alternatives of the most common modes of transport—road and air, which are the least sustainable choice of mode."[106]

The importance and necessity of multimodal transport are also emphasized in Communication Sustainable and Smart Mobility Strategy – putting European transport on track for the future (ports and airports should become hubs of multimodal mobility, thus improving air quality at the local level).[107] It is also highlighted that "the COVID-19 pandemic has demonstrated how increased multimodality is also crucial to improving the resilience of our transport system and how ready the public is to embrace sustainable alternative modes of travel."

According to the European Green deal and "Fit for 55" package, European transport is based on the multimodal system, which should improve connectivity and internal market between all regions. It is expected that an interconnected multimodal transport system should be based on an "affordable high-speed rail network, abundant recharging and refueling infrastructure for zero-emission vehicles and supply of renewable and low-carbon fuels."[108]

Multimodal transport as a more environmentally friendly form of transport can certainly serve as a way to achieve environmental goals. However, this form of transport needs to be more promoted and encouraged, but also the existing legal framework needs to be adapted.

## 6. "FIT FOR 55" AND SHIFTING FROM AIR TO RAIL TRANSPORT

Mobility and transport enable and simplify our economic and social life. Traveling leads to greater cohesion and empowers European identity.[109] To achieve carbon-neutral transport by 2030 the Commission proposed revising legislation and implementing new initiatives as part of the active policy of revitalization of rail transport in the EU.[110] In 2021 the Council adopted conclusions on rail, highlighting the further development and boosting of rail freight and passenger

106 Pencheva, Asenov, Sladkowski, Ivanov, Georgiev, *op. cit*., note 103, p. 64

107 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Sustainable and Smart Mobility Strategy – putting European transport on track for the future [2020] COM/2020/789 final

108 *Ibid.*

109 *Ibid.*

110 Commission Staff Working Document Evaluation of Regulation (EU) No 913/2010 concerning a European rail network for competitive freight [2021] SWD(2021) 135 final, p. 8

transport competitiveness.[111] Initiatives and measures proposed in the "Fit for 55" package and nominating 2021 The European Year of Rail boost and promote rail compared to other transport modes, especially air transport. As stated, the EU is trying to shift the majority of medium-distance passenger transport to rail[112] by 2050.

Do ambitious Green Deal goals and "Fit for 55" make rail and air transport rivals since the initiative on the EU level proposes the shift from air to rail due to sustainability or should multimodal air-rail transport solutions become complementary to meet the target?

Aviation is one of the industries most hit by the Covid-19 pandemic, and it is one of the industry sectors most affected by the "Fit for 55" legislative proposals.[113] Although it is expected that "Fit for 55" package will transform aviation and transport in general towards net-zero carbon emissions in 2050 and a reduction of 55% greenhouse gas (GHG) emissions by 2030 it will touch aviation from many different angles such as:

- mandated blending of sustainable aviation fuels (SAF)
- ending of free carbon allowances
- adding a new taxes on fossil fuels including jet fuel
- change in Carbon Border Adjust Mechanism (CBAM) that will raise the fuel cost on which airlines rely.[114]

In response to the "Fit for 55" proposals, European Airlines, aerospace manufacturers, and air navigation service providers published the initiative "Destination 2050" as their plan for full decarbonization. It is recognized that the whole European transport ecosystem and decision-makers must act together to reach common goals.[115] After the COVID-19 pandemic and the impact on the aviation

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111 European Council, Building the single European railway area, 2022, [https://www.consilium.europa.eu/en/policies/single-eu-railway-area/], Accessed 8 April 2022

112 Railway and waterborne transport are mentioned as the most environmentally friendly modes of transport, which is why shifting transport to these modes is proposed. "The total environmental costs in the EU-28 of air pollution, climate change, well-to-tank emissions and noise caused by flying are substantially higher (EUR 32.7 billion for a selection of 33 airports) than those caused by rail passenger transport (EUR 7.8 billion)." EEA, Report No 19/2020, Train or plane?, *op. cit.*, note 28, p. 19

113 Adler, K., EC Fit for 55 proposals promise „transformative impact" on aviation, 2021, [https://cleanenergynews.ihsmarkit.com/research-analysis/ec-fit-for-55-proposals-promise-transformative-impact-on-aviat.html], Accessed April 9 2022

114 *Ibid.*

115 Royal Netherlands Aerospace Centre, Destination 2050, A Route to Net Zero European Aviation, 2021, [https://www.destination2050.eu/wp-content/uploads/2021/03/Destination2050_Report.pdf] Accessed April 9 2022

sector, it is more than ever important to revise existing legislation and programs and approach them in a new and better way. On July 14th 2021 a new proposal for a Regulation on ensuring a level playing field for sustainable air transport was presented, highlighting that a uniform and a clear set of EU rules must apply at all EU levels enabling equal opportunities for all airlines and airports.[116] Mandates prescribed in "Fit for 55" under the program named ReFuelEU Aviation Initiative regarding the Sustainable Aviation Fuel are correlated with the aviation industry's interest in using sustainable biofuels and governments must implement constructive policy framework and legislation to avoid "the creation of a patchwork of different measures on the national level."[117]

Due to the European Green Deal goals and promoting rail transport as the most sustainable, there are initiatives and debates that some air routes should be operated by high-speed trains (HSR) instead.[118] According to the available data and analysis, this idea needs to be further discussed and explored from different angles: environmental, economic, and social. It is important to find areas where rail and air are complementary. Compared to rail transport, aviation produces much more GHG emissions, but road[119] transport produces 5 times more than aviation and 140 times more than rail transport. Some authors emphasize that "the introduction of HSR services does not necessarily lead to overall environmental advantages".[120] However, all recent studies and debates on policymaking go toward the air-rail shift. For example, there is an initiative in France to prohibit by national law domestic flights when there is an alternative by train for a trip less than 2 hours and 30 minutes, with the exception only of connecting flights to distant destinations.[121]

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116 Proposal for a Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport [2021] COM/2021/561 final

117 *Ibid.*

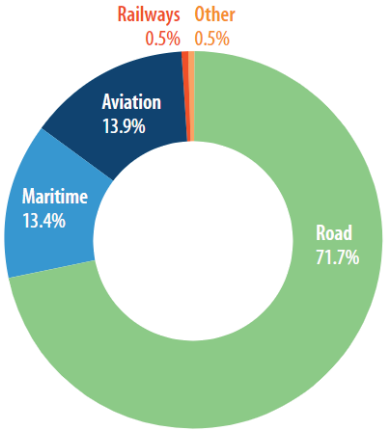
118 Eurocontrol, Think paper #11, *Plane and train: Getting the balance right,* 2021, [https://www.eurocontrol.int/publication/eurocontrol-think-paper-11-plane-and-train-getting-balance-right], Accessed 9 April 2022

119 According to the White Paper of 2011, 30% of freight road transport longer than 300 km needs to be redirected to other modes of transport by 2030, such as rail and water transport; and by 2050 more than 50%

120 D'Alfonso, Jiang, Bracaglia, *op. cit*., note 53, p. 262

121 Ministere de la Transition Ecologique, *Climate and resilience law: ecology in our lives,* 2021, [https://www.ecologie.gouv.fr/loi-climat-resilience], Accessed 9 April 2022

**Figure 4.** Share of transport GHG emissions in 2018.




*Source:* Eurocontrol, Think paper #11, 2021, *Plane and train: Getting the balance right,* [https://www.eurocontrol.int/publication/eurocontrol-think-paper-11-plane-and-train-getting-balance-right] Accessed 9 April 2022

The EEA "Train or plane?" report of 2020 shows that a number of studies have tried to identify the impact of high-speed rail on air travel supply and demand in Europe: "while high-speed rail has an impact on the number of seats offered, there is mixed evidence for how this affects the number of flights, which is most relevant from an environmental point of view."[122]

The "plane vs. train "substitution is mainly discussed in the two categories: distances up to 500 km and 500-1000 km. The goal is to substitute short-haul flights with High-Speed Rail (HSR). This would affect 24.1% of European flights, responsible only for 3.8% of aviation gross emissions based on 2019 data.[123] According to the Transport and Environment research "Maximising air to rail journeys", a shift toward the rail transport connecting major European cities with a distance up to 1000 km would reduce only 2-4% of overall EU aviation emissions.[124]

There is also an issue regarding HSR infrastructure. It is indisputable that a big shift to rail requires new infrastructure. The cost of HSR infrastructure is 5 times more than for air transport, and rail infrastructure, in general, is 10 times more damaging to land use "resulting in a total habitat damage cost of € 2.7 billion in

122 EEA, *Report No 19/2020, Train or plane?, op. cit.*, note 28, p. 11

123 Eurocontrol, *op. cit.,* note, 118

124 Transport and Environment, *Maximising air to rail journeys,* 2020, [https://www.transportenvironment.org/wp-content/uploads/2021/07/2020_07_Air2Rail_Briefing_paper.pdf] p. 7, Accessed 10 April 2022

the then-EU 28."[125] When it comes to noise pollution people living in the vicinity of HSR lines are 5 times more affected than those living in the airport area.[126]

Despite the major COVID-19 impact, aviation is still making efforts toward reaching net-zero emissions by investing in new technologies and the use of sustainable aviation fuels. This all comes with a high cost for the aviation sector and airlines in general, so transport investments should be equally balanced to provide the best result.

Some airlines already offer to their passengers Rail & Fly service as an option in combination with the ticket for the international flight.[127] This is the complementary multimodal solution that combines rail and air transport, especially in the areas where road transport is dense and rail infrastructure already exists. Rail simply cannot substitute air in all terms, but multimodal solutions with a balanced and coordinated approach can improve connectivity and enhance sustainability. Rail transport can be compared with air transport only when discussed HSR. However, it is not possible to achieve the goals set by the EU Green Deal especially when the member states have different infrastructures and financial possibilities making it impossible to shift. Also, there is a major difference in funding because airport infrastructure is usually funded by airports themselves, and the cost of HSR infrastructure is paid from public taxes. In this way, HSR is not the practical and fast way to achieve green goals. Sustainable transport means putting users first and ensuring affordable, efficient and cleaner modes of transport, and here multimodal transport can help. However, an easier way to finance multimodal solutions should be developed.

## 7. CONCLUSION

The development of transport has considerably contributed to the increase of adverse environmental impacts. Also, the impact of pollution on human health is enormous and harmful. However, some modes, like rail and inland waterway transport, are considered more eco-friendly. The European Union's transport policy is focused on sustainable development, and for this purpose, a number of documents, measures, and programs have been adopted.

One of the White Paper "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system" goals is that most

[125] Eurocontrol, *op. cit.,* note, 118

[126] *Ibid.*

[127] Deutsche Bahn, *The train to your plane,* [https://www.bahn.de/service/buchung/bahn_und_flug/rail-and-fly-english], Accessed 10 April 2022

medium-distance passenger transport should go by rail by 2050. It was stated in the White Paper that "the EU aviation industry should become a frontrunner in the use of low-carbon fuels to reach the 2050 target." In the year 2019 European Commission published the European Green Deal that aims to achieve climate neutrality by 2050. The initiative included in the European Green Deal is "Fit for 55" package adopted in 2021. "Fit for 55" represents EU's target of reducing net greenhouse gas emissions by at least 55% by 2030. The "Fit for 55" package stirs the way of presented green transition through new policies, use of regulations, amendments, and non-legislative communication. As envisioned by the 2011 White paper, a single European transport area still remains the main focus and pillar of European transport policy. In 2021, the EU adopted the European Climate Law (Regulation (EU) 2021/1119), which legally sets the EU's target to become climate-neutral by 2050.

Currently, the demand for traveling is reduced due to the COVID-19 pandemic. The COVID-19 pandemic affected all transport modes so the passenger transport within the European Union member states was partially or completely closed during the worst periods of the pandemic.

In order to achieve the recovery of the transport sector from the COVID-19 pandemic, but also to achieve environmental goals, solidarity between Member States and citizens is needed. As pointed out in the European Green Deal, all Member States need to participate in the costs, but assistance will be provided to those who need it most so that everyone can benefit from the transition. The same can be said for transport - all transport modes will have to contribute to the 55% reduction effort.

As was presented in the paper, the EU is trying to shift the majority of medium-distance passenger transport to rail by 2050. In the ambition is to achieve climate neutrality by 2050 every mode of transport should contribute. Railway and waterborne transport are mentioned as the most environmentally friendly modes of transport, so shifting transport to these modes is proposed. However, caution is needed here as well. Due to the European Green Deal goals, there are initiatives that some air routes should be operated by high-speed trains.

The paper raises the question: Do ambitious Green Deal goals and "Fit for 55" make rail and air transport rivals since the initiative on the EU level proposes the shift from air to rail due to sustainability or should multimodal air-rail transport solutions become complementary to meet the target? This sifting is not an easy or quick, and the problems are predominantly infrastructural. Despite all problems caused by the COVID-19, aviation is still trying to achieve net-zero emissions by

investing in new technologies and using sustainable aviation fuels. However, this causes huge costs for the aviation industry.

A complete shift from air to rail is not likely. In general, the choice between the mode of transport that users choose depends on the specific situation. They certainly take into account the length of the trip, cost, reliability, distance, safety, frequency of the connections, connection with other modes of transport and the like. Rail simply cannot substitute air in all terms in distance regions and islands where connectivity is crucial for economic growth and survival. Finally, this is not even necessary since they can be complementary. Rail and air transport offer multimodal solutions that will benefit both transport users and the environment.

In order to achieve the maximum efficiency of these two modes of transport, which would be part of multimodal transport, certain measures and adjustments will certainly be needed. To achive multimodal transportation major airports need to be connected to the rail network. In addition to infrastructural and technical needs, it will certainly be necessary to adapt legal solutions. For this purpose, it is necessary to investigate the legal regulations of multimodal transport, both passenger and transport of goods. It has already been warned in the paper that regulation of multimodal transportation it is not satisfactory. That will certainly lead to the absence of multimodal transport benefits.

"Fit for 55" package is very ambitious and challenging plan. It will affect all industries and citizens. Especially after the COVID-19 pandemic, it is necessary to revise targets set by the "Fit for 55" packages and to implement measures through RefuelEU that will incentivize the use of sustainable aviation fuels (SAF), considering that SAF is three to five times more expensive than jet fuel. It is necessary to boost the production of SAF because higher production will lower the price and consequently rise the demand. However, there is a justified fear that this will not be easy and quick to implement. We should definitely move away from fossil fuels and turn to alternative and environmentally friendly energy sources. Recent political developments have shown that oil supplies could be cut off quickly. Record oil prices on world markets also support the thesis that it is necessary to look for alternative energy sources. We have already said that this will financially burden the aviation industry, which is still in great losses caused by the COVID-19 pandemic. RefuelEU sets mandatory percentages of SAF that must be mixed with kerosene, which increase over time. Therefore, the opposition of the aviation industry is to be expected, especially since the goals change quickly and often and require huge results in a relatively short period of time. Smaller companies that do not have large funds will be particularly affected. Since alternative fuels should actually be used in all modes of transport, it is necessary to investigate whether

there are enough resources for their production. The European Union has set over-ambitious goals and started complex changes in legislation. Looking at the above problems only in air transport, we think it is not unjustified to ask whether it is possible to achieve carbon neutrality by 2050.

Although the European Commission is optimistic about achieving climate neutrality, we do not share their optimism when it comes to transport. Achieving the goal is challenging for all modes of transport. The future COVID-19 epidemiological situation, which is impossible to predict, political situation and armed conflicts will certainly affect the positive outcome, the amount of available energy sources, and the possibility of adapting certain modes of transport (primarily air). It remains to be seen whether is "Fit for 55" indeed suitable for reducing net-zero emissions target of 55% by 2030.

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UDK 338.246.027:061.1(4-67EU)
Review article

# THE EU COMMISSION PLAN TO SUPPORT THE ECONOMY: THE COMPATIBILITY OF STATE AIDS IN EMERGENCY SITUATIONS

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***ABSTRACT***

*The serious risk of a general economic crisis within the internal market, due to the development of the COVID-19 pandemic, has pushed the EU Commission to react in the context of the economic and financial support to the undertakings. The EU Communication of 13 March 2020 offers a first coordinated answer to the prospected crisis. Its most interesting aspect is the clarification of the financial and economic intervention in the economy. The EU Commission suggests that the best actor for the intervention to maintain the competition in the internal market is that of the State(s), but rush to subsidies shall be avoided. Therefore, parts of the Communications are devoted to the evaluation and to the compatibility of State aid projects, in the creation of a new Temporary Framework on State aids. This general approach has proved not-efficient as the pandemic had started affecting all the (Member) States, which reacted with different lock down measures. Therefore, the following amendments to the Communications focus on the future applicable criteria for the compatibility of State aids to face the economic crisis. This paper analyses the EU Commission Temporary Framework on State aid, in order to detect the extent to which it derogates or softens the previous system. For this purpose, the article analyses in depth the EU Commission's Communications in the light of regulation n. 651/2014. After a brief analysis of the practice, the continuity of the Temporary Framework with the common State aid regulation is stressed.*

***Keywords:*** *EU Commission communications, Health and economic crisis, State aid, State aid compatibility, Temporary Framework*

## 1. THE EUROPEAN UNION'S RESPONSE TO THE ECONOMIC CRISIS RESULTING FROM THE HEALTH EMERGENCY

The risk of a general economic crisis within the EU internal market, as a consequence of the COVID-19 epidemic and pandemic outbreak, induced the EU Commission to react on the side of the economic and financial support to the undertakings. The first Communication dates back to 13 March 2020[1] and provides a coordinated answer to the ongoing health emergency through some first economic and financial means devoted to the limitation of the negative effects of the crisis. In the light of the then epidemic situation, which hit particularly Italy and only started to spread in other European Countries, the EU Commission identified some temporary shock factors in the internal market economy.[2] In a framework, where the health situation seemed reasonably affordable, the EU Commission opted for a soft approach, calling the Member States to solidarity, rather the introducing extraordinary means, in order to face the emergency.

The Communication identified three main issues, for which it was necessary to find a coordinated response, as so to avoid hard rebounds on the Member States' economies and on the global financial markets: life and health of the people thought investments on health furniture; the protection of the undertakings and of the employees; the reduction of the impact of the crisis on the economy.

As regards the first objective, the Commission insisted on the existence of an internal market for the health products and equipment, too, in a solidarity approach. As for the second point, the Institution envisaged a temporary modification to the transport sector, with particular regard to air traffic, in order to avoid flights without passengers, and to the touristic sector.

Finally, the Commission introduced economic and financial supports, from the EU and the European Bank on Investments budgets, granting liquidity measures to support undertakings, economic sectors and areas particularly jeopardised, through programs to boost investments, imposing the suspension of the credits in favour of the hit undertakings, keeping liquidity to the economy through the banking sector and investments' initiatives.

Only at the end of the prospected interventions, the Communication dealt with the State aids' issue. The Commission observed that the main response must come

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1 Communication from the Commission, Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final

2 These are determined by the decline of the Chinese economy with impacts on the internal market, the interruption of the supply chain, the decrease of the demand and the problem of the liquidity of the undertakings

from the Member States, due to the limited extent of the EU budget.[3] Furthermore, a national action could be quicker and more efficient, especially in favour of small and medium undertakings, avoiding *rush to subsidies* that would have favoured bigger Member States.

However, for these aspects the Communication constituted a sort of reminder of the actions already admissible pursuant to the Treaty. Indeed, it recalled that Member States could adopt measures favourable to the economy with general impact; or in favour of the consumers; or, alternatively, in application of Article 107(2) and (3) of the TFEU; or, finally, *de minimis* aids.[4] Two elements were completely innovative compared to the pre-existing legal framework: the prospected flexibility in the control of the aid, especially on the basis of the impact of the epidemy on the economy of the concerned Member State, and the quick evaluation of the notified measures, possibly within a few days from the notification.[5] After all, the Commission had already showed a few days before a commitment towards a particular readiness in the examination of the State aid projects linked with the epidemy, with the authorisation issued in 24 hours after the notification.[6]

The insufficiency of a generic response of this kind was soon detected. The exact impact of the economic crisis could not have been perfectly understood at the beginning of March 2020, but its hardness could not be anymore questioned when almost all Member States were hit by the pandemic. After numerous lock-down national provisions, the EU Commission has intervened in short time with the first Temporary Framework for State aid measures[7], amended six times, up to No-

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3 This remark did not impede the adoption of specific measures with EU funding, in the field of the cohesion politics: Ottaviano, I., *Il ruolo della politica di coesione sociale, economica e territoriale dell'Unione europea nella risposta alla COVID-19*, in Eurojus, Vol. 9, No. 3, 2020, pp. 123 ff.

4 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1

5 The number of authorisation decisions has revealed very high from the beginning of the outbreak of the pandemic, Massa, C., *COVID-19 e aiuti di Stato: il Quadro temporaneo introdotto dalla Commissione e le misure di sostegno adottate dagli Stati membri*, in Eurojus, Vol. 9, special number: L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive, 2020, p. 161. The update of the decisions issued of this basis is available at: *Coronavirus Outbreak - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework*, 17 May 2021, [https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf], Accessed 29 April 2022

6 EU Commission Decision, 12 March 2020, SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19 [2020] OJ C 125/1

7 Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 91I/1

vember 2021[8], aimed to clarify the national possibilities for the intervention in the economy in these unique circumstances. The State aid issue became key, and not just a mere part of a general solidarity program for the relaunch of the economy.

These Communications produce an indirect binding effect on the Commission in the exercise of its margin of appreciation. Indeed, the Institution must follow the criteria envisaged therein in the evaluation of the compatibility[9], safe a specific express motivation on the reasons that induced to disregard them in the case at stake[10], under the control of the Court of Justice.[11] Therefore, Member States' interventions gain legal certainty, when the aid project respect the criteria established by the Commission; furthermore, it is possible to expedite the EU Commission control proceedings, under regulation 2015/1589.[12]

This is not the first occasion in which the Commission tries to face a global economic crisis through soft law measures with temporary limited efficacy. Already in 2009, the Institution had adopted a temporary framework[13] in order to tackle the hard distress of the banking system after the financial crisis in the years

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8 Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 112/1; Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 164/3; Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 218/3; Fourth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2020] OJ C 340I/1.; Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C 34/6; Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C 473/1

9 Case T-457/09 *Westfälisch-Lippischer Sparkassen und Giroverband v European Commission* [2014] ECLI:EU:T:2014:683, par. 218

10 Case T-135/12 *France v Commission* [2015] ECLI:EU:T:2015:116, par. 93-; Case C-667/13 *Estado português v Banco Privado Português and Massa Insolvente do Banco Privado Português* [2015] ECLI:EU:C:2015:151, par. 67-; Case C-93/15 P *Banco Privado Português SA and Massa Insolvente do Banco Privado Português SA v Commission* [2015] ECLI:EU:C:2015:703, par. 61

11 Case 323/82 *Intermills v Commission* [1984] ECLI:EU:C:1984:345, par. 25

12 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ 248/9

13 Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis [2009] C 8/1

2007/2008. Nevertheless, the framework at the time differs from the current one due to the different effects of the crisis. Indeed, in that moment it was possible to identify an economic sector particularly jeopardised, the banking market, whose loss of stability affected the general market solidity. Therefore, the measures enacted by the Commission had as object the restoration of the stability and of the solvability of the banks, in order to grant again loans to the undertakings.[14] The current pandemic-related crisis hit indiscriminately all kind of undertakings and productions, so that the prospected solutions needed to have a horizontal impact.

## 2. MEMBER STATES' SUPPORTS OUTSIDE THE SCOPE OF APPLICATION OF THE STATE AID RULES

The first tool for economic public support mentioned by the Commission is the approval of measures that do not qualify such as State aids. For this, the Communication has no innovative functions, since it is self-evident that an economic intervention that does not constitute aid is free from requirements, conditions and authorisations.

In order for the national support not to fall into the scope of application of Article 107(1) of the TFEU, any of the elements constituting the aid shall miss. Since the EU Commission analysis refers to the public intervention in the economy, the measures cannot but be dispensed by the State, or thought public resources. The first requirement of Article 107(1) is fulfilled. Therefore, the selectivity or the prejudice to competition or to the trade between Member States shall alternatively not be met.

This last element is normally presumed, once the existence of the other factors is demonstrated.[15] Nevertheless, *de minimis* aids under regulation n. 1407/2013 are considered to be unsuitable to create harms.[16] Outside the scope of application of

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14 Wagner, L., *Aides d'État: la Commission européenne confrontée au risque systémique*, in Juris Classeur Eur, Vol. 19, No. 1, 2009, pp. 4 ff.

15 Case 730/79 *Philip Morris v Commission* [1980] ECLI:EU:C:1980:209, par. 11; Case C-667/13 *Estado português v Banco Privado Português and Massa Insolvente do Banco Privado Português* [2015] ECLI:EU:C:2015:151, par. 46; Case C-150/16 *Fondul Proprietatea SA v Complexul Energetic Oltenia SA* [2017] ECLI:EU:C:2017:388, par. 31

16 In the same framework, in order to grant the proper functioning the services of general economic interest, the Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] L 114/8 has been modified (Commission Regulation (EU) 2020/1474 of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic [2020] L 337/1). Its scope of application is widened, thus including undertakings in difficulty in the period from 1 January 2020 to 30 June 2021, and extended up to the 31 December 2023

the *de minimis* regime, it seems difficult to overcome the presumption of harm to the competition and to the trade between Member States. According to the Court of Justice[17], the sole fact that the beneficiary operates at a local level, or, on the opposite, exclusively in third Countries, is not a proper element to exclude the negative impact of the aid in the internal market.

The selectivity condition is more sensitive, since its definition appears to be easy and clear-cut, but its practical application can give rise to difficulties. Indeed, on the basis of the Court of Justice and the General Court case law, this requisite is easily satisfied. A measure is deemed to be selective, if it meets one of the four following conditions.

The first is the determination of the beneficiaries, or of particular economic sectors. On this point the Court of Justice interprets widely the notion of selectivity, thus including regimes, although the beneficiaries or the granted amounts cannot be determined individually, and aids granted to wide categories of undertakings. In this regard, the judgment in the case *Adria Wien*[18] remains meaningful, since it recognised a selectivity character of a measure in favour of undertakings manufacturing goods. The fact that the fiscal benefit gives advantages to a wide number of beneficiaries, not to be determined automatically, does not preclude the selectivity of the provisio. Nor the high number of beneficiaries allows to consider the national intervention such as a general ruling of political economy.[19]

Likewise, in the *CETM* case the General Court clarified that the mere exclusion of a sole category of undertakings from the benefit is suitable to satisfy the requisite of the selectivity.[20]

A second useful element for assuming the selective character of the measure is determined by the margin of appreciation of the public body in the identification of the beneficiaries. It follows that not all undertakings or not all requesting subjects can benefit from the subsidy due to the national margin of appreciation[21], nor are there means to grant its absolute general application and the admission to it for all the undertakings concerned.

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17 Case 102/87 *France v Commission* [1988] ECLI:EU:C:1988:391, par. 19; Case C-142/87, *Belgium v Commission* [1990] ECLI:EU:C:1990:125, par. 35; Cases from C-278 to 280/92 *Spain v Commission* [1994] ECLI:EU:C:1994:325, par. 40

18 Case C-143/99 *Adria Wien GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion* für Kärnten [2001] ECLI:EU:C:2001:598, par. 53

19 Case C-75/97 *Belgium v Commission* [1999] ECLI:EU:C:1999:311, paras. 32 ff.

20 Case T-55/99 *CETM v Commission* [2000] ECLI:EU:T:2000:223, par. 39

21 Case C-200/97 *Ecotrade Srl v Altiforni e Ferriere di Servola SpA* [1998] ECLI:EU:C:1998:579, par. 40; Case C-256/97 *DM Transport* [1999] ECLI:EU:C:1999:332, par. 27

Another hypothesis for the selectivity character subsists when it derogates to the general regulation of (private) law. Through an exceptional discipline it is indeed possible to exclude some undertakings or some productions from the application of the general national regulation, conferring them an advantage. Its allocation can be justified to the extent that it grants the coherence of the national juridical or fiscal system.[22]

Finally, the geographical framework of reference can be relevant, if the aid is allocated by a local public entity.[23]

An admissible national intervention must constitute a measure reforming the market or the financial system. As noted by the Commission in its Temporary Framework, these supports might stem from wage integrations, from the suspension from the payment of some taxes, from the economic support attributed directly to consumers for non-enjoyed services. This kind of intervention is always admitted, since it constitutes a reform of the fiscal, or of the commercial system, or it regards the bankruptcy or the work-related discipline law. Therefore, a configuration such as a State aid is precluded. Furthermore, special reasons for their adoption are not needed. The health crisis could be the opportunity for national and EU-level reforms useful for the economic recovery, but the link between the two can have a mere accidental character.

Since these measures do not constitute aids, they do not need to be notified to the Commission pursuant to Article 108(3) of the TFEU. A precautionary approach would suggest to proceed to the notification in any case. The control proceedings might be extremely quick and be concluded in two months after the preliminary examination, according to Article 4 of the regulation 2015/1589, or through the simplified procedure in 20 days.

## 3. THE AUTOMATIC COMPATIBILITY OF STATE AIDS: NATURAL DISASTERS AND EXCEPTIONAL OCCURRENCES

The Temporary Framework recalls the application of some legal basis in the TFEU, concerning the compatibility of State Aids. The objective of the Temporary Framework consists in clarifying the scope and the impact of these provisions to the current pandemic circumstances.

The compatibility clause within of Article 107(2) is automatic, but the Commission controls its correct application. Therefore, in the scope of lit. b) definitions

[22] Cases T-515/13 and 719/13, *Spain v Commission* [2015] ECLI:EU:T:2015:1004, par. 83

[23] Case C-88/03 *Portugal v Commission* [2006] ECLI:EU:C:2006:511, paras. 55 ff.

of *natural disasters*[24] and *exceptional occurrences* have been necessary. Furthermore, the scope of these derogations is restrictive[25], due to their exceptional character, under several standpoints. Firstly, the event must be non-foreseeable, or outside the control of the concerned people, such as a maritime accident[26] or a terrorist attack.[27] Secondly, the economic harm must be a direct consequence of the non-foreseeable events.[28] Finally, the amount of the aid must correspond with the amount of the harm produced by the non-foreseeable events, since the former has a compensatory function.[29]

This last condition has been recalled in the fifth amendment, which reaffirms at point 19 that the aid shall not over-compensate the harm. Therefore, its rigorous quantification shall be proved, and the aids shall cover the losses up to the non-gained profits. For example, the mere length of the crisis; or the social distancing; or the ban to create aggregations is not as such a cause that gives effect to a harm to be compensated pursuant to Article 107(2)(b).

In the Temporary Framework, the Commission lingers on the scope of application of Article 107(2)(b), widening it in the further amendments to the first version of the Temporary Framework. In order to tell this kind of compatible aid, the Institution focuses on the directly jeopardised economic sectors, such as, for example, transports, tourism, culture, detail commerce or the organisation of events. These are immediately harmed by the mere pandemic outbreak, because their customers are reduced as a consequence of the infectious risk. Due to this rationale, the third amendment to the Temporary Framework makes it clear that this kind of aid can

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24 Landi, N., *Exemptions from the General Incomaptibility Principle under Article 87(2) and (3) of the EC Treaty*, in: Santa Maria, A. (ed.), Competition and State Aid: An Analysis of the EC Practice, Alphen aan den Rijn, 2007, p. 51; for further references: Sacker, F-J., *European State Aid Law: A Commentary*, Hart, Beck, 2016

25 Case C-156/98 *Germany v Commission* [2000] ECLI:EU:C:2000:467, par. 46-; Case C-301/96, *Germany v Commission* [2003] ECLI:EU:C:2003:509, par. 106 ff.- *Amplius*: Orzan, M. F., *De jure Compatible Aid under Article 107(2) TFUE*, in: Hofmann, H.C.H.; Micheau C. (eds.), State Aid Law of the European Union, Oxford University Press, Oxford, 2016, pp. 236 ff.

26 State aid NN 62/2000 concerning an oil spill caused by the sinking of oil tanker Erika [2000] OJ C 380/9

27 Communication from the Commission to the European Parliament and the Council: The repercussions of the terrorist attacks in the United States on the air transport industry, COM (2001) 574/F1

28 Case C-278/00 *Greece v Commission* [2004] ECLI:EU:C:2004:239, par. 81; Case T-268/06 *Olympiaki Aeroporia Ypiresies AE v Commission* [2008] ECLI:EU:T:2008:222, par. 52-. As a consequence, a State aid to reinsurance undertakings against natural disaster does not fall in the scope of the rule, because the direct link between the event and the harm misses, case T-135/17 *SCOR SE v Commission* [2019] ECLI:EU:T:2019:287, paras. 97 ff.

29 Case T-423/14 *Larko Geniki Metalleftiki kai Metallourgiki AE v Commission* [2018] ECLI:EU:T:2018:57, par. 142

be granted to all undertakings, notwithstanding the harmed economic sector in which they operate. At the time of its adoption, July 2020, the direct effects of the health crisis on the economy could not be anymore distinguished on the basis of the relevant economic field. The expressly considered case is the prohibition to exercise economic and commercial activities after national lock down measures (par. 13).

The principle of immediacy has been expressly recalled in the Fifth amendment to the Temporary Framework, which includes in the direct relevant harm those prejudices stemming from the impossibility to exercise the economic activity, fully or partly, due to the lock down measures, enacted temporally, or locally, or with sensitive limitations to the access to events/places. This consists of restrictions to the benefit of these services for determined categories of customers, such as, for example, the tourists in the hospitality industry. Other measures, such as social distancing, do not seem to comply with the conditions set forth in Article 107(2). The characteristic element in the application of Article 107(2)(b) is thus determined by the immediacy of the harm as a direct consequence of the pandemic diffusion. Therefore, aids can be granted with a margin of flexibility, including favouring undertakings which had already benefited from rescue aids or restructuring aids.

The extension of the application of Article 107(2)(b) constitutes an element of flexibilization. Indeed, the economic difficulty is not a direct consequence of the pandemic exceptional occurrence, but depends on the national restrictions' measures. Nevertheless, the slightly wider interpretation of the Treaty rule set forth by the third amendment appeared – and indeed is – useful, since the closing of the commercial activities had been imposed with the considered prevailing scope of protection of everybody's health, entrepreneurs' and their employees', too. With this clarification in mind, it is possible that those Member States, enacting stronger lock down measures, could more easily grant aids in favour of non-operating activities.

## 4. THE APPLICATION OF THE RULES ON COMPATIBILITY DURING THE HEALTH CRISIS

The EU Commission's margin of appreciation is clearer within the scope of Article 107(3), since the compatibility is not automatic. Nevertheless, these exceptions must be interpreted restrictively, too.[30] The character of immediacy in the causality becomes irrelevant in the scope of Article 107(3). Lit. b) has been interpreted

[30] Evans, A., *EC Law of State Aid*, Oxford University Press, Oxford, 1997, pp. 107 ff.

in the sense that the whole national economy shall be affected[31], although in the context of the internal market. Lit. c), on the under development of some productions or economic activities, or geographical areas, grants a wider margin of appreciation.[32] Indeed, it is applicable to each economic sector or geographical area, even at a national level. Although the difficulty condition can be evaluated on the basis of national criteria, the impact of the aid on the internal market must be verified.[33] Furthermore, the aid must be strictly linked to initial investments, to the creation of new jobs, or to the entrepreneurship reconstruction. It is not possible to envisage aids with only one beneficiary. For this reason, the Commission had devoted a large part of regulation n. 651/2014[34] to investments aids and adopted the Guidelines on restructuring aids.[35]

Lit. c) has been the legal basis in order to overcome the financial crisis in 2008. Up to that moment, it had been rarely applied.[36] At that time, the Commission initially refused to recognise the applicability of lit. b), because the economic harm hit particularly the sole banking sector in the first stage of that crisis.[37] Therefore, it was preferred to take advantage of the Guidelines on rescuing and restructuring undertakings in difficulty, based indeed on lit. c). Under this legal ground, rescue supports were granted in favour of the Roskilde Bank[38], of the Hypo Real Estate[39] and of Bradford & Bingley.[40] Only in a further stage of the financial crisis, its general rebounds were clearer, thus admitting exceptions to the aids' prohibition pursuant to lit. b), too.

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31 Cases T-132/96 and T-143/96 *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [1999] ECLI:EU:T:1999:326, par. 167; Cases C-57/00 P and C-61/00 P, *Freistaat Sachsen Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [2003] ECLI: EU:C:2003:510, par. 93

32 Craig, P., De Búrca G., *EU Law. Text, Cases, Materials*, Oxford University Press, Oxford, 2020, p. 1173

33 Cases T-126/96 and T-127/96 *Breda Fucine Meridionali SpA (BFM) and Ente partecipazioni e finanziamento industria manifatturiera (EFIM) v Commission* [1998] ECLI:EU:T:1998:207, par. 79

34 Commission Regulation (EU) No 651/2014, of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1

35 Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C 249/1

36 Karpenschif, M., *Manuel de droit européen des aides d'État*, Bruylant, Bruxelles, 2019, p. 166

37 Further, on the subsidies in the financial sector: Ianus, R., Orzan, F., *Aid Subject to a Discretionary Assessment under Article 107(3) TFEU*, in State Aid Law of the European Union, State Aid Law of the European Union, Oxford University Press, Oxford, 2016, pp. 267 ff.

38 State aid NN 36/2008 – Denmark - Roskilde Bank A/S, Brussels, C (2008) 4138 final

39 Commission Decision of 18 July 2011 on the State aid C 15/2009 (ex N 196/2009), which Germany implemented and is planning to implement for Hypo Real Estate [2010] OJ C 13/58

40 State aid NN 41/2008 – United Kingdom Rescue aid to Bradford & Bingley Brussels C (2008) 5673 final

The 2008 experience demonstrated the opportunity to take immediately advantage of both legal grounds in the pandemic crisis, in favour of the harmed undertaking or the jeopardised production, and globally, too, in order to overcome the prejudice of a Member State market. Therefore, the scope of application of both derogations is detailed in the first version of the Temporary Framework.

Concerning lit. c), the Guidelines on rescue and restructuring aids are once more recalled. These could be useful in order to support undertakings in financial difficulty. The crisis could be determined or only aggravated by the pandemic. Clearly, regional aids have no relevance here, since the final objective is not the support of a geographic underdeveloped area in a State[41], but rather to maintain a minimum level of competition and competitiveness in the market.

More room is reserved to the analysis of lit. b), which is considered as a main tool. The cross-impact of the crisis and the horizontal character of the economic and financial difficulties stem clear from the beginning of the pandemic outbreak. The general reference to a serious disturbance in the economy of a Member States, within lit. b), appears proper so as to face a situation, where it is not possible to predetermine a sector or groups of sectors particularly affected, different from those initially already considered in the field of Article 107(2)(b).

A commonality with the 2008 crisis is constituted by the involvement of all Member States, since the lock down measures impact on all undertakings, crossing the whole internal market. A partial geographic distinction can depend on the strictness and on the duration of the national restrictive measures. Nevertheless, in the internal market a full closing of the exercise of economic activities in a Member State necessarily impacts on other States, even if these adopted more flexible solutions. The grave repercussion mentioned in lit. b) is therefore interpreted in order to include economic harms to the internal market globally considered, within which each Member State is free to introduce autonomously lock down, and, symmetrically, recovery measures (within the coordination envisaged by the Commission).

The general criterium for the compatibility evaluation is the adequacy of the measure, in the two prongs of its suitability to reach its target and of its proportionality. The last amendment to the Temporary Framework expressly insists on this last condition. Although the State aid creates distortions to the competition, these must be limited to what is necessary in order to recover the repercussion to the Member State economy. Therefore, the support measures must be suitable to reach their incentivisation targets, and be structured in a way so that to supply the ben-

[41] Case 248/84 *Germany v Commission* [1987] ECLI:EU:C:1987:437, par. 19

eficiary with the objectively needed tools.[42] In any case, overcompensations must be avoided. These characteristics summarise the preceding practice and case law, in the restrictive perspective of the applications of the prohibition's exceptions.

The Commission details the objective conditions to be met in order to presume the compatibility requisites of Article 107(3)(b). These are distinguished on the basis of the form of the aid[43], with potential possible aggregations among different kind of aids.[44] The amendments to the Temporary Framework further widen the number and the kind of measures falling into its scope of application[45] and the interpretation of the compatibility requirements, in order to grant legal certainty to the supplying Member State and to the beneficiaries, and to allow the maintenance of economic activity in the internal market notwithstanding total or partial lock down measures.

## 5. THE DETERMINATION OF THE BENEFICIARIES

It is only in the framework of the clarifications on the applicability of Article 107(3)(b) that the EU Commission submits some specifications over the potential beneficiary of the aid.[46] Their scope consists in the individuation of undertakings that are in a difficulty situation strictly linked with the health and economic crisis, so that the aids can be suitable in order to overcome the grave repercussion envisaged in the provisio. On the opposite, the public support would risk to be almost casual and therefore useless for the economic recovery. Therefore, it seems correct that these guidelines on the determination of the beneficiary do not apply in the scope of Article 107(2)(b), due to its compensation purpose.

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42 Ahlqvist., V., Claici, A., Tizik, S., *How to Estimate the COVID-19 Damages? Economic Considerations for State Aid During a Time of Crisis*, in European State Aid Law Quarterly, Vol. 19, No. 2, 2020, p. 153 submit that the harmed undertakings could prove the prejudices suffered because of the crisis, in order to allow the State to enact immediately the best favourable measures

43 EU Commission therefore distinguishes direct grants, repayable advances or tax breaks; loan guarantees; subsidized interest rates for loans; guarantees and loans conveyed through credit institutions or other financial institutions

44 Honoré, M., *State Aid and COVID-19 - Hot topics*, in European State Aid Law Quarterly, Vol. 19, No. 2, 2020, pp. 111 ff.; Massa, C., *op. cit*., note 5, pp. 155 ff.; Riedel, P.; Wilson, T.; Cranley, S., *Learnings from the Commission's Initial State Aid Response to the COVID-19 Outbreak*, in European State Aid Law Quarterly, Vol. 19, No. 2, 2020, p. 115

45 From the characterisation view point, paras. 18 ff. of the first amendment appear interesting, since they determine tools to sustain research and innovation on COVID-19. Although its premise refers to lit. c), it seems that these measures fall within the scope of lit. b), since they are oriented towards the promotion and the execution of an important project of common European interest, which is the health and care rights

46 Further: Riedel, P.; Wilson, T.; Cranley, S., *op. cit*., note 44, p. 122

The individuation of the beneficiary has incurred into modifications in the amendments of the Temporary Framework. The first communication required the undertaking not to be in difficulty at the date of 31 December 2019.[47] This condition served the purpose to grant a strict link between the economic difficulties and the crisis, so that the aids could be granted to sound undertakings. The negative development of the events imposed a flexibilization of this requirement. The third amendment to the Temporary Framework admits to all kind of supports small businesses and undertakings already in difficulty, too. The closing of many economic activities open to the general public, usually organized such as small undertakings, has probably induced to open the access to the public support. The sole fact that these undertakings employ a small number of employee, or are conducted within a family, has not hidden the high number of this kind of enterprises and the economic, financial and social repercussions of their potential liquidation or bankrupt. Neither in this case can the public support be generalized. Indeed, these undertakings shall not be under any insolvency proceedings according to national law, nor have benefitted from any rescue or restructuring aid.[48] Therefore, with respect to the definition of undertaking in difficulty, the grave loss of capital stock or of funds becomes irrelevant. In July 2020, at the adoption of the third amendment, this effect on the structure and the solidity of the small undertaking was practically unavoidable, so that the application of these criteria for the determination of the beneficiary would have been too preclusive.

Nevertheless, due to the strict link between the grave economic difficulty of these undertakings and the lock down measures, it is submitted that at least a consistent part of these small enterprises could benefit from the aids granted according to the para. 2(b), at least as clarified by the third amendment, if not from *de minimis* aids. The economic loss seems to be easily proved, and at the same time it seems efficient to support the undertakings with a financially limited aid.

Despite the general and understandable economic and financial difficulty, the Temporary Framework has not introduced any exception the *Deggendorf* rule[49], that is the prohibition to grant new aids to a beneficiary that has not restored

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47 The notion of difficulty is defined pursuant to Article 2(18) of the regulation n. 651/2014, which differs according to the undertaking being a SME or a big undertaking

48 Nevertheless, it is provided that the undertaking, having benefitted from rescue aids, can receive other kind of aids within the Temporary Framework to the extent that it has paid back the loan or cancelled the warranty; or, having received restructuring aids, it is not subject to a restructuring plan anymore

49 Case C-355/95 P *Textilwerke Deggendorf GmbH (TWD) v Commission and Germany* [1997] ECLI:EU:C:1997:241

previous illegal aids.[50] The solution appears consonant with Article 1(4)(a) and (b) of the regulation n. 651/2014, that excludes from its scope of application beneficiaries subject to an outstanding recovery order. The Temporary Framework seeks not to introduce exceptions to the general State aids discipline, thus envisaging a potentially dangerous precedent. Despite the fact that every kind of undertaking risks serious harm, therefore needing a public support, the principle of correctness within the market prevails even within the Temporary Framework, so that new aids cannot be granted to whom shall give back public subsidies. Since the beneficiary of an illegal aid is already in a position of (incorrect) advantage with respect to its direct competitors on the market, it cannot be further favoured. If it received other aids, its market position would never be rebalanced with that of its competitors.

The Court of Justice has recently clarified that the State has no duty to grant aids, and can impose further procedural conditions with respect to the requirement imposed by the Commission in its authorization decision.[51] Among these, a declaration from the beneficiary, stating that it is not subject to an outstanding recovery order, can be included, in order to grant a reasonable certainty about the respect of the conditions established by the regulation n. 651/2014.[52] The judgment is interesting not only because it clarifies the trilateral relationship Commission – Member State – beneficiary as regards the effects of the Commission decision and the role of the State, but especially because of its date. On 6 May 2020 Europe was gradually going out of the first lock down period, whose consequences could not be perfectly clear. The margin of appreciation of the States leaves them the

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50 The Italian legislator has introduced a derogation to this rule, on which: Ciprandi, A., *Aiuti di Stato nell'emergenza COVID-19: il legislatore italiano sospende la c.d. "clausola Deggendorf". Deroga giustificata o deviazione eccessiva da un principio fondamentale?*, in Aisdue, 15 July 2020, pp. 43 ff., [https://www.aisdue.eu/agnese-ciprandi-aiuti-di-stato-nellemergenza-covid-19-il-legislatore-italiano-sospende-la-c-d-clausola-deggendorf-deroga-giustificata-o-deviazione-eccessiva-da-un-princi/], Accessed 29 April 2022

51 Cases from C-415/19 to C-417/19 *Blumar SpA and Roberto Abate SpA v Agenzia delle Entrate* [2020] ECLI:EU:C:2020:360, par. 23

52 This practice can rise doubts on the efficacy of the vigilance duty of the State concerning the use of the aids, which can be inferred from Article 20 of the regulation 2015/1589, on abusive aids. If the beneficiary uses the aids in a different way with respect to what established in the Commission authorization decision, the institution can start a formal investigation procedure, the same envisaged for illegal aids. Here, the State is fully part of the procedure and the addressee of the final decision. If, after an abuse of the beneficiary, the State is subject to a Commission decision, a duty of vigilance can be derived, Keppenne, J.K., *Une vue d'ensemble des règles de procédure de l'art. 88 CE et commentaires sur leur application depuis l'entrée en vigueur du règlement 659/1999*, in: AEA – Association Européenne des Avocats (ed.), Droit européen de la concurrence: un nouveau rôle peur les Etats membres, Bruylant, Bruxelles, 2001, p. 242. If the State is not aware of restitution duties from the undertaking, the vigilance is most probably non-effective

evaluation of the opportunity to grant aids and their implementation within the Temporary Framework, too.

## 6. SOME FINAL REMARKS

The Temporary Framework and its amendments use the notion of exceptional circumstances from their very beginning. It is meaningful that the terms of Article 107(2)(b) of the TFEU, and in particular that of *exceptional occurrences*, are not used.[53] The definitions stemming from the precedent practice and case law could have allowed a characterization of the pandemic such as an exceptional occurrence, which would have covered all the State aids granted in order to face the crisis, safe the respect of the principle of necessity and proportionality. The automatic compatibility would have allowed the States to act even more quickly.

Nevertheless, this open approach would have produced some difficultly manageable consequences. The Member States would have felt free to grant subsidies, making less controls on the adequacy and the proportionality of the measures. From the Commission, only authorisation decisions would have been expected, quickly issued after simplified procedures or after preliminary examinations. A decision of a different kind would have been probably contested, thus following an expansion of the time needed to grant the aid, a prejudice to the legal certainty and practically a grave harm to the undertakings.

The Commission has therefore preferred a third way, based on its consistent practice.[54] The notions used in Article 107 of the Treaty and in the Temporary Framework must have a different interpretation and refer to diverging notions. Therefore, not all aids granted due to the pandemic can fall within the scope of application of Article 107(2)(b). With this, the EU Commission maintained the peculiarity of the automatic compatibility, at the same time softening the substantial conditions for the issue of a positive decision according to Article 107(3).[55] In this way it has balanced two needs. The first one relates to the serious control on the notified measures. The pandemic situation cannot justify national reactions outside the (EU) law, where Member States grant unconditionally subsidies. The

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53 The analysis of the other linguistic versions confirms the deliberate difference in the two texts. In Article 107 we can read *eventi*, *acontecimientos*, *Ereigniss*, événements; in the Temporary Framework: *circostanze*, *circumstancias*, *Umstände*, *circonstances*

54 According to Quinley, C., *The European Commission's Programme for State Aid Modernization*, in Maastricht Journal of European.and Comparative Law, Vol. 20, No. 1, 2013, p. 43 the Commission's practice makes it possible to define *a priori* which aids are compatible

55 Ciprandi, A., *op. cit.*, note 50; Nicolaides, P., *No New Aid to Undertakings that Have not Yet Repaid Incompatible Aid*, 19 May 2020, available at: [www.lexxion.eu/en/stateaidpost/no-new-aid-to-undertakings-that-have-not-yet-repaid-incompatible-aid/], Accessed 29 April 2022

second one is the quick and certain answer to the objective difficulties of the undertakings. The individuation of the applicability conditions of Article 107(3) is useful for the Member States in order to draft measures certainly satisfying them, thus realizing the certainty of the compatibility, and for the Commission in order to close the control proceedings quickly, after the preliminary examination. The envisaged limits, as, for example, in the determination of the beneficiaries, are once more useful in order to prevent frauds, that divert from the final objective to face the economic crisis.

Only the persisting health crisis has induced the Commission to extend the scope of application of Article 107(2)(b), nevertheless clarifying its applicability conditions in the fifth amendment. This choice can be justified by a new evaluation of the proportionality *in abstracto*, needed because of the new health and medical discovers, the availability of vaccines and of health treatment, that allowed a gradual reopening of the economic and social activities. Furthermore, the global impact of the crisis limits the risks of abuses by Member States.

The last (worrying) limitation is that of time. The amendments of the Temporary Framework keep extending its applicability of the Temporary Framework, which is fixed on 30 June 2022 by the sixth amendment, safe some further exceptions according to the scope of the aid. The current situation induces to ask whether a continuous extension of the Temporary Framework is the best way to face the economic impact of the health crisis, since it should be temporary in nature and suitable to solve specific problems. On the opposite, it risks being applicable for a long time, perduring those exceptional circumstances that allows the automatic grant of a proportionate and compensatory aid.

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UDK 341.645(4-67EU):340.131(439)
Review article

# HUNGARY AND THE LUXEMBOURG COURT: THE CJEU'S ROLE IN THE RULE OF LAW BATTLEFIELD

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***ABSTRACT***

*After the introduction of the then Article F.1 TEU by the Amsterdam Treaty, later supplemented by the Nice Treaty, Hungary has earned the dubious reputation to be the first Member State against which an Article 7 TEU procedure has been triggered. While the predominantly political process is apparently stalled for the time being, the Court had to deal with various aspects of the deteriorating rule of law situation. Although forming part of an undeniably fragmented approach, the Court's judgments nevertheless clearly attest the retrogressive developments in Hungary since 2010.*

*The analysis of the Court's jurisprudence is based on the qualitative measurement of the rule of law indicators drawn up by the Venice Commission of the Council of Europe. The identification of the cases pertinent to our investigation presents a challenge by itself as there is no label attached to a case dossier titled "rule of law". In addition, several relevant cases deal with issues which prima facie do not have a bearing on this topic. Thus, e.g. the case relating to the radical lowering of the retirement age for Hungarian judges apparently revolves around age discrimination in the workplace while in fact these measures were politically motivated and had an adverse effect on judicial independence.*

*The subject-matter of the cases identified so far range from the independence of the judiciary and regulatory bodies to the functioning of NGOs and higher education institutions; from the criminalisation of assistance for asylum seekers to the judicial challenge of the conditionality regulation. Most cases are infringement proceedings initiated by the European Commission but the Court was also turned upon through preliminary reference or actions for annulment.*

*By analysing the submissions of the parties, the opinions of the Advocate General as well as the Court's assessment thereof, the paper aims to evaluate the role of the Court: its potential and the limitations. While not denying the Court's contribution to the provision of consistent responses against the systemic threats against EU values, there are various institutional and procedural constraints hampering the Court's ability to secure compliance in the subject area.*

***Keywords****: Court of Justice of the European Union, conditionality regulation, rule of law, democratic backsliding, Hungary*

## 1. INTRODUCTION

Whereas at the beginning of the integration project it was thought that the Union posed more serious threat to the legal order of the Member States than the other way round,[1] this is not the case anymore. On the positive side, the EU has evolved into a value-based organization with a growing number of democratic traits, on the negative side, several Member States have recently backslid from liberal to illiberal democracies.[2]

In general, there are four major justifications invoked by illiberal governments to rationalize their variance with European values. According to Kochenov and Bárd, these include the invocation of national sovereignty in general and the invocation of national security in specific circumstances (see e.g. the so-called Lex CEU, Lex NGO and Stop Soros cases below), in addition, the more sophisticated tool of reference to constitutional identity, and finally, disinformation campaigns.[3]

As there are numerous studies on the illiberal system in Hungary and the systematic disabling of checks and balances,[4] the present article focuses on the role of the EU institutions, more specifically the role of the CJEU in the fight against rule of law backsliding in Hungary. In addition, the paper also examines the EU toolbox to counteract progressive destruction of law in Member States. The paper starts with the recapitulation of the concept of the rule of law and the identification of the cases related to rule of law in Hungary (Section 2), then it goes on to briefly

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1 See e.g. the *Solange*-saga: Solange I, BverfGE 37, 291 (1974); Solange II, BverfGE 73, 339 (1986); Solange III, BverfGE 89, 155 (1993); Solange IV, BverfGE 102 (2000). See also Hilpold, P., *So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European Popular Spirit*, Cambridge Yearbook of European Legal Studies, Vol. 23, 2021, pp. 159-192; Komanovics, A., *A Lisszabonba vezető rögös út, avagy az Unió emberi jogi deficitjének felszámolása*, in: Pánovics A. (ed.), Együtt Európában. Múlt, jelen, jövő. Egyetemi tanulmányok, Budapest 2009, pp. 156-196

2 Democratic backsliding: rule of law backsliding is a 'process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.' Pech, L.; Scheppele, K.L., *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies Vol. 19, No. 3, 2017, at p. 8

3 Kochenov, D.; Bárd, P., *Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement*, RECONNECT, Working Paper No. 1, 2018, [https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf], Accessed 17 May 2022, p. 10

4 See the various publications of RECONNECT, a multidisciplinary research project [https://reconnect-europe.eu/publications/], Accessed 17 May 2022, Kochenov; Bárd, *op. cit.*, note 3; see the 2020, 2021 and 2022 issues of the Hungarian journal Fundamentum [http://fundamentum.hu/], Accessed 17 May 2022; or various posts and debates of the Verfassungsblog [https://verfassungsblog.de/tag/rule-of-law/], Accessed 17 May 2022

describe the facts of the cases and the major findings of the Court (Section 3), finally it investigates the contribution of the Court, as well as other institutions, to the protection of rule of law and basic values of the EU (Section 4). In doing so, the article examines whether the toolbox available for the EU is sufficient to secure adherence to European values, whether the institutions deployed the instruments in a meaningful manner, and whether existing instruments should or could be fine-tuned.

The article finds that there is a great asymmetry between the values laid down in Article 2 TEU and the competence of the institutions to act upon these values.[5] The reasons for the EU's inaction[6] are numerous: as far as the Court is concerned, its room for manoeuvre is limited by its judicial character and the institutional and legal framework set by the TFEU (e.g. the types of actions or the *locus standi* rules). In addition, the Court sometimes failed to exploit even those restricted avenues. Indeed, the modest results are partly due to extrinsic factors, including the false claims to democratic legitimacy,[7] symbolic and/or creative compliance, as well as the selective strategy of the Commission in launching infringement actions.

## 2. THE IDENTIFICATION OF RULE-OF-LAW RELATED CASES

### 2.1. The concept of rule of law

In order to identify the cases, the notion of the "rule of law" has to be clarified first. While the founding Treaties did not originally contained the concept of the rule of law, it was "encapsulated in the first Treaty provision describing the role of the European Court of Justice" providing that the Court "shall ensure that in the interpretation and application of this Treaty the law is observed".[8] Formal enshrinement in the Treaties was preceded by a judicial reference in *Les Verts* where the Court found that "… the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic

5 Wouters, J., *Revisiting Art. 2 TEU: A True Union of Values*, European Paper Vol. 5, No. 1, 2020, pp. 255-277, at p. 260: "there is a striking asymmetry between the proclamation of the values in Art. 2 and the Union's competences to act upon these values."

6 *Ibid.*, p. 260

7 Since its election in 2010 until the latest (2022) reelection, Fidesz has enjoyed supermajority in Parliament with just a few exceptions, thus the capturing of institutions and the democratic backsliding has taken place without the *formal* violation of constitutional norms

8 Art. 164 EEC Treaty

constitutional charter, the Treaty."[9] It was the SEA which contained the first brief reference to the notion in its preamble, then in the Maastricht Treaty the term was mentioned in relation to the Common Foreign and Security Policy in TEU as well as the development cooperation in the EC Treaty.[10] The 1993 Copenhagen criteria defining whether a State is eligible to join the European Union provide, *inter alia*, that "[m]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".[11] It is remarkable to note that at the time when the accession criteria were adopted the EU itself had no mechanism ensuring that "old" Member States meet the same criteria.

In 1997, a new provision was introduced in Article 6 TEU by the Amsterdam Treaty stipulating that the Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." The sanctioning mechanism introduced by the Amsterdam Treaty has been complemented by a preventive mechanism in the Nice Treaty, laid down in Article 7 TEU.

The Lisbon Treaty moved the principles from Article 6 to Article 2 TEU, replaced the term "principles" with "values", a terminological variation probably devoid of legal relevance,[12] and expanded the list containing the values.[13] With the abolition of the pillar structure, the Court's jurisdiction was extended to cover the Area of freedom, security and justice. In addition, the Court gained jurisdiction to review of the legality of the acts of the European Council intended to produce legal effects vis-à-vis third parties.[14] Finally, the Court's jurisdiction was extended to give preliminary rulings concerning the validity and interpretation of acts of the bodies, offices or agencies of the Union.[15]

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9 Case 294/83 *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166, par. 23

10 Art. J.1(2) TEU and Art. 130u(2) EC Treaty, respectively

11 European Council Conclusions of 21-22 June 1993, SN 180/1/93 REV 1; [https://www.consilium.europa.eu/media/21225/72921.pdf], Accessed 17 May 2022

12 Pech, L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, RECONNECT Working Paper No. 7, 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608661], Accessed 17 May 2022, at p. 13

13 Art. 2 TEU provides that the Union "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

14 Art. 263 TFEU

15 Art. 234 TFEU. See e.g. Magen, A.; Pech, L., *The rule of law and the European Union*, in: May, C. and Winchester, A. (eds.): Handbook on the Rule of Law. Cheltenham: Edward Elgar 2018. pp. 235–256, at pp. 236-238; Pech, L.; Scheppele, K.L., *Illiberalism Within: Rule of Law Backsliding in the EU,* Cambridge Yearbook of European Legal Studies 2017, Vol. 19, pp. 3-47, at p. 3

Starting with the 1999 Austrian elections, the EU has been confronted with rule of law crises in several Member States, such as the collective expulsion of Roma people by France to Romania and Bulgaria,[16] the democratic backsliding starting with the compulsory early retirement of Hungarian judges and prosecutors, the 2012 constitutional crisis in Romania,[17] then the capture of the judiciary in Poland. Indeed, the enthusiasm for European values seems to have vanished in various "new" Member States.[18]

Until the 2010s, the gradual evolution of the Treaty framework was not matched with similar developments with regard to the EU toolbox. Since then, the European Commission and the Council have developed various instruments to ensure respect for the rule of law in all Member States. Certain tools aim at *prevention and promotion*, including the following:

- *The European Rule of Law Mechanism*[19] is a yearly cycle with an *annual rule of law report* at its centre. The second (the latest) annual report was adopted by the Commission in July 2021[20] including 27 country chapters.[21]
- The *EU Justice Scoreboard*[22] is an annual report prepared by the Commission, providing comparable data on the independence, quality and efficiency of national justice systems.

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16 "EU may take legal action against France over Roma", *BBC News, 14 September 2010*, [https://www.bbc.com/news/world-europe-11301307], Accessed 17 May 2022

17 Hipper, A. M., *Romania In Hungary's Footsteps: Different Victor, Same Strategy*, VerfBlog, 2012/7/12, [https://verfassungsblog.de/romania-hungarys-footsteps-victor-strategy/], Accessed 17 May 2022; Perju, V., *The Romanian double executive and the 2012 constitutional crisis*, International Journal of Constitutional Law, Vol. 13, No. 1, 2015, pp. 246–278

18 Kochenov; Bárd, *op. cit.*, note 3, p. 7; Scheppele, K. L.; Kochenov, D.; Grabowska-Moroz, B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Vol. 39, 2020, pp. 3–121

19 European Commission Communication, Strengthening the Rule of Law within the Union. A blueprint for action, COM (2019) 343 final, 17 July 2019

20 2021 Rule of Law Report: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2021) 700 final, Brussels, 20 July 2021. See also the 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary. Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report. The rule of law situation in the European Union. Commission Staff Working Document. SWD/2021/714 final, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0714], Accessed 17 May 2022

21 2021 Rules of law report – Communication and country chapters, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en], Accessed 17 May 2022

22 Commission Communication, The EU Justice Scoreboard. A tool to promote effective justice and growth, COM (2013) 160 final, p. 1. See also EU justice scoreboard, available at: [https://ec.eu-

- *The European Semester* is a yearly process resulting in country-specific recommendations on macroeconomic and structural issues, including on justice systems and anti-corruption.[23]
- In the framework of the *Cooperation and Verification Mechanism*, the Commission monitors and reports on progress made in Romania and Bulgaria in a number of defined area, namely judicial reform, corruption, and the fight against organised crime.[24]
- In 2014, the Council introduced its own dialogue-based instrument, the *Annual Rule of Law Dialogue*.[25] The dialogues are conducted on a thematic basis. The first evaluation of the tool took place in 2019 when the Council found that the dialogue could be "stronger, more result-oriented and better structured", "preparations for the dialogue [could] be more systematic". The Council agreed that proper follow-up should be ensured.[26]

While the tools listed above focus on prevention, the EU has several instruments at its disposal to *respond* to rule of law issues:

- The Commission or the Member States may launch *infringement proceedings*.[27] Some scholars suggested that the Commission ought to make more extensive use of interim measures as rule of law infringements could lead to irreversible harm. It has also been argued that the Court should "automatically prioritize

ropa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en], Accessed 17 May 2022. The latest: [https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf], accessed 17 May 2022

23 The European Semester, available at: [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en], Accessed 17 May 2022

24 Assistance to Bulgaria and Romania under the CVM, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm_en], Accessed 17 May 2022

25 Council of the EU, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20-21. The tool was adopted "as a response to the Commission's Rule of Law Framework, clearly disliked by the Council". Fleck, Z.; Chronowski, N.; Bárd P., *The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary*, MTA Law Working Papers 2022/4, [https://jog.tk.hu/mtalwp/the-crisis-of-the-rule-of-law-democracy-and-fundamental-rights-in-hungary], Accessed 17 May 2022, at p. 19

26 Par. 7 of the Presidency conclusions – Evaluation of the annual rule of law dialogue, 19 November 2019, [https://www.consilium.europa.eu/media/41394/st14173-en19.pdf], Accessed 17 May 2022. The next evaluation will take place in 2023

27 Arts. 258 and 259 TFEU

and accelerate" rule of law related cases.[28] The Commission indicated that it would develop its practice in this regard.[29]

- *Preliminary references*, while not specifically designed to address democratic backsliding, have proved to be a useful tool especially in those Member States that have adopted measures to curb judicial independence.
- *Art. 7 TEU* was introduced in Amsterdam with a view to address serious breaches to the rule of law, with dialogue and possible sanctions. In its current version, it includes a preventive as well as a sanction mechanism. The preventive mechanism can be triggered by one-third of the Member States, the Commission or the European Parliament, and as of May 2022, two Member States have become under scrutiny. As the sanctions mechanism requires the unanimous vote of the European Council, its useful effect is significantly curbed if more than one Member State are involved as they might join forces and mutually shield each other.
- In 2014, the Commission launched an early-warning, dialogue-based instrument, the *Rule of law framework*[30] to address systemic threats to the rule of law in EU countries. Whereas the Commission has refused to apply the tool against Hungary, in 2016 it was triggered in relation to Poland.[31] This led to the activation of Art. 7(1) against Poland in December 2017.
- Regulation 1303/2013 (the Common Provisions Regulation) envisages the suspension of payment from EU funds "if there is a serious deficiency in the effective functioning of the management and control system of the operational programme".[32]

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28 Bárd, P.; Chronowski, N.; Fleck, Z.; Kovács, Á.; Körtvélyesi, Zs; Mészáros, G., *Is the EU toothless? An assessment of the EU Rule of Law enforcement toolkit*, MTA Law Working Papers 2022/8, [https://jog.tk.hu/mtalwp/is-the-eu-toothless-an-assessment-of-the-eu-rule-of-law-enforcement-toolkit], Accessed 17 May 2022, at p. 6

29 Commission Communication, Strengthening the Rule of Law within the Union. A blueprint for action, COM (2019) 343 final, at p. 14

30 Commission Communication issued in 2014: A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, 19 March 2014

31 European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71

32 Art. 142(1)a) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006

- Another noteworthy development is the adoption of the rule of law conditionality regulation.[33] The regulation focuses on the protection of the financial interest of the EU and is accompanied by a set of guidelines prepared by the Commission to clarify a number of elements related to the functioning of the conditionality regulation.[34]

Albeit the Treaties contain no definition thereof,[35] this does not mean that the rule of law "reveals serious conceptual uncertainties and serious inconsistencies" or is "a complex concept which cannot be precisely defined".[36] There are many fundamental concepts of EU law not specified in the Treaties which have been developed by the Court in its jurisprudence.[37] Furthermore, even if the rule of law is an "essentially contested concept",[38] there are various documents providing a detailed description of its elements. This article is based on the definitions provided by the Venice Commission, including the 2011 Report on the rule of law[39] and the 2016 Rule of law checklist[40] as well the European Commission's Communication on the Rule of Law Framework.[41] The latter provides that:

> The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union … and of the European Court of Human Rights, as well

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33 Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22. December 2020, p. 1

34 Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, C (2022) 1382 final, 2 March 2022

35 Thus, the Hungarian government has argued that the concept "lacks well-defined rules and remains the subject of much debate internationally and among national constitutional bodies and academia.", Varga, J., *Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask | View*, Euronews, 22 November 2019, [www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view], Accessed 17 May 2022

36 As argued by Hungary in case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 99 and 200. Furthermore "the 'core elements' of the concept of 'the rule of law' … are themselves theoretical categories and principles … and cannot be converted into rules" (par. 201)

37 The concept of charges having equivalent effect to customs duties, measures having equivalent effect to quantitative restrictions, worker, equal pay for equal work, etc.

38 Kochenov; Bárd, *op. cit.*, note 3, p. 19; Pech, L. *et al.*, *Meaning and Scope of the EU Rule of Law,* RECONNECT, Deliverable 7 February 2020, [https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf], Accessed 17 May 2022, p. 6

39 Venice Commission, Report on the rule of law, CDL-AD(2011)003rev

40 Venice Commission, Rule of Law Checklist, CDL-AD(2016)007

41 Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final

> as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.
>
> Those principles include *legality*, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; *legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law*.[42]

The list can be extended with e.g. the principle of accessibility of the law, the principle of the protection of legitimate expectations; the principle of proportionality, prohibition of corruption and the principle of civilian control of security forces.[43] In light of the definitions put forward by the Venice Commission and the European Commission, by now there is comprehensive and widely accepted definition of the rule of law and its elements.[44] The principle of rule of law, together with its core subcomponents can be found in the primary and secondary sources of EU law, in the case law of the CJEU as well as in soft law documents, thus "one may conclude that it is not the lack of a definition which may be the issue but rather the multiplication of provisions which emphasise different components of the rule of law."[45]

### 2.2. Identification of key cases

In view of the above, the next step is the identification of those cases which can be qualified as rule of law related. Not an easy task since the cases do not necessarily explicitly contain the keyword "rule of law", or they might be only indirectly related to the rule of law. Thus the cases stemming from a string of concerning developments impeding access to asylum in Hungary are in strong correlation with the rule of law deficit. In spite of this they are not listed here since they form part of

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42 COM (2014) 158 final, p. 4; emphasis in the original. See also Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of play and possible next steps, COM (2019) 163 final. This document adds *separation of powers* to the list, p. 1

43 Kochenov, D.; Pech, L., *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, Vol. 11, No. 3, 2015, pp. 512-540, at pp. 522-523; Magen; Pech, *op. cit.*, note 15, p. 243

44 For a detailed analysis see e.g. Pech *et. al.*, *op. cit.*, note 39; Pech, L., *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, European Constitutional Law Review, Vol. 6, No. 3, 2010, pp. 359-396

45 Pech *et. al.*, *op. cit.*, note 39, pp. 21-24

a very specific problem.[46] Identification of relevant cases are further complicated by the miscategorisation of cases, as is the case with the compulsory retirement of Hungarian judges, which was decided on the basis of EU antidiscrimination law. This is not to say that the list is necessarily complete, yet it is submitted that the cases listed below are the most relevant from the perspective of this paper. The Venice Commission was also involved with regard to certain contested Hungarian legislation, thus its opinions will also be explored where relevant.

**Table 1.** List of cases

| | Case | Issue | Type of action | Interveners (in support of whom) | Decision |
|---|---|---|---|---|---|
| **1** | C-286/12 *Commission v Hungary* | Radical lowering of the retirement age for Hungarian judges | Infringement proceedings | --- | Infringement |
| **2** | C-288/12 *Commission v Hungary* | Premature termination of office of the Hungarian Data Protection Supervisor | Infringement proceedings | European Data Protection Supervisor (Commission) | Infringement |
| **3** | C-78/18 *Commission v Hungary* | Transparency of associations / Lex NGO | Infringement proceedings | Sweden (Commission) | Infringement |
| **4** | C-66/18 *Commission v Hungary* | Higher education / Lex CEU | Infringement proceedings | --- | Infringement |
| **5** | C-650/18 *Hungary v Parliament* | Triggering Art. 7 TEU by EP | Annulment | Poland (Hungary) | Action dismissed |
| **6** | C-821/19 *Commission v Hungary* | Criminalisation of assistance for asylum seekers / Lex Stop Soros | Infringement proceedings | --- | Infringement |
| **7** | C-564/19 *Criminal proceedings against IS* | Illegality of the order for reference | Preliminary reference | Observations by: Netherlands, Sweden, Commission | Incompatible with EU law |
| **8** | Cases C-156/21 & C-157/21 *Hungary and Poland v Parliament and Council* | Rule of law conditionality regulation | Annulment | Poland and Hungary (in support of the other) (in support of the EP and the Council) Belgium, Denmark, Germany, Ireland, Spain, France, Luxembourg, Netherlands, Finland, Sweden; Commission | Action dismissed |

*Source:* Author

[46] See e.g. joined cases C-643/15 and C-647/15, *Hungary and Slovakia* v. *Council*, ECLI:EU:C:2017:631; joined cases C-924/19 PPU and C-925/19 PPU, *FMS and Others* v. *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367, or case C-808/18, *Commission* v. *Hungary*, ECLI:EU:C:2020:1029

## 3. THE KEY DECISIONS

### 3.1. Case C-286/12, *Commission* v. *Hungary* (Radical lowering of the retirement age for Hungarian judges)[47]

The contested Hungarian measures introduced by the amendment of the relevant Hungarian legislation in 2011 stipulated that judges and prosecutors who have reached the general retirement age, namely 62, were obliged to retire. As the European Commission considered this to constitute age-related discrimination contrary to the Directive on equal treatment in employment and occupation,[48] it brought an action against Hungary. In its submission, Hungary contended that the objective of the reform was the standardisation of the rules relating to retirement for all persons as well as the facilitation of the entry of young lawyers into the judicial system with a view to establishing a "balanced age structure".[49] Whereas the Court accepted that both aims could constitute legitimate employment policy objectives, it found that "the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned" and the objective could have been achieved by less restrictive measures, e.g. by the gradual decrease of the upper-age limit. As regards the second aim, the contested national legislation was not appropriate to achieve the objective of establishing a more balanced age structure.[50]

Whereas the Court's conclusions are certainly correct, it is regretted that the Court remained within the anti-discrimination framework suggested by the Commission and failed to consider the impact of the Hungarian measures on judicial independence. In its opinion, the *Venice Commission* could not find any convincing justifications either, bearing in mind that excessive duration of proceedings, partly stemming from the heavy workload of the courts, is a source of concern in Hungary. Thus, the real motives behind the new regulation seem to have been to overcome judicial opposition and constrain judicial independence by forcing the judges into early retirement, more specifically "to ensure that all new appointments, including numerous appointments of court leaders, will be made under the new system" where the President of the NJO (National Judicial Office), elect-

47 Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0286], Accessed 17 May 2022

48 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000], OJ L 303

49 Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, paras. 25, 28 and 59

50 Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, paras. 61-62, 68, 70-71 and 77

ed by the Parliament for 9 years, has excessive weight in the appointment of court presidents.[51]

A new legislation was adopted by the Hungarian Parliament on 11 March 2013 in the implementation of the judgment,[52] retired court leaders however were not reinstated into their former (leading) positions if that place was already filled with new appointees.

### 3.2. C-288/12 *Commission v Hungary* (Premature termination of office of the Hungarian Data Protection Supervisor)[53]

In Hungary, the Data Protection Supervisor was made responsible for the performance of the tasks entrusted to supervisory authorities under the Data Protection Directive.[54] In 2012, however, the system was reformed to replace the Supervisor with a national authority for data protection, thus Mr András Jóri, who was appointed Data Protection Supervisor in 2008 for a term of six years, had to vacate office before serving his full term. The Commission, supported by the European Data Protection Supervisor, took the view that the Hungarian measures were contrary to the Directive, which stipulates that the independence of the authorities responsible for the protection of personal data is to be guaranteed.

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51 "The Venice Commission examines this issue *not from the special angle of age discrimination, but from its effect on judicial independence*. From this point of view, the retroactive effect of the new regulation raises concern. … The Commission does not see a material justification for the forced retirement of judges (including many holders of senior court positions). *The lack of convincing justifications may be one of the reasons for which questions related to the motives behind the new regulation were raised in public*. […] This provision seems not to be related to the general issue of the retirement age, but to *the will of Parliament to ensure that all new appointments, including numerous appointments of court leaders, will be made under the new system*, giving the newly elected President of the NJO the essential role in these appointments. Bearing in mind the heavy workload of several courts, it is difficult to justify forcing judges to retire early, on the one hand, while not providing for a speedy filling of vacancies, on the other." (Emphasis added) Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, CDL-AD(2012)001-e, paras. 104 and 106, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e], Accessed 17 May 2022. Described as "losing by winning" by Scheppele; Kochenov; Grabowska-Moroz, *op. cit.*, note 19, p. 3

52 Law XX of 2013 on the legislative amendments relating to the upper age limit applicable in certain judicial legal relations,11 March 2013, Magyar Közlöny, 2013/49

53 Case C-288/12 *European Commission v Hungary* ECLI:EU:C:2014:237, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0288], Accessed 17 May 2022

54 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281, p. 31

The Court started by pointing out that the data supervisory authorities must be allowed to perform their duties free from external influence. This entails an obligation for the Member States to allow that authority to serve its full term of office. Supervisory authorities are hindered in the independent performance of their tasks if State authorities could exercise a political influence over their decisions. If premature termination of office were permissible it could lead the Supervisor to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence.[55]

Similarly to the early retirement case, the Court missed the opportunity to consider the wider context even though here it made references to the danger of inadmissible political influence. The Venice Commission was more categorical: it was not convinced by the contention of the Hungarian Government that the reform was necessary as new information technology required more efficient action, and that an administrative body could work more efficiently. The *Venice Commission* took the view that the Supervisor could have been endowed with the necessary resources if there had been the requisite will of the political decision-makers.[56]

### 3.3. Case C-78/18 Commission v. Hungary (Transparency of associations / Lex NGO)[57]

In 2017, Hungary introduced a law[58] (Transparency Law) which imposed obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold, and which provided for the possibility of applying penalties to organisations in violation of the provisions of the law. Such NGOs must also indicate on their homepage and in their publications that they had been classified as an organisation in receipt of support from abroad.

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55 Case C-288/12 *European Commission v Hungary* ECLI:EU:C:2014:237, paras. 50-54 – The only step made in implementation of the judgment was a simple apology issued by the minister of justice to the former Data Protection Supervisor, [https://tasz.hu/cikkek/nyilt-level-az-igazsagugyi-miniszternek], Accessed 17 May 2022. This also shows the inexplicable lack of use of interim measures by the Court, and the pressing need therefor.

56 Opinion on Act CXII of 2011 on informational Self-determination and Freedom of Information of Hungary, CDL-AD(2012)023-e, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)023-e], Accessed 17 May 2022, paras. 28-29

57 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0078], Accessed 17 May 2022

58 Law No. LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad,13 June 2017, Magyar Közlöny 2017/93. Sport associations as well as religious organisations are, however, exempted from the application of the law

In the view of the Commission, supported by Sweden, this constituted discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations, in breach of Hungary's obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union.

The Court found that the difference in treatment based on the origin of the capital, thus based on the place of residence or the registered office of the donors, constituted *indirect discrimination on the basis of nationality* contrary to the free movement of capital.[59] While the objective consisting in increasing transparency in respect of the financing of associations may be considered to be an overriding reason in the public interest, Hungary did not establish the existence of a genuine, present and sufficiently serious threat to a fundamental interest of society.[60] The Transparency Law was based on a presumption that financial support sent from other Member States or third countries was intrinsically suspect.[61]

By hindering the activities of civil society organisations, and hence the achievement of the aims which they pursue, the Transparency Law restricted the right to the *freedom of association*, which constitutes one of the essential bases of a democratic and pluralist society.[62] Similarly, the Court found that imposing or allowing the communication of personal data such as the name, place of residence or financial resources of natural persons to a public authority must be characterised as an interference in their *private life* and the right to the *protection of personal data*. While it is true that public figures cannot claim the same protection of their private life as private persons, donors granting financial support to civil society organisations cannot be regarded as public figures, contrary to the submission of Hungary.[63]

Hungary contended that increasing the transparency of the financing of associations must be regarded as an objective of general interest recognised by the Union, this was, however, dismissed by the Court which found that the provisions of the Transparency Law could not be *justified* by any of the objectives of general interest which Hungary relied upon.[64]

In its opinion on the Transparency Law, the *Venice Commission* found that whereas on paper certain provisions requiring transparency of foreign funding may appear

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59 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, par. 62

60 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, par. 95

61 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, par. 93

62 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, paras. 116-119

63 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, paras. 120-134

64 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, paras. 139-142

to be in line with the standards, they cannot serve as a pretext for limiting the legitimate activities of these associations. The reasons behind the exclusion of sports and religious organisations from the scope of the act is not clear; the reporting, labelling obligations imposed on civil society organisations are excessive and the sanctions are disproportionate.[65]

The contested Hungarian legislation was repealed on 18 May 2021, with effect from 30 June 2021, and such a quash would have constituted adequate implementation of the CJEU judgment. Regrettably, the 2017 law was replaced by Law XLIX of 2021 on the transparency of civil organizations whose activity is liable to influence public life, which is again based on the presumption that any activity aimed at influencing public life is *a priori* suspicious. In addition, the State Audit Office[66] was vested with the task of carrying out and publishing annual audits of NGOs with a budget of over €55,000, even if the organisations do not receive public funds. It must be noted that under Hungarian law the competence of the State Audit Office covers only *public* finances.[67] Finally, religious and sports organisations are once more exempt from such audits, constituting an incomprehensible and unjustified discrimination between the various types of civil organisations.

### 3.4. Case C-66/18 *Commission v Hungary* (Higher education / Lex CEU)[68]

In 2017, the Hungarian Law on Higher Education was amended,[69] providing first, that higher education institutions from States outside the European Economic Area (EEA) could continue their activities in Hungary only if an *international treaty* existed between Hungary and their State of origin and, second, that all foreign higher education institutions who wanted to offer higher education in Hungary were required also to *offer such education in their State of origin*. There

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65 European Commission for Democracy Through Law (Venice Commission), Hungary – Preliminary Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad. Opinion 889/ 2017 of 2 June 2017, CDL-PI(2017)002, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)002-e], Accessed 17 May 2022, para. 63

66 (*Hun.),* Állami Számvevőszék

67 Art. 43(1) of the Hungarian Fundamental Law (i.e. constitution) provides that "The State Audit Office shall be the organ of the National Assembly responsible for financial and economic audit. Acting within its functions laid down in an Act, the State Audit Office shall audit the implementation of the *central budget*, the administration of *public* finances, the use of funds from *public* finances and the management of *national assets*. …" (Emphasis added)

68 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0066], Accessed 17 May 2022

69 Law No CCIV of 2011 on national higher education was amended by Law No XXV of 2017. The legislative process was extremely time-constrained: the draft was tabled by the minister of human resources on 28 March 2017, the law was adopted just a week later, on 4 April 2017

was only one foreign institution in Hungary which did not meet the new requirements, the Central European University (CEU), founded under the law of New York State by the Hungarian-born US businessman George Soros. The Commission thought that the Hungarian measures are incompatible with GATS (General Agreement on Trade in Services), Articles 49 (freedom of establishment) and 56 TFEU (free movement of services) and Articles 13, 14(3) and 16 of the Charter of Fundamental Rights (academic freedom, the freedom to found higher education institutions and the freedom to conduct a business).

As regards compatibility with GATS, it suffices to say that the Court found the Hungarian measures incompatible with the commitments in relation to national treatment given under the GATS as both requirements modified the conditions of competition in favour of Hungarian providers, contrary to Article XVII of the GATS.[70]

The requirement of genuine teaching activity in the State of origin was found to be rendering less attractive the exercise of the freedom of establishment in Hungary for nationals of another Member State who wished to establish themselves in Hungary, thus constituting a restriction on the freedom of establishment which could not be justified by Hungary's arguments based on maintaining public order, nor on those based on overriding reasons in the public interest relating to the prevention of deceptive practices and the need to ensure the good quality of higher education.[71]

The Hungarian measures were found incompatible with the Charter inasmuch as the measures at issue were capable of hampering the academic activity of the foreign higher education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous organisational structure that was necessary for conducting their academic research and for carrying out their educational activities. Consequently, those measures were such as to limit the academic freedom protected in Article 13 of the Charter.[72] In addition, those measures limited both the freedom to found educational establishments guaranteed in Article 14(3) of the Charter and the freedom to conduct a business enshrined in Article 16 of the Charter.[73] The Hungarian measures could not be justified by any of the objectives of general interest recognised by the Union upon which Hungary sought to rely.[74]

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70 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, paras. 94-156

71 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, paras. 167-170 and 178-190

72 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, par. 228

73 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, par. 234

74 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, paras. 239-242

According to Law LIV of 2021 adopted in the implementation of the judgment, universities based outside of the EEA are allowed to operate in Hungary if there is a prior international treaty with the State of origin and the education provided by the foreign institution is "equivalent" with the education of Hungarian institutions.[75] This however has no impact to the facts of the present case as CEU has ceased to operate in Hungary and in November 2019 opened a new campus in Vienna (Austria).

### 3.5. Case C-650/18, *Hungary v European Parliament* (Triggering Article 7 TEU by EP)[76]

On 12 September 2018, the EP adopted a resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.[77] Four hundred and forty-eight MEPs voted in favour of that resolution, 197 voted against it and 48 MEPs abstained. It must be noted that the MEPs had been informed, one and a half days before the vote, of the fact that abstentions would not be counted as votes cast, thus they were well aware of the rules applying to the voting process.[78] Hungary sought the annulment of the resolution arguing that the Parliament wrongly excluded abstentions when counting the votes cast for the purposes of adopting the contested resolution and, in order to be adopted, a minimum of 462 votes in favour would have been necessary.

Article 354(4) TFEU stipulates that for the purposes of Article 7 TEU, the EP shall act by a two-thirds majority of the votes cast, representing the majority of its component Members. When interpreting the term of "votes cast", the Court found that the notion, in accordance with its usual meaning in everyday language, covered only a positive or negative vote on a given proposal. It held that abstention meant a refusal to adopt a position on a given proposal, thus it could not

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75 Art. 76(1) of Law CCIV of 2011 as amended

76 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0650], Accessed 17 May 2022. Poland as intervener in support of Hungary – The legislative package is named after George Soros, whose "Open Society foundations have donated billions to promoting civil society and human rights, particularly in the former Communist countries of central and eastern Europe." *Hungary passes anti-immigrant 'Stop Soros' laws*, The Guardian, 20 June 2018, [https://www.theguardian.com/world/2018/jun/20/hungary-passes-anti-immigrant-stop-soros-laws], Accessed 17 May 2022

77 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL) [2018] OJ C307, p. 75

78 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, par. 12

be treated in the same way as a "vote cast".[79] As to the contention of Hungary that this interpretation would run counter to the principle of democracy and the principle of equal treatment, the Court recalled that MEPs had been informed in advance about the legal consequences of their abstention.[80]

### 3.6. Case C-821/19 *Commission v Hungary* (Criminalisation of assistance for asylum seekers / Lex Stop Soros)[81]

In 2018, Hungary amended certain laws concerning measures against illegal immigration, and added a new ground of inadmissibility of an application for international protection,[82] not listed in the Procedures Directive.[83] Furthermore, Hungary criminalised the organising activity of facilitating the lodging of an asylum procedure,[84] contrary to the Procedures Directive as well as the Reception Directive.[85] Finally, the Hungarian legislation provided for restrictions on the freedom of movement of persons suspected of having committed such an offence.[86]

The Court held that Hungary had failed to fulfil its obligations under the Procedures Directive by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on its territory via a safe third country. Article 33(2) of the Procedures Directive sets out an exhaustive list of the situations in which Member States may consider an application for international protection to be inadmissible, and the *new ground for inadmissibility* introduced by Hungary is not among those.[87]

Similar conclusion was reached in relation to the *criminalisation of assistance to asylum seekers*. Hungary's submission that the introduction of that offence had been

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79 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, paras. 82-84

80 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, par. 96

81 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0821], Accessed 17 May 2022

82 Art. 51(2)(f) of Law No. LXXX of 2007 on the right to asylum, 29 June 2007, Magyar Közlöny 2007/83

83 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180 p. 60 (the Procedures Directive)

84 Art. 353/A of the Law No C of 2012 establishing the Criminal Code, 13 July 2012, Magyar Közlöny 2012/92, "Facilitating illegal immigration"

85 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180, p. 96) (the Reception Directive)

86 Article 46/F of Law No XXXIV of 1994 on the police of 20 April 1994

87 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 33

justified by the increased risk of misuse of the asylum procedure[88] was dismissed by the Court. It found that the scope of the Hungarian provision was not limited solely to the lodging of an intentionally abusive application or to misleading the authorities but gave rise to a risk of criminal prosecutions being brought against almost any person involved in the initiation of an asylum procedure in Hungary, thus restricted the right to have access to those applicants and to communicate with them.[89] The wording of the offence was capable of strongly discouraging any person wishing to provide assistance, and went beyond what was necessary to attain the objective of preventing fraudulent or abusive practices.[90] Finally, restrictive measures against persons who have been accused or found guilty of such an offence[91] was also held to be contrary to the two Directives.[92]

The *Venice Commission* was requested by the PACE to provide an opinion on the Hungarian government's "Stop Soros" legislative package, and it started with the premise that "[c]riminalising certain activities by persons working for NGOs in the framework of their functions represents an interference with their freedoms of association".[93] It went on to find that while pursuing the legitimate aim of prevention of disorder or crime, the Hungarian legislation went far beyond that aim by criminalising organisational activities which were not directly related to the materialization of the illegal migration, such as "preparing or distributing informational materials". It argued that "there may be circumstances in which providing 'assistance' is a moral imperative or at least a moral right".[94] The offence introduced by the Criminal Code "lacks the requisite precision and does not meet the foreseeability criterion as understood in the ECtHR case-law".[95]

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88 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 45

89 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, paras. 45 and 95

90 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, paras. 116-133

91 Art. 46/F of the Law No XXXIV of 1994 on the police, 20 April 1994, Magyar Közlöny 1994/41, provides that police officers shall prevent any person suspected of offences including "Facilitating illegal immigration" (Art. 353/A of the Criminal Code) mentioned above from entering an area within a distance of less than eight kilometres from the external border of Hungary

92 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, paras. 151-164. The AG reached a different conclusion

93 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 70

94 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 103

95 Venice Commission, Hungary – Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), CDL-AD(2018)013-e, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e], Accessed 17 May 2022; paras. 100-105

### 3.7. Case C-564/19, C-564/19 *Criminal proceedings against IS* (Illegality of the order for reference)[96]

The facts of the case are rather complex and stem from a criminal procedure before a Hungarian court against a Swedish national. In the course of the proceedings, it became clear that Hungary did not have an official register of translators and interpreters and Hungarian law did not specify who may be appointed in criminal proceedings as a translator or interpreter, nor according to what criteria. Thus, (in his initial reference) the referring judge asked the Court whether this situation is compatible with two EU Directives on criminal proceedings (*first question*).[97] In addition, the national judge submitted two further questions relating to various elements of judicial independence: namely the direct appointment by the President of the National Office for the Judiciary (NOJ) of temporary senior judges (*second question*),[98]and the insufficient remuneration of Hungarian judges in relation to their responsibilities (*third question*).[99]

Following this, the Hungarian Prosecutor General brought an appeal in the interests of the law against the order for reference, and the Kúria (Supreme Court) ruled that the questions referred were not relevant and necessary for the resolution of the dispute concerned. The order by the first instance judge for referral to the CJEU was found to be unlawful, without, however, altering its legal effects. Parallel to this, disciplinary proceedings were brought against the referring judge which was, however, later withdrawn.

Thereafter, the referring judge decided to supplement his initial request for a preliminary ruling (the supplementary request for a preliminary ruling) with two additional questions: first, whether the Supreme Court can declare a reference for

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96 Case C-564/19 *Criminal proceeding against IS*, ECLI:EU:C:2021:949; [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0564], Accessed 17 May 2022

97 Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L280, p. 1 and Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings [2012] OJ L142, p. 1

98 Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 34: "the President of the NOJ had infringed the law through the practice of declaring vacancy notices for judicial appointments and appointments to the presidency of courts unsuccessful without sufficient explanation and then, in many cases, appointing on a temporary basis court presidents who were the choice of the NOJ President"

99 Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, para 38: "… since 1 September 2018 – unlike the practice followed in previous decades – Hungarian judges receive by law lower remuneration than prosecutors of the equivalent category who have the same grade and the same length of service, and in which, in view of the country's economic situation, judges' salaries are generally not commensurate with the importance of the functions they perform, particularly in the light of the practice of discretionary bonuses applied by holders of high level posts"

preliminary ruling unlawful (*fourth question*) and secondly, whether the initiation, on the same grounds, of disciplinary proceedings against the referring judge is compatible with EU law (*fifth question*).

The Court started with the analysis of the fourth question recalling the importance of the cooperation between the national courts and the Court of Justice established by Article 267 TFEU. Accordingly, national courts have the widest discretion in referring questions to the Court involving interpretation of provisions of EU law.[100] It would be contrary to this cooperation if the supreme court of a Member State could declare that a request for a preliminary ruling is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings. The assessment of whether the questions referred are relevant or not falls within the exclusive jurisdiction of the Court.[101] Any other conclusion would undermine the effectiveness of EU law and would prompt the national courts to refrain from referring questions to the Court.[102]

With regard to the fifth question on the disciplinary procedure against the referring judge, the Court held that the discretion of the national judge to make a reference for a preliminary ruling to the Court constitutes a guarantee that is essential to judicial independence. The mere prospect of sanctions would undermine the preliminary ruling mechanism under Article 267.[103]

As to the interpretation and translation in criminal proceedings (first question), the Court found that Member States must take specific measures to ensure sufficient quality of interpretation; and Member States must enable the national courts to ascertain that the interpretation was of sufficient quality, so that the fairness of the proceedings and the exercise of the rights of the defence are safeguarded.[104]

The second and third questions relating to various aspects of *judicial independence* were found inadmissible inasmuch as they were not "necessary" to enable the referring court to "give judgment" in the case before it.[105]

Recent years have witnessed various attacks against the independence of the judiciary not only in Hungary, but in Portugal, Romania, Malta and, most impor-

[100] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, paras. 68-69
[101] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 72
[102] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, paras. 73-81
[103] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 91
[104] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, paras. 98-138
[105] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 140

tantly, Poland as well.[106] In this context, Article 267 TFEU can be seen as a tool of self-defence if judicial independence and the right to a fair trial is undermined by national legislation or decisions.[107] As the Commission is rather selective in launching infringement proceedings, Article 267 is mobilised to secure the independence of the judiciary.[108] Disciplinary proceedings against judges, or the threat thereof, have a chilling effect whereby judges enter into a form of prior compliance with the political authority. Judges must enjoy an independence allowing them to perform their duties free from external influence.[109]

### 3.8. Cases C-156/21 & C-157/21, *Hungary and Poland* v. *Parliament and Council* (Rule of law conditionality regulation)[110]

On 16 December 2020, the EU legislature adopted a Regulation which established a general regime of conditionality for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States. The sanctions envisaged by the Regulation contain the suspension of payments from the Union budget or the suspension of the approval of one or more programmes financed by that budget.[111] Hungary and Poland, the countries affected by rule of law procedures, sought the annulment of the Regulation. In support of its request, Hungary raised several pleas based on the alleged absence of legal basis, the circumvention of the procedure laid down in Article 7 TEU, and the breach of legal certainty. All submissions were dismissed by the Court.

As regards the legal basis for the Regulation, the purpose of the contested Regulation is *to protect the Union budget* from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not

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106 For a detailed analysis see Pech, L.; Kochenov, D., *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Stockholm, 2021; e.g. the table on pp. 94 and 95

107 *Ibid*., p. 95

108 *Ibid*., p. 96

109 ENCJ (European Network of Councils for the Judiciary), *Independence, Accountability and Quality of the Judiciary. Indicators and Surveys: Leading a process of positive change*, ENCJ Report 2018-2019, 2019, [https://bit.ly/3M6XvqZ], Accessed 17 May 2022

110 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0156]; see also Case C-157/21 *Poland* v *European Parliament and Council of the European Union*, ECLI:EU:C:2022:98, [https://eur-lex.europa.eu/legal-content/hu/TXT/?uri=CELEX:62021CJ0157], Accessed 17 May 2022

111 Regulation (EU, Euratom) 2020/2092, of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020], OJ L433I, p. 1

to penalise those breaches as such. Breach of the rule of law affects sound financial management or the financial interests of the Union in a sufficiently direct way.[112]

The Court found that the Regulation did *not circumvent Article 7 TEU* inasmuch as the Regulation seeks to protect the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise, through the Union budget, breaches of the principles of the rule of law.[113]

As regards the third plea, alleging *breach of the principle of legal certainty*, Hungary argued that the Regulation did not define the concept of "the rule of law" or its principles. The Court found that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers, equality before the law and non-discrimination referred to in the Regulation had been the subject of extensive case-law of the Court. These principles are recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems. Hungary cannot maintain that it is not possible to determine with sufficient precision the essential content of these principles, nor that those principles are of a purely political nature.[114] Hence, the claim for annulment of the contested Regulation was dismissed in its entirety.

The Court's reinforcement that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains legally binding obligations[115] is particularly noteworthy. While upholding the Union's obligation to respect the national identities of the Member States, the Court refused to accept that the obligations stemming from Article 2 might vary from one Member State to another.[116] Moreover, acknowledging that compliance with the values enshrined in Article 2 TEU cannot be disregarded after accession, the Court accepted the application of the principle of non-regression as regards the Copenhagen criteria,[117] by holding that the Member States "have undertaken to respect at all times" the concept of the rule of

112 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 111, 119 and 144

113 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 168-171

114 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 236, 237 and 240

115 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 232

116 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 233

117 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 126

law.[118] The Court found an intrinsic link between respect for EU values and the principle of solidarity: the principle of mutual trust itself is based on the commitment of each Member State to respect the values contained in Article 2 TEU.[119]

## 4. CONCLUSIONS

All cases described above were decided against Hungary, and although the judgments were followed by minor legislative adjustments, they did not result in any material improvements on the ground. The reduction of democratic qualities in Hungary and other Member States arguably undermines the perception of Europe as a bastion of democracy. *The concept of the rule of law* has served as a basis for European integration right from its inception. Notwithstanding its consolidated definitional status,[120] the rule of law as a concept, however, appears to have become increasingly challenged.[121] According to the illiberal critique, or authoritarian populist critique, the concept lacks proper definition,[122] so that advocates of the double standard critique accuse the EU institutions with hypocrisy and contend that the rule of law actions against Hungary (and Poland) are ideologically motivated and the EU targets Central European Member States while being much more lenient in relation to Western members. The juristocracy critique maintains that judicial procedures take over the role of political debates, issues are decided along legal, constitutional and procedural quibbles and, as a consequence, decisions no longer reflect the will of the majority population.

Indeed, the juristocracy critique has been used to justify attacks against courts for their judicial or constitutional activism.[123] Béla Pokol, one the most prominent

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118 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 234

119 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 129

120 There is arguably a *consensus* on the concept of the rule of law and its elements: "... it seems that a consensus can now be found for the necessary elements of the rule of law" – Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev-e, para. 41. The question remains, however, to what extent the common European values (Article 2 TEU) are reconciable with the protection of national identities (Article 4 TEU)

121 Pech *et al.*, *op. cit.*, note 39, pp. 45-61

122 See e.g. Varga, *op. cit.*, note 36, and the pleas raised by Hungary in Case 156/21 Hungary v European Parliament and Council of the European Union, ECLI:EU:C:2022:97 relating to the rule of law conditionality regulation

123 Pokol B., *A jurisztokrácia és a demokrácia határvonalán*, Jogelméleti Szemle, No. 4, 2015, pp. 4-18, at pp. 4 and 5. – A Hungarian law journal (Jogelméleti Szemle) dedicated a whole issue to the juristocracy debate (JESZ, 2015/4). See also Pokol, B., *A jurisztokratikus állam*, Dialóg Campus, Budapest, 2017; and the thematic issue of Jogelméleti Szemle 2019/2 on the Paradigm of juristocracy and juristocratic State ("A jurisztokrácia és a jurisztokratikus állam paradigmájáról")

Hungarian representative of this approach, disapproves the European Court of Human Rights and the Luxembourg Court as well. He argues that "decisions no longer reflect the will of the majority population, but the political constellation of judicial bodies, and the financial and organizational powers of jurists advising the judges or rights protection groups".[124]

The author of this paper opines that the concept of the rule of law is adequately developed, and while a certain measure of double standard cannot be totally dismissed, Hungary is usually the worst of all EU Member States on the list of e.g. Transparency International[125] or WJP Rule of Law.[126] As regards the juristocracy critique, restrictions on the power of the legislative constitute a prominent feature of constitutional democracies. Judicial review, including constitutional justice, serves to constrain legislative power in order to uphold the constitution. Furthermore, by acceding to the EU, Hungary has recognized and accepted the necessity of integration cooperation.[127]

When assessing the role of the EU institutions and the EU *legal* toolbox in securing compliance with European values, the first issue to be considered is *the use of infringement actions*. Contrary to the wording of Article 258 TFEU, the European Commission "is not bound to commence the proceedings provided for in that provision but in this regard has a discretion".[128] The Commission's decision is influenced by a range of factors, including the staff available; the gravity and effects of the violation; whether the contested measures constitute isolated acts of limited importance or, to the contrary, they stem from a structural deficiency; the pertinent political situation or whether the EU provision in issue might be altered in the near future. It is not easy to specify the Commission's response threshold but it seems to have taken a rather soft position: it has tolerated the creative compliance

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124 Pech et al., *op. cit.*, note 39, p. 58. – An example from Poland: Jarosław Kaczyński said that "no state authority, including the constitutional tribunal, can disregard legislation". Davies, C., *Poland is 'on road to autocracy', says constitutional court president*, The Guardian, 18 December 2016, [https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says-high-court-president], Accessed 17 May 2022

125 In 2021, Poland scored 56, Romania 45, Hungary 43, Bulgaria 42 points out of 100. The results are given on a scale of 0 (highly corrupt) to 100 (very clean). Transparency International, [https://www.transparency.org/en/cpi/2021], Accessed 17 May 2022

126 Out of the maximum of 1 (the last three EU Member States) Greece scored 0,61, Bulgaria 0,54, Hungary 0,52 points. (Adherence to the rule of law: weaker (0) to stronger (1).) World Justice Project, [https://worldjusticeproject.org/rule-of-law-index/global], Accessed 17 May 2022

127 Drinóczi, T., *Jurisztokrácia és alkotmányoligarchia vagy többszintű alkotmányosság és alapjogvédelem? Reflexiók Pokol Béla írására*. Jogelméleti Szemle, No. 4, 2015, pp. 32-45, at p. 35 and 37; Magen; Pech, *op. cit.*, note 15, p. 242

128 Case C247/87 *Star Fruit Company SA v Commission*, ECLI:EU:C:1989:58, para. 11. See also Case C431/92 *Commission v Germany*, ECLI:EU:C:1995:260, para. 22

and the solidification of quasi-authoritarian regimes for quite a while. The Von der Leyen Commission was also reluctant to launch rule of law related actions, the first being initiated only in 2021, three years after taking office.[129] Such a selective strategy is unacceptable in the case of systemic attacks against the rule of law.[130]

To further improve the effectiveness of infringement actions, it is of paramount importance that the Commission does not misconstrue or miscategorise the case. The landmark example for *improper categorisation* is the Hungarian early judicial retirement case where attack against judicial independence was framed as an age-related antidiscrimination issue.

In the infringement actions against Hungary, the Commission has never applied for *interim measures*, even though it would have been justified in order to avoid serious and irreparable harm to the interests of peoples or organisations affected by the contested legislation (e.g. in the cases relating to the early retirement of judges, the Ombudsman, Lex NGO, Lex CEU).[131] All in all, the Commission's approach to compliance assessment is rather fragmentary and is squeezed in a legalistic-technocratic framework.

It must be added that so far *the Member States* themselves have never seized the opportunity to take action under Article 259;[132] they tend to approach the Commission asking for action instead. Since the Commission pursues a selective strategy it might be argued that Member States have a moral responsibility to fill in this vacuum.[133]

The *Court's* room for manoeuvre is circumscribed by the types of actions specified in the Treaties, including the *locus standi* rules. Real change cannot be achieved if rule of law related cases are presented to the Court in a piecemeal fashion, dis-

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129 E.g. a letter of formal notice as regards legislation sanctioning discrimination in the field of education and vocational training [https://ec.europa.eu/commission/presscorner/detail/en/INF_21_2743], Accessed 17 May 2022, respect for the fundamental rights of non-discrimination of LGBTIQ people and freedom of expression, or the rejection of Klubradio's application for the use of radio spectrum on highly questionable grounds [https://ec.europa.eu/commission/presscorner/detail/en/INF_21_6201], Accessed 17 May 2022

130 Pech; Kochenov, *op. cit.*, note 107, p. 66

131 See, however, Order of the Vice President of the Court of 19 October 2018 in Case 619/18 *Commission v Poland,* ECLI:EU:C:2019:615; Order of the Grand Chamber of 18 December 2018 in Case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:615

132 On inter-State proceedings see e.g. Komanovics, A., *Inter-State Human Rights Litigation – The Possibilities and Limitations of Collective Enforcement*, VI Congresso Internacional de Direitos Humanos de Coimbra, Vol. 6, No. 1, 2021

133 Pech and Kochenov, *op. cit.*, note 107, p. 66

guising the systemic nature of the violations involved.[134] It must not be forgotten, however, that originally it seemed unlikely that the Court should be involved in rule of law cases and decide in politically highly-charged disputes. In any case, after a hesitant start the Court began to take a more vigorous stance in support of European values.[135] Thus, in the case relating to the rule of law conditionality regulation the Court reiterated that Article 2 TEU is not merely a statement of policy guidelines or intentions but contains legally binding obligations for the Member States through Article 19 TEU, and compliance therewith can be reviewed by the Court.[136]

In *preliminary reference cases* the Court's answer ought to be useful, practical, and sufficiently precise to enable the national judge to make EU-law compatible conclusions.[137] In rule of law related cases it is even more important that Luxembourg provide unambiguous answers leaving no room for doubt for the national judge as to what the only possible answer is. The rationale behind such a reduction of national judicial space is that "by the time its [the Court's] preliminary rulings need to be applied to the disputes at hand, there may well be no independent judges left to apply them."[138] It is also noteworthy that Article 267 TFEU has unexpectedly emerged as a tool of self-defence for the national judges under attack, and as an indirect way to enforce compliance with EU values.

As regards the *implementation of the judgments*, Hungary was repeatedly late in making the necessary adjustments, or employed "creative" or symbolic compliance techniques, designed to create the appearance of norm-conform behaviour. Regrettably, the Commission was also prepared to accept such a creative compliance with European values.[139]

The questions arises whether EU's current rule of law toolbox is sufficiently comprehensive and sophisticated. *Article 7 TEU* is considered too strong to be used: indeed, it took quite a while for the EU to trigger the mechanism against Hungary

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134 Scheppele, Kochenov and Grabowska-Moroz, *op. cit.*, note 19, p. 22.

135 Pech; Kochenov, *op. cit.*, note 107

136 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 161 and 232

137 Somssich R., *Az előzetes döntéshozatali eljárás közel hat évtized távlatából*, Iustum Aequum Salutare, Vol. XIV, No. 2, 2018, pp. 39–55, at pp. 50-51

138 Pech; Kochenov, *op. cit.*, note 107, p. 223

139 Batory, A., *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, Public Administration, Vol. 94, No. 3, 2016. pp. 685-699, at 686. – "Symbolic and creative compliance occur when an addressee, in this case a member state, pretends to align its behaviour with the prescribed rule or changes its behaviour in superficial ways that leave the addressee's original objective intact." Ibid., p. 689

(and Poland) albeit it might have prevented the illiberal regimes from getting more and more entrenched. Article 7 remains a highly political process with Members States being reluctant to "interfere" in domestic matters of their peers. In addition, the process might result in an impasse if there are more than one Member State involved as they could mutually veto sanctions against the other.

*The Rule of law conditionality regulation* is, or could be, a real and powerful weapon but the great lengths the Hungarian and Polish government were to go against its introduction indicate that implementation will not be a bed of roses. In the Commission proposal, the competence to suspend or reduce payments from the EU budget was vested with the Commission, while the Council would have been able to veto the Commission's decision by a qualified majority.[140] In the final version, however, the Commission may only propose measures if rule of law breaches in a given Member State threaten the EU financial interests, whereas the final decision is taken by Council, a political institution.

The EU toolbox could be supplemented with other measures, like an automatic suspension mechanism in new legislative measures which would always be activated if Article 7 proceedings is triggered against a Member State.[141] A less radical solution would be similar to that already used in relation to environmental protection as provided for in Article 11 TFEU. By analogy, rule of law requirements could be integrated into the definition and implementation of the Union's policies and activities.

There are several ways to improve the EU's rule of law "ecosystem". The Fundamental Rights Agency could be given a more significant role to play in the protection of European values, e.g. it could be involved with the Article 7 TEU procedure. The European Anti-Fraud Office (OLAF) should be granted competence to do more than just issuing recommendations,[142] thus its findings might lead to the suspension of EU payments, or it could make a file public if the Member State does not act upon its recommendation. As regards the European Public Prosecutor's Office (EPPO), budget payments could be withheld from Member States who do not sign up to the EPPO. More systematic cooperation with the

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140 [https://www.europarl.europa.eu/legislative-train/theme-new-boost-for-jobs-growth-and-investment/file-mff-protection-of-eu-budget-in-case-of-rule-of-law-deficiencies], Accessed 17 May 2022

141 Pech, L.; Kochenov, D., *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, 2019, [https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf], Accessed 17 May 2022, p. 13

142 After an investigation is concluded, OLAF recommends action to the EU institutions and national authorities concerned. [https://ec.europa.eu/anti-fraud/about-us/what-we-do_en], Accessed 17 May 2022

Venice Commission could also contribute to the promotion and protection of EU values.[143]

Whereas it could be argued that a "rule of law enforcement cocktail" can increase a number of "pressure points" which, in turn, could prevent democratic deterioration,[144] the EU already has a full set of instruments at its disposal, so far not used to its full potential, and there is no point in creating new tools if the EU fails to use existing ones.[145]

By way of conclusion, the EU's inertia undermines the integrity of common European values and the credibility of the EU in the eyes of candidate States as well as the international community. There is a pronounced gap between the EU's internal commitment to the rule of law and the external promotion of its values. Similarly, there is a marked asymmetry between Union's (pro-rule of law) rhetoric and its action or, rather, failure to act when it comes to the actual enforcement of values.[146] A clear example thereof is the rule of law backsliding in Hungary through measures disguised as well-intentioned "reforms" allegedly aiming to improve transparency, efficiency, the protection of families, quality of education, etc. but which in fact systematically erode democracy. Creative compliance, "instrumentalisation of the law has transformed the rule of law into 'rule by law', which dismantles the very essence of the rule of law."[147]

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143 Pech; Kochenov, *op. cit.*, note 142, p. 12-15

144 Pech; Kochenov, *op. cit.*, note 142, p. 17

145 Note however that besides formal instruments the EU has informal tools as well including shaming in press releases, scoreboards and other communication for creating social or normative pressure; Batory, *op. cit.*, note 118, p. 688

146 Magen; Pech, *op. cit.*, note 15, p. 248

147 Kochenov, D.; Grabowska-Moroz, B., *Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined*, RECONNECT Working Paper No. 16, 2021, [https://reconnect-europe.eu/wp-content/uploads/2021/07/WOP16_July2021.pdf], Accessed 17 May 2022, p. 10

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UDK 336.74(4-67EU:497.5)
Review article

# LEGAL ASPECTS OF THE INTRODUCTION OF THE EURO AS THE OFFICIAL CURRENCY IN THE REPUBLIC OF CROATIA*

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***ABSTRACT***

*The 1992 Maastricht Treaty defined the conditions for the introduction of the euro as a common currency in the European Union. These are macroeconomic indicators that measure the level of nominal convergence achieved and thus the state's readiness to participate in monetary union. These conditions (convergence criteria) relate to price stability, stability and sustainability of public finances, which includes budget deficits and public debt, exchange rate stability and convergence of long-term interest rates.*

*In addition to nominal convergence, the degree of legal convergence is also assessed - the provisions of national legislation relating to the independence of the central bank, the ban on monetary financing and preferential access to state financing, and integration into the European System of Central Banks are assessed. Among the member states that have not yet adopted the euro, only the Republic of Croatia is fully harmonized in this regard.*

*On July 10, 2020, the Croatian kuna was included in the European Exchange Rate Mechanism (ERM II). Accessing the ERM II mechanism is often referred to as the euro waiting room. Despite the fact that the pandemic caused by the COVID-19 virus has not abated, the Republic of Croatia has not stopped its efforts to become a full member of the euro area. The paper will present the benefits of the introduction of the euro, but also the inevitable costs incurred during the conversion process. As the pandemic has not slowed down the conversion process and the moment of conversion is approaching, on the other hand, there are conflicting views on the introduction of the euro as the official currency, which are trying to be implemented through a referendum.*

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-21 "Fiscal policy and development of the public finance system".

*The paper will discuss the legal aspects of Croatia's accession to the euro area and what measures are envisaged when exchanging the Croatian kuna for the euro, especially from the aspect of consumer protection, given the fact that Croatia has one of the highest euroization rates of all non-euro area EU member states.*

***Keywords**: Croatian kuna, euro, euro area, euroization, pandemic*

## 1. INTRODUCTION

The 1992 Maastricht Treaty defined the conditions for the introduction of the euro as a common currency. These are macroeconomic indicators that measure the level of nominal convergence achieved and thus the readiness of a state to participate in a monetary union. These conditions (the convergence criteria) relate to price stability, sound and sustainable public finances, including budget deficit and public debt, exchange rate stability and convergence of long-term interest rates.[1] In addition to looking back at each of these indicators for the last 12 months, convergence sustainability is assessed.

On 10 July 2020, the Croatian kuna was included in the European Exchange Rate Mechanism (ERM II). Admission to the ERM II mechanism is often referred to as the euro area waiting room. Despite the fact that the pandemic caused by the COVID-19 virus has not abated, the Republic of Croatia has not stopped its efforts to become a full member of the euro area. The paper will present the benefits of the introduction of the euro, but also the inevitable costs incurred during the conversion process. The pandemic has not slowed down the conversion process and the moment of conversion is approaching, but on the other hand, there are opponents of the introduction of the euro as the official currency, that are trying to implement their views through a referendum.

## 2. THE CREATION OF THE EURO AREA

The idea of introducing a common European currency, the euro, was initiated and proposed by the founding states of today's European Union (Belgium, France, Italy, Luxembourg, the Netherlands and Germany). The aim was to speed up the process of achieving the Economic and Monetary Union, a European Union project based on harmonisation of economic and monetary policies of Member States for the purpose of creating a single monetary area and introducing the euro as a common currency. The single monetary policy is determined by the European Central Bank (ECB) and complemented by coordinated fiscal and economic

[1] Šabić, A., *Pristupanje europskom tečajnom mehanizmu ERM II – važan korak na putu prema uvođenju eura*, Pravo i porezi, No. 9/20, UDK 336.748, Zagreb, 2020, p. 8

policies. These ideas were confirmed on 1 January 1999, when the new common currency was adopted by the following 12 EU Member States: Austria, Belgium, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Germany, Portugal and Spain. The euro payment system was introduced on 1 January 2002, when euro banknotes and coins were put into circulation, while the changeover from the national currencies to euro was completed by the end of February 2002. Greece formally joined the euro area in 2001 (when it met the convergence criteria), and it was followed by Slovenia (2004), Cyprus and Malta (2008), Slovakia (2009), Estonia (2011), Latvia (2014) and Lithuania (2015). Sweden and Denmark refused to join the euro area (the 2003 referendum and the 2000 referendum, respectively). Bulgaria and Romania have started the preparation process for joining the euro area, while Poland, the Czech Republic and Hungary have expressed no interest in starting the process.[2]

**Table 1.** Origin of the euro arae

| | |
|---|---|
| 1.1.1999. | The euro is becoming the new common currency of 11 member states EU and replaces the currencies of their countries (Austria, Belgium, Finland, France, Ireland, Italy, Luxembourg, Germany, the Netherlands, Portugal, Spain). These states make up the so called euro area. Exchange rates between theese currencies and the euro are irrevocable determained. The currencies of their countries remain denominations of the euro. Euro, introduced as book money (euro banknotes and coins) does not yet exist.<br>Eurosystem (European Central Bank) and national central banks of the countries that introduced the euro), takes over determining and implementing a single monetary policy for euro area. |
| 1.1.1999.-31.12.2001. | Previous period: gradual changeover to the euro for the total economy in euro area countries. |
| 1.1.2001. | Greece introduced the euro. |
| 1.1.2002. | The "old" national currencies of the euro area countries do not exist more in the form of book money. All non-cash transactions must be in transacted in the euro, not the "old" national currencies of the euro area countries.<br>In twelve EU Member States (Austria, Belgium, Finland, France, Greece, Ireland, Italy, Luxembourg, Germany, the Netherlands, Portugal, Spain), which make up the euro area, euro banknotes and coins were put into circulation. The beginning of the so-called period of "dual circulation". |

[2] Vedriš, M., *Pripreme za uvođenje eura: optimalno polazište*, EKONOMIJA/ECONOMICS, Vol. 26, No. 1, Zagreb, 2019, p. 131

| | |
|---|---|
| 28.2.2002.<br>(at the latest) | Banknotes and coins of 12 EU Member States (Austria, Belgium, Finland, France, Greece, Ireland, Italy, Luxembourg, Germany, the Netherlands, Portugal, Spain - these countries represent the so-called euro area) have finally been removed from circulation - the end of the so-called "dual circulation" |
| 1.1.2007. | Slovenia introduced the euro. |
| 1.1.2008. | Cyprus and Malta introduced the euro. |
| 1.1.2009. | Slovakia introduced the euro. |
| 1.1.2011. | Estonia introduced the euro. |
| 1.1.2014. | Latvia introduced the euro. |
| 1.1.2015. | Lithuania introduced the euro. |

*Source*: Odar, M., *Izazovi financijskog izvještavanja pri ulasku u Eurozonu – iskustva Republike Slovenije*, RiF, UDK 657.2, Zagreb, 2019

In short, it can be said that the arguments of Poland, Hungary and the Czech Republic against the introduction of the euro can be divided into three groups. First, in terms of monetary policy independence in a broader sense, policy makers and the general public have recognised the importance of the exchange rate as a stability factor and a driver of growth. This can be particularly attractive in countries with a low degree of euroisation and in the ZLB environment. Good examples of such countries are Poland, Hungary and the Czech Republic, where credit euroisation is approximately 10%-25%. Due to its high degree of euroisation, Croatia does not belong to the group arguing against the introduction of the euro. Second, the experience of peripheral countries of the euro area during the euro area crisis highlighted the importance of real income convergence, structural convergence and adjustment mechanisms. Finally, support for the euro area fell significantly during the euro area crisis. Given that the crisis arose in the euro area and had the greatest impact on euro area countries, four non-euro area Member States believe it would be better for them to remain outside the single currency area.[3]

According to the results of the latest Eurobarometer survey on the euro area, a large majority (76%) of respondents believe that the single currency is good for the EU. This is the greatest support since the introduction of euro coins and banknotes in 2002. Furthermore, a majority of 65% of citizens in the euro area think that the euro is good for their country, which also represents the greatest support recorded so far. Therefore, euro area countries seem to see many benefits from the euro even after the post-2010 euro area crisis.[4]

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[3] Deskar-Škrbić; M., Kunovac, D., *Dvadeseta godišnjica eura: zašto se neke zemlje još ne* žele *pridružiti? Gledište ekonomista,* available at: [https://euro.hnb.hr/documents/2070751/2104183/p-049.pdf/0e1ad796-d11b-e939-54d1-2a58161b75cf], p. 13, Accessed 10 February 2022

[4] *Ibid.*, p. 17

## 3. THE PROCEDURE AND THE IMPLEMENTATION CRITERIA

Croatia has already experienced currency exchange. When the kuna was introduced on 30 May 1994 after the stabilisation programme, it replaced the Croatian dinar as a temporary currency issued by the Ministry of Finance with the signature of the Minister. The CNB exchanged dinars on a regular basis until the end of 1994 and subsequently until the end of June 1995.[5]

However, the process of introducing the euro is extremely complex and poses a great challenge to potential new members of the euro area, which is why the European Commission published a special book - a guide on how to prepare countries for such changes.[6]

According to the price stability criterion, the inflation rate in a Member State must not exceed the average inflation rate of the three best performing EU Member States in terms of price stability, increased by 1.5 percentage points. Given the imprecise definition of the reference value, the European Commission and the European Central Bank have discretion in deciding which Member States are best performing in terms of price stability, which directly affects the decision on which countries meet this criterion. Nevertheless, it can be said that the lowest inflation rate is usually considered to be the best price stability achievement. The public finance sustainability criterion takes into account the general government deficit-to-GDP ratio, which must not exceed 3%, and the public debt-to-GDP ratio, which must be less than 60%, or if it exceeds this value, it must diminish at a satisfactory pace. In other words, in order for a Member State to be able to meet the public finance criterion, it must not be in the process of an excessive budget deficit. The exchange rate stability criterion will be considered met if the Member State has participated for at least two years in the exchange rate mechanism, and during that period there have been neither devaluations of the central parity nor large exchange rate fluctuations around the central parity. According to the criterion of long-term interest rates, the yield on long-term government bonds issued in national currency must not exceed a reference value equal to the average yield on bonds of the three best performing EU Member States in terms of price stability, increased by 2 percentage points.[7]

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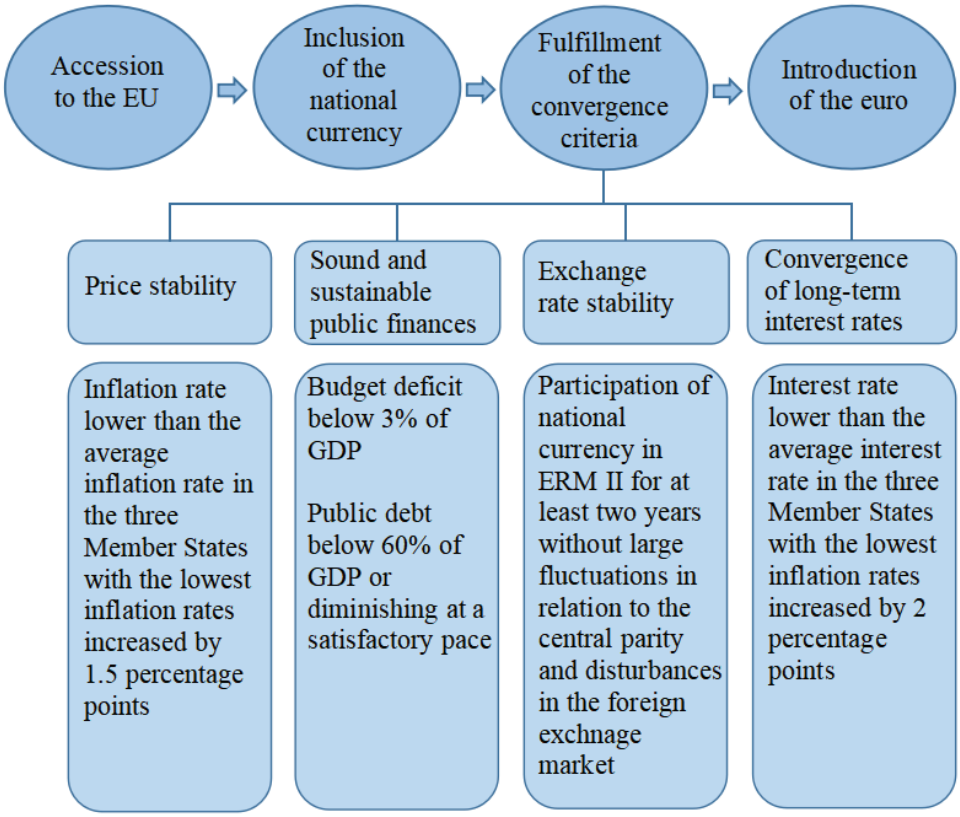
5 Blašković, A., *Novčanice kuna moći* ćemo *mijenjati trajno, ali za kovanice imamo ograničen rok, evo koliko je drugima ostalo 'ispod madraca'*, Poslovni dnevnik, 31 December 2021, available at: [https://www.poslovni.hr/hrvatska/novcanice-kuna-moci-cemo-mijenjati-trajno-kovanice-3-godine-4319266], Accessed 10 February 2022

6 Vedriš, *op. cit.,* note 2, p. 132

7 Šabić, *op. cit.,* note 1, p. 9

**Figure 1.** Criteria for the introduction of the euro




*Source*: Šabić, A., *Pristupanje europskom tečajnom mehanizmu ERM II – važan korak na putu prema uvođenju eura*, Pravo i porezi, No. 9/20, UDK 336.748, Zagreb, 2020, p. 9

Since 2016, the Republic of Croatia has met all the convergence criteria, with the exception of the exchange rate stability criterion. Although it has been recording a stable exchange rate for more than a quarter of a century, it has not officially participated in ERM II for at least two years and this criterion has not been met. Among the nominal convergence criteria, the criterion referring to sound and sustainable public finances, i.e. public debt exceeding the reference value of 60% of GDP, has been until recently the biggest obstacle for Croatia. However, the consolidation achieved increases the chances that all criteria will be met in the near future. Namely, according to EU rules, the public finance sustainability criterion can be met even if the debt exceeds the reference value level, but provided that it diminishes at a satisfactory pace.[8]

[8] Vedriš, *op. cit.,* note 2, p. 138

According to this year's reports on the convergence of the European Commission and the European Central Bank, among non-euro area Member States only Croatia and Sweden meet all economic convergence criteria, except the exchange rate criterion, as they do not participate in the ERM II exchange rate mechanism.

It is worth adding that in addition to nominal convergence, the degree of legal convergence is assessed - the provisions of national legislation relating to central bank independence, the prohibition on monetary financing and preferential access to finance and integration into the European System of Central Banks are assessed. Among the Member States that have not yet adopted the euro, only the Republic of Croatia is fully harmonised in this respect.

**Table 2.** Convergence criteria – Republic of Croatia

| Description | Inflation rate (04/2019-03/2020) | Participation in ERM II in the last two years | Public finance criteria | | | Long-term interest rates (04/2019 - 03/2020) |
|---|---|---|---|---|---|---|
| | | | Budget balance, % of GDP (2019) | Public debt, % of GDP (2019) | Excessive budget deficit procedure | |
| Croatia | 0.8 | No | 0.4 | 73.2 | No | 1.3 |
| Reference value | 1.8 | | -3% | 60% (or reduction at a satisfactory rate) | | 2.9 |

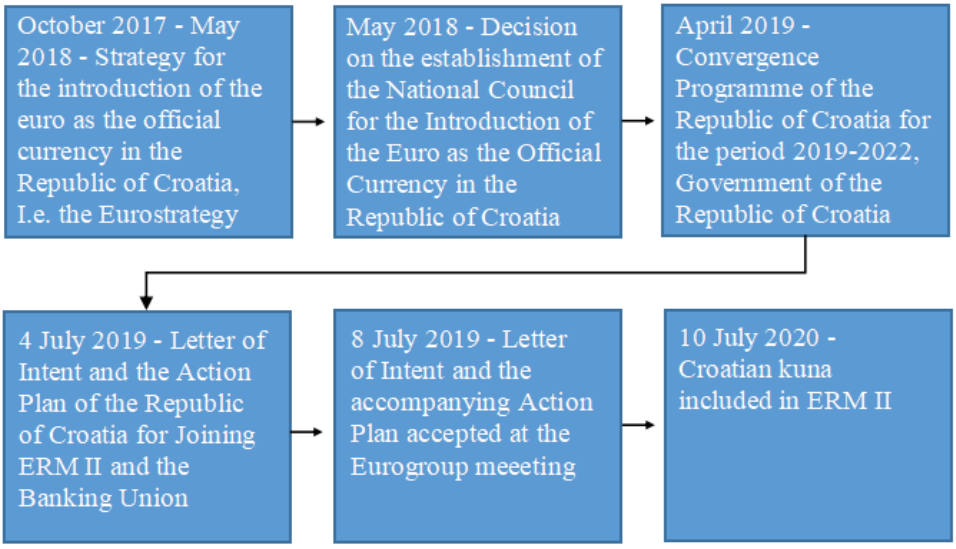
*Source*: European Commission, Convergence Report, Institutional Paper 129., Brussels, June 2020

The first activities aimed at preparing for ERM II entry and the introduction of the euro were launched in October 2017 by the presentation of the Strategy for the introduction of the euro as the official currency in the Republic of Croatia, which provides a cost-benefit analysis of the introduction of the euro, and describes the process of introducing a common currency and economic policy and adjustments before the introduction of the euro.

Membership in the ERM II exchange rate mechanism is an important step in determining the overall dynamics of joining the euro area. Now, after joining the ERM II mechanism, for which there are no official requirements in the European Union legislation, in the next phases leading to the final introduction of the euro, there is no room for political influence, but only criteria and procedures clearly specified in this respect.[9]

[9] Šabić, *op. cit.,* note 1, p. 6

**Figure 2.** Croatia's letter of intent to join ERM II - measures and activities




*Source*: Author's research

Given strong growth in exports, a significant surplus in the current account of the balance of payments as well as budget deficit reduction and a gradual decline in the public debt-to-GDP ratio due to the implementation of fiscal consolidation measures combined with economic recovery, in October 2017, the Government and the Croatian National Bank prepared the Strategy for the introduction of the euro as the official currency in the Republic of Croatia[10] (the so-called Eurostrategy), which was adopted in May 2018. For the needs of part of the professional, and even more so the general public, the document contains an overview of possible benefits and costs after the introduction of the euro as a national currency.

Consequently, in order to implement the Eurostrategy itself, on 10 May 2018, the Government adopted a Decision on the establishment of the National Council for the Introduction of the Euro as the Official Currency in the Republic of Croatia,[11] which defined reform measures that Croatia should implement as a precondition for joining the European Exchange Rate Mechanism II, i.e. the Exchange Rate Mechanism II (ERM II). The content of the letter of intent and the accompanying Action Plan of the Republic of Croatia for Joining ERM II and the Banking

[10] Strategy for the introduction of the euro as the official currency in the Republic of Croatia, Government of the Republic of Croatia and Croatian National Bank, Zagreb, April 2019

[11] Official Gazette No. 43/2018

Union[12] were adopted at the last session of the National Council held on 3 July 2019, after which, based on the decision made at the 164th session (held on 4 July 2019), they were sent by the Republic of Croatia to the Member States of the euro area, Denmark and the institutions of the European Union, thus formally initiating the procedure for the introduction of the euro.[13]

In this context, the economic policy of the Government of the Republic of Croatia will focus in the medium term on the following three pillars: high-quality investments, efficient structural reforms and macroeconomic stability and sustainable public finances.

In summary, the National Reform Programme, the Convergence Programme of the Republic of Croatia for the period 2019-2022, the Strategy for the introduction of the euro as the official currency in the Republic of Croatia, and the Economic and fiscal policy guidelines for the period 2020-2022 are the documents that provide a fundamental framework for change important for doing business in the Republic of Croatia in a simpler and more efficient way.[14]

Joining ERM II is part of the implementation of the Strategy, and in order for Croatia to join ERM II, it was necessary to initiate formal requirements, i.e. procedures, which was done even before the aforementioned session of the National Council, which essentially confirmed everything previously agreed upon with the European Commission (EC), the European Central Bank (ECB) and Eurostat.

The importance of the process of preparation of the letter of intent and the Action Plan with reform measures for Croatia's international perception can be illustrated by the fact that the process of preparation for entry into ERM II, and consequently the euro area, is one of the important elements that contributed to raising Croatia's credit rating to the investment level. In this context, it should be mentioned that on 7 June 2019, the second of the world's three most important credit rating companies, Fitch, assigned Croatia a BBB investment grade rating, with a positive outlook. The importance of this is shown by the fact that the last time Croatia was at that level of investment credit rating was 14 years ago.[15]

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12 Action Plan of the Republic of Croatia for Joining ERM II and the Banking Union, [https://vlada.gov.hr/UserDocsImages/Vijesti/2019/07%20srpanj/08%20srpnja/HRVATSKA%20AKCIJSKI%20PAN%20HR.pdf], Accessed 10 February 2022

13 Savić, Z., *Hrvatska na putu u ERM II i uvođenje eura*, EKONOMIJA/ECONOMICS, Vol. 26, No. 1, Zagreb, 2019, p. 113

14 Vedriš, *op. cit.,* note 2, p. 145

15 Savić, *op. cit.,* note 13, p. 113

However, it is especially important that the paper starts from the basic hypothesis that Croatia's entry into the euro area is determined not only by formally meeting the criteria, but by realistically considering the ability of the national economy to participate in such a strong environment in terms of the level of efficiency. All this and more, bearing in mind the fact that, measured by a number of globally and EU-relevant ranking lists of development and efficiency, the Republic of Croatia is often placed at the bottom of these lists by the level of its performance to achieve economic growth.[16]

After the letter of intent was defined and agreed upon, the letter of intent on Croatia's accession to the European Exchange Rate Mechanism II[17] was accepted at the Eurogroup meeting held on 8 July 2019 in Brussels together with the Croatian Action Plan of the Republic of Croatia for Joining ERM II and the Banking Union. This was the first step towards participation in ERM II, which precedes the introduction of the euro as the official currency. Namely, in the letter of intent, Croatia commits itself to a number of reforms implemented by the Government and some other institutions as well, such as the CNB and the Central Bureau of Statistics, whose results should have a positive impact on the quality of institutions, but also on perseverance in implementing reforms in the period before joining ERM II. Specifically, the following 9 institutions are in charge of the implementation of the 19 measures listed in the Action Plan:

- Ministry of Finance,
- Ministry of State Property,
- Ministry of Justice and Public Administration (in cooperation with the Ministry of Finance),
- Ministry of Economy, Entrepreneurship and Crafts,
- Ministry of Health,
- Ministry of Construction and Physical Planning,
- Croatian National Bank,
- Central Bureau of Statistics.

Given that 9 institutions are responsible for 19 measures, the implementation of measures from the Action Plan is coordinated by the Prime Minister's Office.[18]

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16 Vedriš, *op. cit.,* note 2, p. 147

17 Letter of Intent on Croatia's Accession to the European Exchange Rate Mechanism II, available at: [https://euro.hnb.hr/documents/2070751/2600163/hp04072019_RH_Pismo_namjere_ulazak_u_ERM-II_mehanizam_i_Akcijski_plan.pdf/94520ded-ba4a-4446-f5a8-efe2e1850ce0?t=1562657291529], Accessed 12 March 2022

18 Savić, *op. cit.,* note 13, p. 114

All measures listed in the letter of intent and the Action Plan must have been implemented by April 2020 at the latest, after which the EU institutions assess whether the measures have been adequately implemented and it is expected that after receiving a positive assessment, Croatia will commence its participation in the Exchange Rate Mechanism II (for at least two years), which precedes its entry into the euro area. In other words, in its letter of intent, Croatia expressed its expectations for joining both ERM II and the Banking Union by mid-2020, following positive assessments by the EC and the ECB of the effective implementation of previous commitments.

Most adjustments will begin once the EU institutions determine that the criteria for adopting the euro have been met.

## 4. WHAT IS ERM II?

The Exchange Rate Mechanism ERM II provides a framework for the movement of the national currencies of EU Member States against the euro to ensure that fluctuations between the euro and EU currencies that have not yet adopted a single currency do not jeopardise economic stability of the EU single market. On the other hand, the aim of ERM II is to prepare Member States for participation in a monetary union, which is why it is often called a waiting room for euro adoption. The European Exchange Rate Mechanism II was established on 1 January 1999, at the beginning of the third phase[19] of the European Economic and Monetary Union (EMU), which introduced the euro as a single currency.

Participation in ERM II is voluntary for all EU Member States that have not yet adopted the euro. However, participation in ERM II for at least two years and without major fluctuations in the central parity and foreign exchange market disruptions is one of the criteria for the introduction of the euro (the convergence criteria or the Maastricht criteria).

Successful participation in the exchange rate mechanism proves that the state is capable of functioning in the conditions of a stable exchange rate against the euro.

[19] The EMU was established progressively in three stages. In Stage 1 (that began in 1990), the free movement of capital between EU Member States was established, cooperation between central banks was increased and coordination in the field of fiscal policies was enhanced, while in Stage 2 (that began in 1994), the predecessor of the European Central Bank, i.e. the European Monetary Institute, was established, and the independence of central banks was improved. Finally, in Stage 3 (that began in 1999), the single currency, i.e. the euro, was introduced, exchange rates were irreversibly pegged (fixed conversion rates were set), the exchange rate mechanism was established and fiscal policy coordination was further strengthened through the adoption of the Stability and Growth Pact

### 4.1. What are the main determinants of ERM II regarding the Republic of Croatia?

The main elements of ERM II participation are the central parity - the exchange rate of the national currency against the euro against which exchange rate stability will be assessed is determined by mutual agreement between the euro area countries and ERM II participants, the European Central Bank and the European Commission, and the acceding country, and - fluctuation margins in relation to the previously defined exchange rate level. These two values are, therefore, important because participation in the exchange rate mechanism, i.e. success in maintaining a stable exchange rate, is assessed in relation thereto. A standard fluctuation margin is ±15% of the central parity, and it is possible to unilaterally commit to or jointly agree on narrower limits.[20] While participating in the exchange rate mechanism, the exchange rate of the national currency must be stable in relation to the previously agreed central parity against the euro. Devaluation of the central parity is not allowed; in the event of devaluation or weakening of the central parity, participation in ERM II would be considered unsuccessful, i.e. the country would not be able to maintain exchange rate stability, and the time period of participation in the mechanism would be interrupted. On the other hand, in case of revaluation, which does not increase a country's competitiveness, but quite the contrary, such a situation would not nullify the time spent in ERM II.[21] The central parity should be determined as close as possible to the equilibrium real exchange rate. Its importance is also evidenced by the fact that the fixed conversion rate decided by the Council of the European Union when adopting the euro is usually equal to the value of the central parity.[22]

For a positive assessment of participation in ERM II it is actually necessary to keep the exchange rate as close to the central parity as possible. In the case of significant appreciation, such an approach to the fluctuation margin will not be considered problematic, but if there is any significant weakening of the exchange rate or depreciation, it will be considered that the state does not meet the exchange rate stability criterion.

The condition for joining ERM II is the simplest way to keep a Member State considered incompatible outside the euro area. However, once a country enters ERM II and meets clearly defined convergence criteria, there is no way to prevent

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20 Savić, *op. cit.,* note 13, p. 114

21 An example is Slovakia, which changed its central parity twice during its participation in ERM II (revalued by 8.5% and 17.6%, respectively), also in agreement with the euro area, other ERM II participants and the EU institutions

22 This was the case for all Member States except Slovakia

that Member State from adopting the euro. It can be said that time until entry into the monetary union and the introduction of the euro starts to run on the day of joining the ERM II mechanism.

Following a positive assessment by the European Commission and the European Central Bank, the country may formally request entry into the ERM II exchange rate mechanism.

The letter of intent to join ERM II was sent on 4 July 2019. In the letter of intent, the Republic of Croatia undertook to implement a total of 19 measures in the following six areas: further strengthening banking supervision by entering into close cooperation between the Croatian National Bank and the European Central Bank, strengthening the macroprudential policy framework, strengthening the framework for anti-money laundering and countering the financing of terrorism, improving the collection, production and dissemination of statistics, improving public sector management, and reducing administrative and financial burden on the economy. Prior to that, in May 2019, a request was sent to the European Central Bank to establish close cooperation between the Croatian National Bank and the European Central Bank. Both of these elements, i.e. the measures previously taken by the ERM II candidate country to be implemented before its entry into ERM II and close cooperation established with the European Central Bank, are part of a new approach to the ERM II accession negotiations. In accordance with the plan, all reform measures were implemented by May 2020, thus fulfilling the conditions for submitting a formal request to join the exchange rate mechanism in July 2020.

In particular, the Croatian authorities undertook to implement 8 measures in 4 areas following the reform measures implemented before entry into ERM II, namely strengthening the anti-money laundering framework following the transposition of the Fifth Anti-Money Laundering Directive, further reducing administrative and financial burden on the economy, strengthening corporate governance in state-owned enterprises, and strengthening the national bankruptcy framework. They are planned to be implemented by March 2022. In its request to join the ERM II mechanism, the Republic of Croatia proposed that the central parity should be at a level that corresponds to the market exchange rate on the day of submitting the request and that standard fluctuation margins of ±15% should be applied. A joint agreement with the finance ministers of the euro area Member States, the finance minister and the governor of the Central Bank of Denmark as a member of ERM II, and the president of the European Central Bank decided on 10 July to include the kuna in ERM II.

In such a defined process, two Member States, i.e. the Republic of Croatia and Bulgaria, joined ERM II together in July 2020.

### 4.2. What are the main determinants of participation of the Croatian kuna in ERM II?

There are two main determinants of participation of the Croatian kuna in ERM II, i.e. the central parity set at the level of 1 euro = 7.53450 kuna and a standard fluctuation margin of ±15% around the central parity. The central parity corresponds to the reference nominal exchange rate or the market exchange rate on the date of entry into the ERM II mechanism. At this level of the nominal exchange rate, the real effective exchange rate of the kuna is in line with macroeconomic fundamentals.

### 4.3. What are the next steps towards the introduction of the euro in the Republic of Croatia?

In the coming period, it is necessary to participate in the ERM II exchange rate mechanism for at least two years and meet other criteria for the introduction of the euro.

An assessment of whether the Republic of Croatia meets all conditions for the introduction of the euro is given by the European Commission and the European Central Bank in their regular reports prepared by these two institutions every two years or at the request of a Member State. On the basis of a positive assessment, when it is assessed that the convergence criteria are in line with Article 140 of the Treaty on the Functioning of the EU, the Council of the European Union adopts a decision on the introduction of the euro and sets a fixed conversion rate in the Convergence Report. This decision is made approximately half a year before the date of the introduction of the euro. At the same time, the Republic of Croatia needs to prepare for the practical aspects of the introduction of the euro.

## 5. DEGREE OF EUROISATION IN CROATIA

Experiences with high inflation have proven to be a crucial reason for a loss of confidence in the domestic currency and the presence of a high degree of euroisation in many countries. For example, those countries in Central, Eastern and Southeastern Europe that recorded the highest annual inflation rates during the transition period maintain on average higher degrees of deposit euroisation in the banking system in the post-transition period.[23]

[23] Savić, *op. cit.,* note 13, p. 101

Croatia has the highest deposit euroisation of all non-euro area EU Member States. In addition, Croatia is strongly trade-integrated with the euro area (>50% of merchandise trade).

Its stability was extremely high during the entire period of its existence, and it was maintained by implementing the so-called managed floating exchange rate. Despite this stability, Croatian citizens keep and express higher values (such as real estate or cars) in euros. In addition, Croats enter currency risks in borrowing, which is still predominantly in kuna linked by a currency clause to the euro, although current circumstances are more conducive to borrowing in kuna. The high degree of deposit euroisation can also be illustrated by the fact that the savings of Croatian citizens in euros have never been less than 66% of the value of total savings, and on average, in the last eight years it amounted to more than 70%. This is the highest deposit euroisation in all EU countries that are not part of the euro area.[24] For example, in Poland and the Czech Republic, euro savings are around 10% (Poland) and around 5% (Czech Republic), and this is the main reason why these countries have not yet adopted the euro. For the same reasons, the interest of their savers regarding the introduction of the euro is much lower than that of Croatian savers.

In one group of countries (including Croatia, Bulgaria and to some extent Romania), high degrees of deposit euroisation have led to credit euroisation as a result of hedging.[25]

Household savings are primarily kept in euros, not in kuna, and they account for 66% of the population's savings and time deposits. Although this is the downward trend as this share has gradually fallen from around 76% in late 2010 to around 66% in the first half of 2019, it is still maintained at high levels.[26]

Household savings in euros have never been below 66%, averaging 76% over the last 9.5 years, confirming the high degree of deposit euroisation, which is highest among Central and Eastern European countries.

For the purpose of comparison, the share of foreign currency deposits in total savings and time deposits in the countries of Central and Eastern Europe comparable to Croatia is significantly lower. In Bulgaria, for example, the level is gradually declining to less than 45%, in Romania it is falling towards 30%, in Hungary it

[24] Savić, *op. cit.,* note 13, p. 101

[25] Dumičić, M.; Ljubaj, I.; Martinis, A., *Perzistentnost euroizacije u Hrvatskoj*, Pregledi P-37, [https://euro.hnb.hr/documents/2070751/2104183/p-037.pdf/d98fb3cf-a191-45c4-b93e-92de959914ea], Accessed 12 March 2022

[26] Savić, *op. cit.,* note 13, p. 101

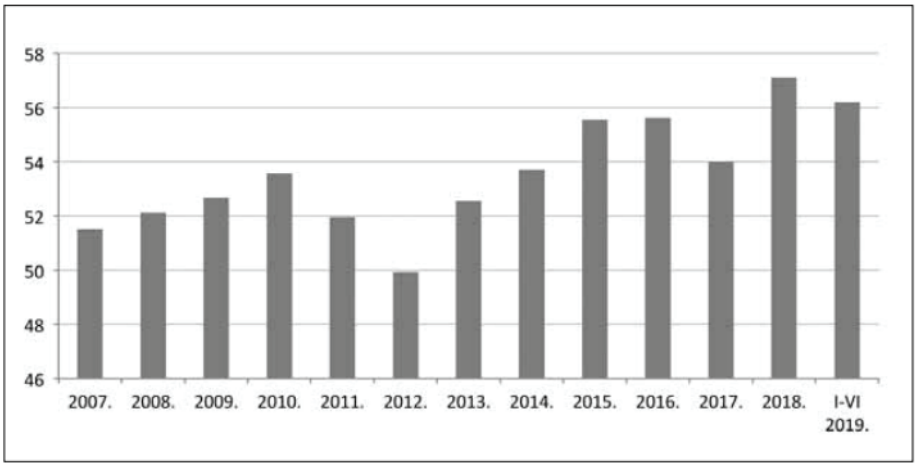
is maintained at more than 10%, whereas in Poland it is around 5% and slightly more than that in the Czech Republic.

The currency structure of loans to households shows that about 46% of loans are in kuna with a currency clause in euros. In the last 9.5 years, loans granted in kuna with a currency clause in euros have averaged 54%, with the share never dropping below 45%. It should be noted that the trend of this share has been declining for several years.[27]

Euro loans have been granted predominantly. The Croatian experience with the loans in Swiss francs influenced the strengthening of repayment security, i.e. the perception of greater security of stable annuities in the case of pure kuna loans. Therefore, since mid-2013, and more intensively since the end of 2015, there has been a pronounced trend of decreasing the share of foreign currency loans to households in total loans, while, as expected, the share of kuna loans in total loans is on the rise. In mid-2018, the share of kuna loans reached and exceeded the share level of foreign currency loans. Then, at the beginning of 2019, they reached and exceeded the share level of 50%, with a tendency to move upward.

It should be noted that exports to euro area countries are dominant in total merchandise exports and reached 56% of the value in 2018, and this level was maintained in the first half of 2019.

**Graph 1.** Share of exports to the euro area by years, in percentage

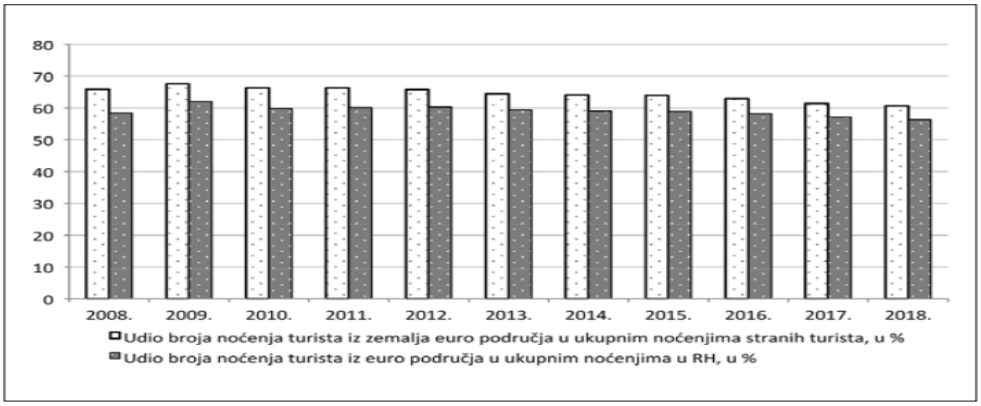



*Source*: Savić, Z., *Hrvatska na putu u ERM II i uvođenje eura*, EKONOMIJA/ECONOMICS, Vol. 26, No. 1, Zagreb, 2019, p. 109

[27] Savić, *op. cit.,* note 13, p. 102

Tourism also shows shows heavy reliance on the euro area countries, i.e. the area that is the most important emitting market. This is confirmed by the basic tourism indicators, i.e. overnight stays and spending. Overnight stays of tourists coming from the euro area countries account for 61% of total overnight stays of foreign tourists. In addition, overnight stays of tourists coming from the euro area countries account for 56% of all tourist overnight stays, and about 66% of expenditure by foreign tourists is generated from visitors coming from the euro area countries.[28]

**Graph 2.** Share of overnight stays of tourists coming from the euro area, in percentage




- Share of the number of overnight stays of tourists from euro area countries in total overnight stays of foreign tourists, in %

- Share of the number of overnight stays of tourists from euro area countries in total overnight stays, in %

*Source:* Savić, Z., Hrvatska na putu u ERM II i uvođenje eura, EKONOMIJA/ECONOMICS, Vol. 26, No. 1, Zagreb, 2019, p. 109

Based on the Croatian experience, it can be concluded that high euroisation is extremely difficult to eradicate.

The key reason is the fact that in the past period, i.e. in more than two decades, the national currency was closely linked first to the DEM exchange rate, and then since the full introduction of the euro (in 2002) with the euro exchange rate. It was a highly managed exchange rate conducted by the CNB and with small nominal oscillations in a very narrow (nominal) corridor.[29]

[28] Savić, *op. cit.,* note 13, p. 109

[29] Vedriš, *op. cit.,* note 2, p. 130

## 6. BENEFITS FROM THE INTRODUCTION OF THE EURO

The greatest benefit of the introduction of the euro is the elimination of currency risk. Total foreign currency debt, including debt with a currency clause, exceeds HRK 500 billion (approximately 150% of GDP), and more than 90% of this amount is linked to the euro.

Furthermore, the introduction of the euro in the Republic of Croatia will bring interest rates closer to their levels in the euro area, which will increase the competitiveness of the Croatian economy.

In addition, the likelihood of costly banking crises will be reduced and the risk of a currency crisis will disappear completely.[30]

The introduction of the euro will also eliminate currency exchange or transaction costs because it will no longer be necessary to execute exchange transactions, i.e. convert euros to kuna and vice versa. Furthermore, when the euro becomes legal tender in the Republic of Croatia, charges for national payments in euros should be reduced to the level of current charges for national payments in kuna. Thus, the introduction of the euro will have a positive impact on e.g. the competitiveness of Croatian exporters. Having the euro as a common currency can help boost international trade and investment. More favourable conditions for international trade arise from reduced transaction costs, greater transparency and easier price comparison, as well as the elimination of uncertainties related to exchange rate movements. Furthermore, after the introduction of the euro in the Republic of Croatia, the Croatian National Bank (hereinafter: the CNB) will gain the right to participate in the annual allocation of monetary income at Eurosystem level, which should have a positive impact on the excess of CNB revenues over expenditures paid into the state budget. By joining the euro area, the CNB will be entitled to a share in the total monetary income of the Eurosystem, but will also retain the majority of its international reserves in the form of an investment portfolio based upon which it will continue to generate income. By joining the monetary union, Croatia will also gain access to the European Stability Mechanism (hereinafter: ESM), which serves to provide assistance to members facing financial difficulties. If access is not possible, the Republic of Croatia will be able to request a loan conditional on the implementation of a macroeconomic adjustment programme. The ESM has a maximum lending capacity of EUR 500 billion, obtained by issuing securities on the financial markets. So far, the ESM has disbursed a total of

[30] Korda, Z., *Uvođenje eura kao službene valute u Republici Hrvatskoj*, Informator, No. 6522, Zagreb, 2018, p. 8

EUR 79.3 billion in financial assistance to three euro area Member States, namely Greece, Cyprus and Spain.[31]

**Table 3.** Benefits from the introduction of the euro

| | **Importance** | **Time effect** |
|---|---|---|
| Currency risk elimination | Great | Permanent |
| Interest rate reduction | Medium | Permanent |
| Elimination of the risk of a currency crisis and reduction of the risk of a banking and balance-of-payments crisis | Medium | Permanent |
| Lower transaction costs | Little | Permanent |
| Encouraging international trade and investment | Medium | Permanent |
| Participation in the allocation of monetary income of the Eurosystem | Little | Permanent |
| Access to euro area financial assistance mechanisms | Little | Permanent |

*Source*: Vedriš, M., *Pripreme za uvođenje eura: optimalno polazište,* EKONOMIJA/ECONOMICS, Vol. 26, No. 1, Zagreb, 2019, p. 135

## 7. THE COST OF INTRODUCING THE EURO

With the changeover to the euro, the central bank loses the ability to independently manage the exchange rate as the main instrument of monetary policy. Instead, the CNB, together with other national central banks (NCBs) of the Eurosystem, will participate in the conduct of the European Central Bank's common monetary policy.

**Table 4.** The cost of introducing the euro

| | **Importance** | **Time effect** |
|---|---|---|
| Loss of independent monetary policy | Little | Permanent |
| Risk of rising price levels during conversion | Little | One-off |
| Risk of excessive capital inflows and growth of imbalances | Little | Permanent |
| Conversion costs | Little | One-off |
| Transfer of funds to the European Central Bank | Little | One-off |
| Participation in the provision of financial assistance to other Member States | Medium | One-off |

*Source*: Strategy for the introduction of the euro as the official currency in the Republic of Croatia, Government of the Republic of Croatia and Croatian National Bank, Zagreb, April 2019

[31] Korda, *op. cit.*, note 30, p. 9

The business cycle in the Republic of Croatia is harmonised with the business cycle in the euro area. However, the expected rise in prices is the main argument against the introduction of the euro, and one of the objective reasons for a price increase is shifting conversion costs to clients. Furthermore, in the conversion phase, entrepreneurs, as a rule, round up prices.

The conducted analyses show that the effects of the introduction of the euro on inflation were relatively small and temporary. The effect of the conversion of national currencies into the euro on overall consumer price inflation in euro area countries was mild. At the same time, a somewhat more pronounced increase in prices was mainly recorded in the service sector and with a smaller number of goods that are purchased more frequently. Several important factors are mentioned in the literature that explain why the conversion of national currencies to the euro may spur price increases. Thus, one of the reasons is the spillover of conversion costs, which include, for example, costs that a firm incurs as a result of changing its prices (so-called menu costs) and IT support costs, onto consumers. Furthermore, it is known that a significant part of prices is formed at the so-called attractive level, which implies price rounding that makes payment practical (such that not many coins/banknotes are needed as change), or setting prices so that they end in 9 (so-called charm or psychological pricing), which affect consumers by underestimating the cost of the purchased product. Therefore, the next factor that may lead to price increases at the time of conversion refers to the possibility that companies do not round prices symmetrically (either downward or upward) to make their amount in euros reach a new attractive level, but rather round them up.[32]

Transport prices and prices in restaurants and hairdressing salons increased in Slovenia after the introduction of the euro, while in Slovakia, the prices of food and construction works increased.[33]

Research has shown that these are mostly products that do not affect lower-income individuals but rather those with higher incomes, such as accommodation, restaurants, and sports services, and these are usually services used by higher-income individuals, as explained by Mavriček.

It should be emphasised that the growth of prices following the introduction of the euro was lower in countries with the dual pricing obligation (i.e. prices in-

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[32] Pufnik, A., *Učinci uvođenja eura na kretanje potrošačkih cijena i percepcije inflacije: pregled dosadašnjih iskustava i ocjena mogućih učinaka u Hrvatskoj,* Zagreb, October 2017, PREGLEDI P-34 [https://euro.hnb.hr/documents/2070751/2104183/p-034.pdf/f996270d-b35b-4be2-ae90-5a39b3145a36], Accessed 12 March 2022

[33] Odar, M., *Izazovi financijskog izvještavanja pri ulasku u Eurozonu – iskustva Republike Slovenije*, RiF, UDK 657.2, Zagreb, 2019, pp. 36-42

dicated in both the national currency and the euro) prescribed for the period several months before and after the day of conversion. Experience has shown that in the process of conversion, the highest increases in prices have been recorded in catering services (i.e. restaurants, cafés and the like), accommodation services, hairdressing services, various repairs, dry-cleaning services and recreational and sporting services.[34]

After the introduction of the euro, there will be one-off costs related to the production of euro banknotes and coins, their distribution and withdrawal of kuna banknotes and coins. The costs of system harmonisation should also be taken into account, such as cash payment adjustments (for example, ATMs and other cash deposit machines), adjustments of information systems and accounting and reporting systems for business entities, as well as legal adjustments to ensure the continuity of contracts and financial instruments. One-off costs also include expenditures for information campaigns and training of employees, especially of financial institutions, with the aim of better informing the general public. According to the experience of countries that have introduced the euro so far, one-off conversion costs could amount to around HRK 1.8 billion (i.e. 0.5% of GDP). The conversion costs are expected to be slightly lower than in other Member States, given a high degree of euroisation of the Croatian economy, but also the importance of the tourism sector, which generates large cash inflows in euros. Furthermore, after joining the monetary union, the CNB will have to pay the appropriate amount to the ECB for capital and reserves and transfer part of its international reserves to the ECB. The amounts of these liabilities are determined according to the share of the Member State in total population and GDP of the European Union. For the CNB, the capital subscription key is currently 0.6023%.[35]

By introducing the euro, the Republic of Croatia will have to pay the remaining 62.8 million euros. The CNB is also obliged to contribute to the ECB's reserves by making payments to the revaluation account and to the reserve account.

In addition to paying capital and reserves, the CNB is obliged to transfer HRK 350 million of foreign exchange reserves to the ECB, which represents about 2% of current gross international reserves. By joining the monetary union, the Republic of Croatia also acquires the right to make use of financial assistance, but at the same time it is obliged to participate in the costs related to solidarity assistance to other members of the euro area. The main cost relates to the payment of an additional amount to the ECB's share capital. The costs of participating in assistance

[34] Pufnik, *op. cit.*, note 32

[35] Korda, *op. cit.*, note 30, p. 9

mechanisms for euro area member countries, assuming that the Republic of Croatia joined the euro area in 2016, would be around EUR 425 million.

This amount, which includes an adjustment of capital due to relatively lower income compared to the EU average, should be paid by the Republic of Croatia from the state budget over several years, i.e. in five installments of approximately 85 million euro.[36]

## 8. THE CHANGEOVER FROM THE KUNA TO THE EURO

The Republic of Croatia will most likely introduce the euro as its currency in 2023, and the burning question is what this transition will look like. Tihomir Mavriček, Executive Director of the CNB's Cash Department, says that the goal is to introduce the euro on 1 January 2023, but the final decision is made by the Council of the European Union.

The exchange rate will be around 7.53, but it will be finally determined in May or June 2022 and will be valid from 1 January 2023. The commercial currency exchange rate will be valid until 31 December 2022.

### 8.1. Timeline for the conversion of the kuna to the euro

As for the storage of the kuna to be replaced by the euro, Mavriček said that since the introduction of the kuna, the CNB has produced 2.8 billion kuna coins.

"If we lined them up side by side, vertically, we would get 4,500 km of coins, i.e. the distance between Zagreb, Croatia, to Riyadh, Saudi Arabia. These coins weigh about 10,000 tons. Based on the experience of other countries, we expect about 35% of coins or 1.13 billion pieces of coins to be returned. That is about 5,200 tons, which corresponds to the weight of 124 new Zagreb trams. If a truck can load 20 tons of coins, we are talking about approximately 260 trucks of kuna coins," Mavriček explained.

All kuna accounts will automatically converted to accounts in euros.

Unlike kuna banknotes that will be exchanged into euros indefinitely, the exchange of coins will be possible up to three years after the introduction of the euro. In the first year, everyone will be able to exchange kuna for euros free of charge in banks, Financial Agency (FINA) and the Croatian Post offices, and after that exclusively in the Croatian National Bank. It should be stressed that banks are not

[36] Korda, *op. cit.*, note 30, p. 9

required to accept more than one hundred banknotes and one hundred pieces of coins in one transaction.

According to the experience of other countries that have joined the euro area, the central bank expects that when exchanging the kuna for the euro, about 36% of the coins in circulation will be returned, or 1.1 billion kuna coins, and 99% of the banknotes, or more than 500 million pieces of kuna banknotes.[37]

The experiences of European countries are diverse. It is estimated that twenty years after euro coins and banknotes started to be used for payments on a daily basis, there are still around 8.5 billion euros left in the former national currencies. For example, according to the information from the Deutsche Bundesbank, a huge amount of German marks remained in many places. According to some estimates, there are almost six billion marks. Even today, German marks can be converted into euros.

**Table 5.** National plans for replacement of national currencies with the euro

| National central bank | Banknotes are valid up to | Coins are valid up to |
|---|---|---|
| Austria | unlimited | unlimited |
| Belgium | unlimited | deadline expired 2004. |
| Cyprus | deadline expired 31.12.2017 | deadline expired 2009. |
| Estonia | unlimited | unlimited |
| Finland | deadline expired 2012. | deadline expired 2012. |
| France | deadline expired 2012. | deadline expired 2005. |
| Greece | deadline expired 2012. | deadline expired 2004. |
| Ireland | unlimited | unlimited |
| Italy | deadline expired 2012. | deadline expired 2012. |
| Latvia | unlimited | unlimited |
| Lithuania | unlimited | unlimited |
| Luxembourg | unlimited | deadline expired 2004. |
| Malta | deadline expired 31.1.2018. | deadline expired 2010. |
| Netherlands | deadline expires on 1.1.2032. | deadline expired 2007. |
| Germany | unlimited | unlimited |
| Portugal | deadline expired 28.2.2022. | deadline expired 2002. |
| 200Slovakia | unlimited | deadline expired 2013. |
| Slovenia | unlimited | deadline expired 2016. |
| Spain | deadline expired 31.12.2020. | deadline expired 2020. |

[37] Blašković, *op. cit.*, note 6

*Source*: European Union, available at: [https://european-union.europa.eu/institutions-law-budget/euro/exchanging-national-currency_en], Accessed 10 March 2022

As for savings and loans, they will also automatically be converted into euros, and after 1 January 2023, salaries and pensions will also be paid in euros.[38]

The Croatian National Bank has also prepared a special vault where it will store and keep all collected money until it is destroyed.

Coins will be stored in the premises of the Ministry of Defense of the Republic of Croatia, while banknotes will be located in a safer place - in vaults, which have already been built for that purpose.

It is estimated that there will be fewer euro coins, but not because of the exchange rate. There is a conversion methodology that was developed by the European Monetary Institute, which is based on the fact that there is more or less the same number of coins and banknotes as for the national currency, but the number of banknotes still prevails.

The euro becomes legal tender in Croatia on the day of its introduction, and the conversion rate is fixed.

The conversion of cash, deposits, loans, prices and other monetary values will be carried out free of charge by applying a fixed conversion rate. In the conversion process, cash, prices and all other amounts expressed in HRK will be converted into euros by applying the full numerical expression of the fixed conversion rate, i.e. including all of its five decimals and then rounding the obtained amount to two decimal places. The conversion of monetary values by applying a short form of the fixed conversion rate will not be allowed.[39]

Most kuna coins and banknotes will be converted into euros within 2 weeks following the introduction of the euro, and the CNB will exchange banknotes without anytime limit. Banks will exchange kuna banknotes and coins into euros one year after the date of the introduction of the euro. In the first six months, banks will provide cash exchange services free of charge, and in the next six months, they

[38] MojPosao.net - Uvodimo euro, promjene već idućeg ljeta. Evo kako će se mijenjati kune, krediti... [https://www.moj-posao.net/HR/Articles/Details/81328/Uvodimo-euro-promjene-vec-iduceg-ljeta-Evo-kako-ce-se-mijenjati-kune-krediti/#ixzz7UJtHdtlj], Accessed 10 March 2022

[39] Guidelines for the adjustment of the economy in the process of replacing the Croatian kuna with the euro, Coordination Committee for Economic Adjustment and Consumer Protection, January 2022, [https://euro.hnb.hr/documents/2070751/2104255/h-smjernice-zamjena-hrvatske-kune-eurom_sijecanj-2022.pdf/41a06aed-f094-7d7e-d5e4-fbdf5c8f4584?t=1642409233015], Accessed 10 March 2022

may charge a fee for this service. In the first six months (starting with the day of the introduction of the euro), it will also be possible to exchange kuna cash for euro free of charge at FINA and Croatian Post offices.

The CNB will exchange kuna banknotes for euro for an unlimited period of time, while kuna coins will be exchanged for up to three years following the introduction of the euro. After the expiry of the period during which banks, FINA and the Croatian Post are planned to provide cash exchange services, citizens will be able to exchange their cash exclusively at the CNB. The central bank will exchange banknotes free of charge for an unlimited period of time, and coins for up to three years from the introduction of the euro. Despite very long periods of time for the exchange, the kuna cash exchange process is expected to be particularly intensive in the first two weeks after the introduction of the euro.

### 8.2. Conversion of kuna assets in bank accounts

The conversion of kuna assets in bank accounts into the euro will be performed instantaneously on the day of the introduction of the euro. All kuna assets in current, giro and savings accounts with domestic banks will be changed over to euros free of charge on the day of the introduction the euro. Hence, unlike cash, whose exchange is time-consuming and logistically challenging, the money held in bank accounts will be converted into euros quickly and easily, with no need for a transitional period. This is the reason why citizens will be invited in the months leading to the introduction of the euro to deposit as much cash as possible into their bank accounts. As all kuna assets in bank accounts will be converted to euros on the day of the introduction of the euro, starting from that day all non-cash payment transactions will be executed only in euros.

As of the date of the introduction of the euro, all kuna loans and loans with a currency clause in euros will be considered as loans in euro. The introduction of the euro will not necessarily lead to amendments to existing loan agreements, regardless of whether these are kuna loans or loans with a currency clause in euros, since the question of their conversion will be regulated by the act regulating the introduction of the euro in the Republic of Croatia (hereinafter: the Euro Act[40]). Specifically, according to this act, loan agreements shall remain in force, and the amounts expressed in kuna in these agreements shall be considered as amounts in euro. In so doing, these amounts shall be converted at a fixed conversion rate free of charge for borrowers. If the personal loan interest rate is fixed, it will continue

[40] The Euro Act will be the basic legal framework with which 46 acts and about 70 by-laws will be amended

to be applied after the introduction of the euro. On the other hand, if the loan was agreed with a variable interest rate linked to a specific parameter, pursuant to the Euro Act provisions, this parameter will be modified as necessary, which will be regulated by the Euro Act. In so doing, the financial position of borrowers shall not become worse. Banks will notify their clients of upcoming changes a few weeks prior to the official euro changeover date.

### 8.3. Dual circulation of the euro and the kuna

Both currencies, i.e. the kuna and the euro, will be in circulation in the first two weeks after the introduction of the euro and after the expiry of that period, only the euro will have the status of legal tender. For the purpose of ensuring a smooth transition to the new currency, both the kuna and the euro will have the status of legal tender during a short transitional period. In other words, in the first two weeks after the date of the introduction of the euro, citizens will be able to use any of the two currencies to pay for their purchases. However, retailers will be expected to give change exclusively in euro. This implies that retailers will exchange part of the total amount of kuna cash in circulation to euro. A rule will be laid down under which a retailer will not be obliged to accept more than 50 kuna coins per one transaction with a buyer. After the two weeks following the date of the introduction of the euro, the euro will become the sole legal tender in the Republic of Croatia.

The competent authorities will undertake a number of measures aimed at protecting consumers from unjustified price increases and an incorrect price conversion. Public opinion polls have shown that there is fear among Croatian citizens that the introduction of the euro will lead to a strong one-off price increase. However, experiences of countries that have already introduced the euro have indicated that such fears are unfounded, especially if the competent authorities undertake adequate measures aimed at consumer protection.

### 8.4. Obligation of dual price display

The results of a survey published by the European Commission[41] show that citizens in Croatia, similarly to other EU countries that have committed themselves to adopting a common currency, are largely afraid that the introduction of the euro could result in price increases and pricing abuses. In order to limit the effect of conversion on price increases, certain measures are planned to be taken to be ef-

[41] Flash Eurobarometer 453, May 2017, available at: [https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/78338], Accessed 29 November 2021

fective in countries that have already adopted the euro (the Strategy). Thus, one of the effective ways to prevent the growth of consumer prices due to currency conversion proved to be the measure of mandatory dual price display in shops in the old and new currency for some time before and after the euro changeover, which reduces the efforts of citizens pertaining to price recalculation and facilitates the detection of unfounded price increases. Furthermore, it is useful to develop detailed instructions for price rounding, which companies should adhere to.[42]

Dual display of prices will be the key measure for consumer protection in the process of introducing the euro. The obligation of dual price display is a key measure aimed at preventing unjustified price increases and incorrect price recalculations. The introduction of a new currency may temporarily make price comparisons more difficult, which some retailers might try to use to increase their profits at the expense of consumers. In order to prevent such practices, by adopting the Euro Act and amending relevant regulations, the Government of the Republic of Croatia will introduce the obligation of dual price display, which will be in force in the period from 30 days after the EU Council decision on the introduction of the euro in Croatia to 12 months after the day of the introduction of the euro. The obligation of dual price display will facilitate identification of retailers and service providers who have increased prices with no justifiable reason or have incorrectly converted them to euros. It will be possible to report cases of unjustified price increases or of incorrect price conversion at the official website dedicated to the introduction of the euro (www.euro.hr) and via other channels.

The companies will have to display dual prices on price lists and promotional materials published on websites and in the media. Each company's cash registers will also be adjusted to dual price display so that the prices of individual products and the invoice total due amount are shown in both currencies. During the period of dual display of prices, the price lists must not contain unnecessary information that could confuse the consumers. Thus, for example, in addition to the price in kuna and euro, the labels in shops may only contain a fixed conversion rate (as a full numerical expression, i.e. in all six digits), so that customers can check up whether the prices have been converted correctly.

In the period of mandatory dual display of prices (starting on the first Monday in September 2022 and ending on 31 December 2023), business entities must report the price and other monetary values in both euros and kuna.[43]

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42 Pufnik, *op. cit.*, note 32

43 Guideline for the adjustment of the economy in the process of replacing the Croatian kuna with the euro, [https://euro.hnb.hr/documents/2070751/2104255/h-smjernice-zamjena-hrvatske-kune-eurom_siječanj-2022.pdf/41a06aed-f094-7d7e-d5e4-fbdf5c8f4584?t=1642409233015]

The competent authorities will closely monitor compliance with the dual price display requirement and, where necessary, punish violators if prices are not displayed in both currencies or if the fixed conversion rate is not applied correctly (as a full numerical expression). Indeed, in conversion and dual display of prices, it is not allowed to reduce/round the fixed conversion rate, which must be applied as a full numerical expression, i.e. with all six digits.

The Ministry of Economy and Sustainable Development will cooperate with business associations and invite retailers and other companies to participate in the campaign to promote fair conversion without rounding up, and in return they will be given the right to use a campaign label that tells their consumers that prices are converted correctly into euros.

The companies that will try to use the process of introducing the euro to increase their prices in currency conversion to the detriment of consumers will bear the consequences and be placed on the list of violators ("blacklist"), which will be published through various information channels. Citizens themselves will also be able to contribute to the creation of these lists. Namely, citizens will be able to submit their complaints, together with evidence of infringements, to the authorities responsible for consumer protection.[44]

## 9. CONCLUDING REMARKS

As a unit of account, the euro was introduced on 1 January 1999, and on 1 January 2002, euro banknotes and coins entered into circulation in 12 EU Member States. It was the largest cash exchange in history.

The euro has established itself as the world's second most important currency, which is evidenced by the fact that about 60 countries directly or indirectly peg their currency to the euro. Since its inception, the euro has been introduced by 19 Member States, and the process continues.

Like all new Member States, Croatia has committed itself by its Accession Treaty to introducing a common currency once it meets the conditions. The Government decides on the moment of initiating the procedure, based on a detailed analysis of economic benefits and costs and an assessment of timeliness. In so doing, one of the basic tasks is to raise the level of competitiveness of the national economy to become able to be an equal member of the euro area.

[44] Introduction of the euro in the Republic of Croatia, CNB, available at: [https://euro.hnb.hr/-/kako-ce-se-provoditi-nadzor-dvojnog-iskazivanja-cijena-], Accessed 15 March 2022

The results of numerous studies show that the effect of the conversion of national currencies into the euro on the growth of consumer prices in the euro area countries was generally mild and one-off. Thus, it is estimated that the largest contribution to the overall increase in prices due to conversion could be made by accommodation services and catering services (in the case of indebted poor countries) or recreational and cultural services and catering services (in the case of indebted poor countries). Furthermore, the introduction of the euro could have a slightly more pronounced effect on higher-income citizens, given that the share of goods and services whose prices could rise significantly (e.g. catering, recreational and cultural services, vehicles) in their basket of goods is higher. On the other hand, conversion to the euro could have a smaller impact on the price of goods and services bought by lower-income citizens, such as pensioners or the unemployed.

Inflation, which will be measured from April last year to April this year, has been singled out as the most problematic criterion so far. Looking at the average of all euro area countries, inflation was 4.3 percent and is slightly higher than in Croatia. It is to be expected that the common problem - energy and food prices whose growth is the result of global disturbances will be taken into account.

Rising prices during conversion can often be the result of the spillover of conversion costs onto consumers, frequent rounding up of prices to reach a new attractive level and the company's belief that consumers ignore small price changes while getting used to the new currency, which requires extra effort to recalculate prices, recalling old prices, etc., and hence they try to take advantage of this situation to increase their profit margins. On the other hand, there are factors that can act in the direction of reducing prices due to greater competition within the euro area, supported by improved price transparency and due to reduced transaction costs and exchange rate risk.

It should be emphasised that of all EU Member States that are not in the euro area, i.e. which have not introducted the euro yet, Croatia has the highest degree of deposit euroisation, which has its roots first in the German mark and today in the euro and is extremely difficult to eradicate.

The geatest benefit of the introduction of the euro is the elimination of currency risk to which the population, businesses and the state are extremely exposed, and the introduction of the euro will reduce the risk of a banking and balance-of-payment crisis and eliminate the risk of a currency crisis. Lower interest rates, lower transaction and exchange costs and stronger protection in the event of economic disruption will lead to additional benefits from the introduction of the euro. However, at the moment, the dynamics of the euro introduction process largely

depends on the implementation of the Action Plan of the Republic of Croatia for Joining ERM II and the Banking Union as a precondition for joining ERM II.

It is also necessary to emphasise the importance of conducting an appropriate information campaign, i.e. good communication with the public, in order to avoid misconceptions made by citizens about price movements during the conversion to the euro.

Available data and previous experiences of euro area members related to the introduction of the euro show that the benefits of adopting the euro outweigh the disadvantages. However, given the current situation regarding inflation in terms of prices for goods and services, as well as the crisis caused by the COVID-19 pandemic and the war turmoil in Europe, it is difficult to predict the real consequences of the introduction of the euro.

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UDK 347.736(497.5):34(4-67EU)
Review article

# IMPLEMENTATION OF THE DIRECTIVE 2019/1023 IN THE CROATIAN LEGAL SYSTEM: A NEW TREND OF RESTRUCTURING IN THE CROATIAN INSOLVENCY LAW OR ANOTHER MISSED OPPORTUNITY?

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***ABSTRACT***

*Saving companies as early as possible and providing new opportunities to faltering entrepreneurs has become one of the main priorities of the EU policy. Following the example of American legislation, the EU Commission has recognized the importance of acknowledging the difficulties in doing business and, through the Directive 2019/1023, created a legal basis for harmonized restructuring tools in EU member state. The aim of the Directive is to enable*

[*] ORCID: 0000-0003-4714-7440. This paper was developed as part of the project of the Faculty of Law of the Josip Juraj Strossmayer University in Osijek titled Legal security, rule of law and legal protection in the commercial, insolvency, civil and administrative disputes as a precondition for continued economic and social growth and as a part of ERASMUS+ programme within professional training of Lidija Šimunović at the Faculty of Law University of Turku in Finland. The paper continues research conducted for the purpose of writing a graduated thesis on: *Directive on restructuring and insolvency: Challenges of Croatian implementation and comparative expirences* by co-author Tena Konjević under the supervision of co-author Lidija Šimunović that was oriented primarily to the EU law. The scientific contribution of this paper is evident in the fact that in the meantime the amended provisions of the Croatian Bankruptcy Act came into force, so the authors analyze the conclusions from the graduated thesis in the context of new provisions of the Croatian Bankruptcy Law to examine whether the objectives of the Directive are or will be achieved in Croatian legal system

*encouragement, reorganization and creation of new opportunities to faltering entrepreneurs. Although the aim of the Directive 2019/1023 is well thought out, its adoption has not been followed by smooth implementation. Many EU Member States used the possibility of extending the implementation deadline and have implemented the Directive 2019/1023, so to speak, at the last minute. One of such countries is the Republic of Croatia, which, with the latest amendments to the Bankruptcy Act from March 2022, passed a series of provisions implementing the goals and solutions from the Directive 2019/1023. This article opens with an analysis of the circumstances that led to the adoption of the Directive 2019/1023 and gives an overview of its objectives and provisions. In addition, the article addresses the short overview of the implementation solutions developed in Austrian and German law, which are role models for Croatian bankruptcy law. The central part of the paper provides a critical analysis of the amended provisions of the Croatian Bankruptcy Act, which implements the Directive 2019/1023 into the Croatian legal system. The authors warn of possible challenges in the enforcement of the objectives of the Directive through the prism of the amended rules of the Bankruptcy Act.*

***Keywords:*** *Directive 2019/1023, early warning tools, event of default, implementation moratorium*

## 1. INTRODUCTION

Statistics show that approximately half of the entrepreneurs operate for less than five years, with approximately 200,000 of them across the European Union facing insolvency each year, which results in the loss of millions of jobs. This means that a significant number of entrepreneurs in the European Union are failing every day and this number is on the rise, with the number of insolvencies doubling since the start of the COVID crisis, and that trend continues.[1]

Previously EU insolvency law focused on regulating cross-border insolvency processes, addressing concerns such as the court's jurisdiction, recognition of the effects of proceedings in the other Member States, and conflicts of laws.[2] With the expanding intercourse between nations, the negative repercussions of a lack of international collaboration in bankruptcy proceedings where assets are located in more than one country have become even more obvious. Creditor countries, of course, bear the brunt of the consequences. Some agreements on jurisdiction and judicial assistance in bankruptcy have been reached, the majority of them involv-

[1] Proposal of the Law on Amendments to the Bankruptcy Act, No. 50301-21/06-21-3, from 2 December 2021, p. 36

[2] Didea, I.; Ilie, D. M., *A New Stage in the Development and Strenghtening of a "Rescue Culture and Prevention in Business" in the Spirit of an European Legal Instrument of the Hard Law Type. Transposition at National Level of Directive (EU) 2019/1023*, Revista Universul Juridic, Vol. 2021, No. 4, 2021, pp. 91; See also: Consolidated text: Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

ing neighboring governments, according to international trade groups. Except for these treaties, no significant progress has been made so far.[3]

In this regard, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereinafter: Directive 2019/1023, Directive)[4] is the first important step toward integrating the various European bankruptcy laws, going beyond the stage of implementing norms and standards that are confined to judicial cooperation and cross-border insolvency processes.[5]

The Directive, following the US Bankruptcy Law solutions, strives to ensure that entrepreneurs and businesses in financial distress can seek help as soon as possible to keep their operations afloat. Where insolvency is a possibility, Member States shall provide debtors with access to a preventive and flexible restructuring framework that allows them to restructure their company to avoid insolvency.[6] Its overarching purpose is to lower barriers to free capital flow within the EU, improve the methods for rescuing distressed businesses, and foster a culture of second chances for unsuccessful entrepreneurs.[7]

Therefore, apart from the process of the adoption of the said Directive and its goal, structure and objectives, the paper also deals with its implementation in Germany and Austria with an emphasis on its implementation in the Republic of Croatia. As a result of the implementation of the Directive, the Croatian Bankruptcy Act[8] was amended as the backbone of the Croatian insolvency system. Therefore, the paper emphasizes the amendments to the Bankruptcy Act and the impact of the Directive on its amendments. In conclusion, the authors warn of possible chal-

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3 Nadelmann, K. H., *The National Bankruptcy Act and the Conflict of Laws*, Harvard Law Review, Vol. 59, No. 7, 1949, pp. 43

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereinafter: Directive 2019/1023)

5 Didea, Ilie, *op. cit.,* note 2, p. 91

6 Directive 2019/1023, preamble (20)

7 Binard, S.; Mara-Marhuenda, C; Minne, G., *The New EU Restructuring Directive and Upcoming Reform of Luxembourg Restructuring and Insolvency Legislation*, Insolvency and Restructuring International, Vol. 14, No. 1, 2020, p. 29

8 Croatian Bankruptcy Act (*Cro*. Stečajni zakon), Official Gazette No. 71/2015, 104/2017, 36/2022, which amendments came into force on 31 March 2022 (hereinafter: Croatian Bankruptcy Act)

lenges in the enforcement of the early warning tools and the objectives of the amendments Croatian Bankruptcy Act.

## 2. THE PROCESS OF ADOPTING THE DIRECTIVE 2019/1023 IN THE EU

Historically, bankruptcy with liquidation has been one of the most common insolvency proceedings in the EU Member States, while the EU did not promote reorganization and restructuring proceedings.[9] A turning-point in this regard occurred in 2014 when the EU Commission concluded that the EU market was facing unprecedented economic crises and that an effective response would be a more flexible legislative framework for bankruptcy and the promotion of restructuring.[10]

In light of these conclusions, the EU Commission adopted the Recommendation on a New Approach to Business Failure and Insolvency in 2014.[11] The text of the 2014 Recommendation aimed at providing a second chance to entrepreneurs in financial distress through effective early warning tools and introducing preventive informal (extra-judicial) restructuring models.[12] The role model for the Recommendation was the US Bankruptcy Law Chapter 11 which enables reorganization to enable the continued operation of the entity facing liquidity problems. Such entities are assisted through various tools, such as the release from debt, deferral of payments, waiver of interest, etc.[13]

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9 Volberda, H., *Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023*, Utrecht Law Review, [https://www.utrechtlawreview.org/articles/10.36633/ulr.638/#n28], Accessed 25 May 2022. See also Martin, N., *The Role of Culture and History in Developing Bankruptcy and Restructuring Law: The Perils of Legal Transplantation*, Boston College International & Comparative Law Review, Vol. 28, No. 1, 2005, p. 51

10 *Ibid*. See also Garrido, Jose M.; DeLong, Chanda M.; Rasekh, Amira; Rosha, Anjum, *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive*, IMF Working Papers, No. 21/152, 2021, p. 5, [https://www.imf.org/en/Publications/WP/Issues/2021/05/27/Restructuring-and-Insolvency-in-Europe-Policy-Options-in-the-Implementation-of-the-EU-50235], Accessed 6 September 2021

11 *Ibid*. See also Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L74/6; Tollenaar, N., *The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings*, Insolvency Intelligence, Vol. 30, No. 5, 2017, pp. 65-66

12 Garrido *et al., op. cit.,* note 10

13 McCormack, G.; Keay, A.; Brown, S., *European Insolvency Law: Reform and Harmonization,* Edward Elgar Publishing, Cheltenham, 2017, p. 227. For more details on the US Bankruptcy Code solutions see Countryman, V., *A History of American Bankruptcy Law*, Commercial Law Journal, Vol. 81, No. 6, 1976, pp. 226-227. See also on comprehensive on consumer protection Ayer, J. D., *Some Awkward Questions about American Bankruptcy Law. An Agenda for Comparativists*, International Insolvency Re-

Although the Recommendation was not a legally binding instrument, the EU Commission extensively expanded its scope with additional early warning restructuring tools and activities and in November 2016 it adopted the draft Directive 2019/1023. The idea of the Commission was to non-binding Recommendation should be replaced with a Directive as a harmonizing and legally binding instrument.[14]

The drafting process for the final text of the Directive was not entirely smooth and it resulted in compromise solutions that reduced the harmonization effect of certain restructuring tools that were envisioned by the first draft if the Directive. The Member States were given the discretion to decide how each mechanism is to be implemented, and it was unclear in the drafting process which mechanisms would be used by each Member State.[15]

The process resulted in the adoption of the final text of the Directive 2019/1023 on 20 June 2019 whose stated goal was to harmonize and promote restructuring proceedings in the Member States through early warning tools and preventive restructuring.[16] However, immediately after the adoption of the Directive, it became apparent that, despite the proclaimed minimal standards of harmonization under the Directive, the pursuit of the desired goals will not be harmonized. Therefore, there is a risk of the emergence of models in some Member States that violate or reduce the rights of the creditors. Furthermore, there is a risk of reduced predictability of the outcomes in such proceedings, which may lead to forum shopping in cross-border disputes.[17]

## 3. THE STRUCTURE AND OBJECTIVES OF THE DIRECTIVE 2019/1023

The Directive 2019/1023 is divided into six parts. The first part of the Directive 2019/1023 defines its subject and scope of application in which the main definitions with the explanation of the early warning and access to information are given. In the second part, the Directive deals with the preventive restructuring

view, Vol. 1, No. 1, 1990, pp. 51, 52; Schecher, A. L., *United States – Canadian Bankruptcy Litigation: Is the Treaty the Way to Go*, International Insolvency Review, Vol. 1, No. 2, 1991, p. 107

14 *Ibid*. See also Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM/2016/SWD/723/final), p. 8

15 Garrido *et al., op. cit.,* note 10

16 *Ibid*., pp. 4-5.; Rotaru, V., *The Restructuring Directive: a functional law and economics analysis from a French law perspective*, Droit & Croissance / Rules for Growth Institute, Paris, 2019, p. 2

17 Garrido *et al., op. cit.,* note 10, pp. 5-9

frameworks such as the availability of preventive restructuring frameworks, facilitating negotiations on preventive restructuring plans, restructuring plans, protection for new financing, interim financing and other restructuring related transactions and duties of directors.[18] The third part addresses the discharge of debt and disqualifications, which are defined as follows: access to discharge, discharge period, disqualification period, derogations and consolidation of proceedings regarding professional and personal debts.[19] The fifth part deals with the monitoring of procedures concerning restructuring, insolvency and discharge of debt, which relates to data collection and Committee procedure. Finally, the sixth part of the Directive defines the relationship with other acts, transposition and entering into force[20].[21]

In the drafting process of the Directive, it was determined that there are many discrepancies among the restructuring models adopted in the Member States. Therefore the Directive aims to address the following three major issues: (1) the establishment of a preventive restructuring framework for each Member State, for debtors in financial distress prior to insolvency; (2) the enforcement of a maximum three-year discharge period, granting a "second chance" to entrepreneurs; (3) the improvement of the efficiency of the insolvency procedures and others of a similar nature.[22]

The underlying goal of the Directive is to remove any obstacles to the proper functioning of the internal market[23] and the enjoyment of the fundamental freedoms (free movement of goods, persons, capital[24] and freedom of establishment).[25] The

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18 Directive 2019/1043, Art. 1-19.; See also Zhang, D., *Insolvency Law and Multinational Groups: Theories, Solutions and Recommendations for Business Failure*, Routledge, Abingdon, 2020, p. 69

19 Directive 2019/1043, Art. 20-24. Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt are presented in the fourth part of the Directive. The Directive prescribe that Member States should introduce specified judicial and administrative authorities who impose these measures, then practitioners in procedures concerning restructuring, insolvency and discharge of debt, supervision and remuneration of practitioners and usage of electronic means of communication. *See also:* Directive 2019/1043, Art. 24-28

20 Directive 2019/1043, Art. 31-36

21 See McCormack, G., *The European Restructuring Directive*, Edward Elgar Publishing Limited, Cheltenham, 2021

22 Gassner, G.; Wabl, G., *The New EU Directive on Restructuring and Insolvency and its Implications for Austria*, Insolvency and Restructuring International, Vol. 13, No. 2, 2019, pp. 5-6

23 See Yu, T., *European Unio Internal Market Law Book Review*, Chinese Journal of Global Governance, Vol. 4, No. 1, 2018, pp. 77-78

24 See: Sehnalek, D., *Free Movement of Capital*, Bialstockie Studia Prawnicze, Vol. 4, No. 81, 2008, pp. 81-82

25 See Maestripieri, C., *Freedom of Establishment an Freedom to Suppy Services*, Common Market Law Review, Vol. 10, No. 2, 1973, pp. 150-153

Directive seeks to remove the barriers created by divergencies in the national regulation of preventive restructuring[26], insolvency[27], debt discharge, and disqualifications, while protecting the rights and freedom of the workers. This is achieved by creating a framework that provide effective national preventive restructuring frameworks for viable enterprises in financial distress, the discharge of debt for honest bankrupt or overly-indebted marketers, and the general improvement of the efficiency of related procedures.[28] Therefore, restructuring should enable debtors to overcome economic difficulties and maintain their operations by remodeling or converting their composition or form, including their assets and liabilities, and by operational modifications. Where such activities are not expressly regulated by national law, contractual, and property-related restructuring activities are conducted under the general conditions provided in bylaws, civil regulations and labour law guidelines. Any debt-to-equity exchange must be compliant with national law, to ensure a timely and effective procedure to prevent unwarranted insolvency and liquidation. The purpose of these frameworks is to prevent the loss of jobs, know-how and opportunities, and to maximize the benefits for lenders in their assessment of the value of assets in liquidation, versus the opportunities that will arise in continued operations. There are also benefits for the business owners and the broader financial system as a whole.[29]

Preventive restructuring frameworks must also reduce the rate of loan defaults by ensuring that organizations can take action before they are forced to default on a loan, thus reducing the risk of loans being concealed in cyclical downturns and mitigating unfavorable economic effects.[30] A large percentage of businesses a nd jobs may be salvaged by establishing a preventive framework in all the Member States where such businesses are established, or where their property or creditors are located. The preventive frameworks should account for and balance the rights of all relevant stakeholders.[31]

On the other hand, non-viable organizations that have no prospect of survival should be liquidated as quickly as possible. If the debtor in financial distress can-

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26 See Moffatt, P., *Debt Restructuring*, International Insolvency Review, Vol. 26, No. 2, 2017, pp. 233-236

27 See Lee, E. B., *Insolvency Law*, Singapore Academy of Law Annual Review of Singapore Cases, Vol. 2011, No. 319, 2011, pp. 319-323

28 See Fannon, I. L., et. al., *Corporate Recovery in an Integrated Europe: Harmonisation, Coordination and Judical Cooperation*, Edward Elgar Publishing Limited, Cheltenham, 2022, pp. 162.-192

29 Directive 2019/1043, preamble (1-2)

30 See Omar, P. J., Research Handbook on Corporate Restructuring, Edward Elgar Publishing Limited, Cheltenham, 2021, p. 384

31 Directive 2019/1043, preamble (3)

not reasonably recover, and restructuring is not possible, there should be efforts to accelerate the process and reduce the losses to the detriment of the lenders, workers and other stakeholders, as well as the financial system as a whole.[32]

Furthermore, different Member States have adopted a range of restructuring mechanisms for debtors in economic distress.[33] Some Member States provide limited recourse to restructuring mechanisms that are available to businesses at a very late stage of the insolvency proceedings. Such approaches have proven to be of limited effectiveness, in light of their formality and limited use of out-of-court preparations. The more prominent trend in insolvency law has been towards a more preventive approach. In the different Member States, restructuring is possible at an early stage, but the available mechanisms were not effective, or they were overly formal, limiting the use of out-of-court preparations. Preventive answers are a developing trend in insolvency law.[34]

In the many Member States, good faith bankrupt marketers need over 3 years to be discharged from their debts in order to re-start their operations. Such inefficient and rigid frameworks lead many entrepreneurs to relocate their business to different jurisdictions where they can have a fresh start, which comes at an expense for the entrepreneurs and their lenders.[35] Such a framework that is prevalent in several Member States is one of the key reasons for the low restoration fees, which has a deterrent effect on traders from engaging in jurisdictions with lengthy and expensive procedures.[36]

The diverging approaches between Member States regarding restructuring, insolvency and the discharge of debt create additional expenses for traders in their risk assessment of the borrowers' likelihood of falling into financial distress in different Member States, as well as additional restructuring costs for businesses that have offices, property or lenders in different member States. This is particularly for the restructuring of global corporations.[37] Investors have noted that the uncertainty related to insolvency rules and the risks of lengthy insolvency proceedings in different Member States are among the key reasons for deciding not to invest in a particular jurisdiction, or not to engage with a company from a particular country. This uncertainty is a disincentive, which obstructs the freedoms undertakings and

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32 *Ibid*.

33 Directive 2019/1043, preamble (4); See more: Olivares-Caminal, R., *et al.*, *Debt Restructuring*, OxfordUniversity Press, Oxford, 2016

34 *Ibid.*

35 Directive 2019/1043, preamble (5); See more Marney, R., *et al.*, *Corporate Debt Restructuring in Emerging Markets: A practical Post-Pandemic Guide*, Palgrave Macmillan, Cham, 2021, pp. 62-65

36 Directive 2019/1043, preamble (6)

37 Directive 2019/1043, preamble (7)

the promotion of entrepreneurship, which is detrimental to the proper functioning of the internal market.[38]

As the objectives of the Directive cannot be achieved under the existing fragmented regulations of the Member States, it was elevated to the Union level, so it can adopt measures in accordance with the principle of subsidiarity as set forth in Article 5 of the Treaty on European Union.[39] In conformity with the proportionality principle outlined in that Article, this Directive does not go beyond what is necessary to attain the stated goals.[40]

Therefore, the Directive should take into account the culture of the countries in order to reduce the effects of insolvency and to provide entrepreneurs a "second chance".[41]

## 4. OVERVIEW OF THE IMPLEMENTATION PROCESS OF THE DIRECTIVE IN AUSTRIA AND GERMANY

The European approach to insolvency law is known to be strict and rigid, which is a remnant of the traditional notions of bankruptcy as a failure.[42] Before the adoption of the Directive 2019/1023 in the EU Member States there were a lot of discrepancies regarding the restructuring regime. On one hand, in restrictive regimes such as in Greece and Italy, only individuals that are involved in a business could qualify for bankruptcy protection, i.e. there was no consumer bankruptcy system. On the other hand, Norway, Sweden, Denmark, Finland, Austria, Germany, France, Spain, and Portugal offer some sort of relief, allowing judges to consider on the discharge requests. Therefore, the Directive came as a reaction of the EU bodies, having recognized the need for urgent changes in this area.[43]

Despite the fact that countries had to implement the Directive initially by 17 July 2021, or under the extended deadline until 17 July 2022, with the exception of a few provisions, only several countries have adopted and published the legislation

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38 Directive 2019/1043, preamble (8-9)

39 See: Arnull, A., *et al.*, *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford, 2015, p. 87

40 Directive 2019/1043, preamble (100)

41 Didea, Illie, *op. cit.*, note 2, preamble (92)

42 Volberda, H., *Crises, Creditors and Cramdowns: An Evaluation of the Protection of Minority Creditors under the WHOA in Light of Directive (EU) 2019/1023*, Utrecht Law Review, Vol. 17, No. 3, 2021, p. 68

43 Martin, N., *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, Boston College International and Comparative Law Review, Vol. 28, No. 1, 2005, pp. 40-41

by which the transfer would be performed.[44] Therefore, Germany, Austria, Greece, France, Portugal, and recently Croatia, have fully or partially implemented the Directive, and all the other Member States are in the process of implementation or have not even started the implementation process.[45] Consequently, as an example of a timely transfer into domestic legislation, the following is an overview of the process of implementation of the Directive in Austria and Germany, and for comparison, the course of implementation in Croatia.

### 4.1. Austria

Before the implementation of the Directive in Austria, a well-functioning out-of-court private workout practice dominated as the main restructuring mechanism in the Austrian market.[46] Despite the fact that such workouts had to be done on a contractual, consensual basis, commercial and practical solutions were frequently found because the main players (especially banks, courts, and advisers) are very professional and tend to act in accordance with (non-binding) 'gentlemen's agreements'.[47] However, there were certain evident flaws with such private workouts. Even though that system was not new in Austria, as the Business Reorganization Act (ger. *Unternehmensreorganisationsgesetz* or URG) was passed in the 1990s to allow pre-insolvency reorganizations inside official proceedings. Such processes, however, have never been recognized in Austrian law.[48]

The implementation of the Directive in Austria started on 22 February 2021 when the draft of the Restructuring and Insolvency Directive Implementation Act[49] was released, and ended on 17 July 2021 when the Restructuring Code[50] (ger. *Restrukturierungsordnung*, hereinafter: "ReO") entered into force. According to Section 6 of the ReO, the debtor is obliged to submit the restructuring plan together with the

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44 McCarthy, J., *A Class Apart: The Relevance of the EU Preventive Restructuring Directive for Small and Medium Enterprises*, European Business Organization Law Review, Vol. 21, 2020, p. 897

45 National transpositions measures communicated by the Member States concerning Directive on restructuring and insolvency, [https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX-:32019L1023], Accessed 5 March 2022

46 See Klauser, A., *Austria, Germany, Italy*, International Business Lawyer, Vol. 30, No. 6, 2002, pp. 258-259

47 See Diago Diago, M. P., *Gentlemen's Agreements and International Financing Agreements*, Cuadernos de Derecho Transnacional, Vol. 4, No. 1, 2012, pp. 124-128

48 Business Reorganization Act (*Ger.* Unternehmensreorganisationsgesetz – URG), Official Gazette No. 114/1997

49 *Restructuring and Insolvency Directive Implementation Act (Ger.* Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz – RIRUG), *Federal Law Gazette I No. 147/2021*

50 Federal Act on the Restructuring of Companies (*Ger*. Restrukturierungsordnung - ReO), Federal Law Gazette BGBI I. No. 147/2021

request for initiating the restructuring procedure or within the deadline allowed for its submission and submit a request for its closure.[51] The outcome of the implementation of the Directive in Austria is a new age in restructuring law. Restructuring measures are currently available even against the objection of individual creditors.[52]

### 4.2. Germany

Over the last two decades, Germany has made significant progress in the sphere of insolvency and restructuring law. Unlike the previous system that was hostile to restructuring and often included forced administration, the dissolution of the debtor's company, the liquidation of its assets, and the reputation of a failed entrepreneur, the new German insolvency law reflects a more friendly attitude to restructuring.[53] Germany adopted its Development of Restructuring and Insolvency Act (*Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, SanInsFoG*) on December 29, 2020. The *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*, *StaRUG*, from January 1, 2021 has had a significant impact on this Act.[54]

The biggest impact ofthe act Act is the establishment of a comprehensive legal framework for out-of-court restructuring, which did not previously exist in German restructuring law.[55] Also, the new Act fills the gap in the previous legal framework for restructuring taking place within a consensual pre-insolvency and insolvency process. It gives the opportunity to the parties to engage in restructuring against the opposition of individuals who do not participate in the insolvency proceedings via a cram-down, involving the possibility of a debt-to-equity swap. This allows the restructuring contract to be terminated as needed, offering the possibility of a moratorium on individual enforcement measures. [56] This makes the German restructuring practices a competitive, effective and practical restructuring mechanism in the international market.[57]

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51 Section 6 of the ReO

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57 Girotto, F.; Backer, A., *Implementation of the EU Restructuring Directive in Germany,* Financier Worldwide Magazine, No. 216, 2020, [https://www.financierworldwide.com/implementation-of-the-eu-re-

## 5. IMPLEMENTATION OF THE DIRECTIVE IN CROATIA WITH AN EMPHASIS ONTO THE NEW AMENDMENTS OF THE CROATIAN BANKRUPTCY ACT: REAL CHANGE OR MORE OF THE SAME

The implementation of the Directive 2019/1023 in the Republic of Croatia lasted for three years.[58] Due to the Updated proposal of the Plan of Legislative Activities of the Ministry of Justice and Administration for 2021, the Proposal of the Law on Amendments to the Consumer Bankruptcy Act[59] and the Proposal of the Law on Amendments to the Bankruptcy Act[60] should be sent to the procedure of the Government of the Republic of Croatia in the first quarter of 2021. However, the original deadline was not met[61]. In December 2021 the Government published the Proposal of the Law on Amendments to the Bankruptcy Act[62] and in February 2022 the Final Proposal of the Law on Amendments to the Consumer Bankruptcy Act[63]. On March 11, 2022, the Croatian Parliament finally decided to amend the Bankruptcy Act and the Consumer Bankruptcy Act[64] by a majority vote, thus completing a significant part of the implementation process.[65] Finally the amendment of the Bankruptcy Act entered into force on the 31 March, 2022.[66]

Despite the fact that the subject of this paper is not the Consumer Bankruptcy Act, it should be emphasized that the Directive has left its mark on it, especially in the general provisions, the position of commissioner, regular consumer bankruptcy proceedings and simple consumer bankruptcy proceedings.[67] Namely, the amend-

structuring-directive-in-germany#.Yov2MKhBxPY], Accessed 5 March 2022

58 Proposal of the Law on Amendments to the Bankruptcy Act, No. 50301-21/06-21-3, from 2 December 2021 (hereinafter: Proposal of the Law on Amendments to the Bankruptcy Act), p. 2

59 Proposal of the Law on Amendments to the Consumer Bankruptcy Act, No. 65-21-02, from 2 December 2021

60 Proposal of the Law on Amendments to the Bankruptcy Act, *op. cit*., note 58

61 Updated proposal of the Plan of Legislative Activities of the Ministry of Justice and Administration for 2021, Ministry of Justice and Administration, from 23 December 2021 [https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=14930], Accessed 12 February 2022

62 Proposal of the Law on Amendments to the Bankruptcy Act, *op. cit*., note 58

63 Proposal of the Law on Amendments to the Consumer Bankruptcy Act, *op. cit*., note 59

64 Final Proposal of the Law on Amendments to the Consumer Bankruptcy Act, [https://www.iusinfo.hr/document?sopi=RDOCSB201D19900101NX6902022T1736178600], Accessed 15 March 2022

65 *Sabor izmijenio Stečajni zakon*, [https://www.edusinfo.hr/aktualno/dnevne-novosti/49907], Accessed 16 March 2022

66 Croatian Bankruptcy Act (*Cro*. Stečajni zakon), Official Gazette No. 71/2015, 104/2017, 36/2022 which amendments came into force on 31 March 2022 (hereinafter: Croatian Bankruptcy Act)

67 Bodul, D., *Pogled na Nacrt Zakona o stečaju potrošača za 2022.: treća sreća?,* [https://www.iusinfo.hr/strucni-clanci/pogled-na-nacrt-zakona-o-stecaju-potrosaca-za-2022-treca-sreca], Accessed 20 March 2022

ments to the Consumer Bankruptcy Act shorten the period of consumer behavior testing from five to three years. The reason for denying the right to release from remaining obligations is also altered, so that instead of ten years, the condition is that the consumer in the six years preceding the filing of the bankruptcy petition or in the last three years (instead of the previous five years) preceding the filing of a simple consumer bankruptcy procedure, be released from remaining obligations or be denied exemption. This aligns these deadlines with the shortening of deadlines for the consumer behavior review period.[68]

### 5.1. Amendment to the Croatian Bankruptcy Act

One of the main purposes of amending the Bankruptcy Act is the establishment of an early warning system that would signal to debtors in financial difficulties that it is necessary to act without delay, simplifying the adoption of the restructuring plan, the establishment of a system for collecting and monitoring bankruptcy data, improving the legal framework for bankruptcy trustees by establishing more restrictive entries into the profession, enhanced initial and continuing professional development; and finally improving the position of workers in bankruptcy proceedings.[69]

According to the obligations arising from the Directive[70], the Amendment to the Bankruptcy Law adopts an early warning system in order for the debtor to detect his financial difficulties as soon as possible and take appropriate action, thus potentially avoiding impending insolvency or liquidation. Also, in order to increase the support of workers and workers' representatives, the obligation to inform them in a timely manner about the availability of the early warning system and about the ways of restructuring and debt relief is introduced. The amendment imposes an obligation on employers to inform their employees at least once a year about early warning tools and procedures related to debt restructuring and debt relief, if the employer is threatened with insolvency or bankruptcy proceedings have been opened against him.[71]

The Directive also requires that the application of the latest information and communication technologies should provide clear, up-to-date and concise informa-

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68 *Izmjene Stečajnog zakona za prevenciju i lakše restrukturiranje*, [https://www.iusinfo.hr/aktualno/dnevne-novosti/48572], Accessed 20 March 2022

69 *Ibid.*

70 Law on Amendments to the Bankruptcy Act, Official Gazette No. 36/2022 (hereinafter: Law on Amendments to the Bankruptcy Act). See also: Bodul, D., *Analiza Nacrta novele Stečajnog zakona iz 2022: još jedne (reformske ili kozmetičke) izmjene?*, [https://www.iusinfo.hr/strucni-clanci/CLN-20V01D2022B1639], Accessed 20 March 2022

71 Art. 4 of the Law on Amendments to the Bankruptcy Act

tion tailored to the users on available preventive restructuring procedures, providing the debtors with sufficient access to clear and transparent early warning tools. The availability of such tools should indicate the likelihood of insolvency and signal the need to act without delay.[72] Thus, the Ministry of Finance, the Tax Administration and the auditor have a duty to warn the debtor of the negative development in their payment that is noted during the course of their work. The employer is obliged to provide employees information about the early warning tools an annual basis, while the debtors and the public can access the relevant and updated information on the e-Bulletin board.[73] According to the amendments to the Bankruptcy Act, the Ministry in charge of justice has a duty to collect and generate data on procedures related to restructuring, insolvency and debt forgiveness, information on the number of debtors who have been subject to restructuring or insolvency proceedings and who, within three years before the application or initiation of such proceedings, if such initiation is provided for by applicable regulations, have confirmed the restructuring plan under the previous restructuring procedure, and other information referred to in Article 9 of the Law on Amendments to the Bankruptcy Act.[74] Such information must be collected at the national level on annual basis. Furthermore, taking advantage of the application of new technology, the existence of a strict but not inflexible framework for action, emphasized literacy and speed of decision-making, are ideas that have been translated into the Act regarding the use of electronic means of communication. Thus, electronic means of communication can be used in pre-bankruptcy and bankruptcy proceedings, with the appropriate application of the rules of civil procedure before commercial courts.[75]

Furthermore, the amended Bankruptcy Act provides for two scenarios: acceptance of the plan by the creditor and confirmation of the plan by the court. Therefore, the court gets much more autonomy in approving the plan and is no longer bound by the creditor's decision on whether or not to approve the plan. Also, the new Bankruptcy Act almost equates the conclusion of bankruptcy and pre-bankruptcy proceedings through the development of a bankruptcy plan. Before the end of the bankruptcy proceedings, the debtor is obliged to settle the costs of the pre-bankruptcy proceedings and the due undisputed creditor's claims incurred after the opening of the pre-bankruptcy proceedings, and is obliged to provide security for the disputed claims. When making a decision on concluding pre-bankruptcy proceedings, the court is obliged to inform the debtor and the trustee about the

72 Art. 3(1) of the Directive 2019/1023

73 Art. 4 of the Law on Amendments to the Bankruptcy Act

74 Art. 9 of the Law on Amendments to the Bankruptcy Act

75 Bodul, *op. cit.*, note 70

time of occurrence of the legal effects of concluding pre-bankruptcy proceedings. Furthermore, a novelty in the law is a special list of bankruptcy trustees called "List of highly qualified bankruptcy trustees", and the possibility of opening a joint office of two or more bankruptcy trustees with the status of a legal entity is introduced. Also, the conditions for taking the professional exam are changing and the adoption of the Code of Ethics for Bankruptcy Trustees is envisaged. The provisions on the right to file a bankruptcy plan have also changed, according to which the debtor would have the right to file for bankruptcy together with the proposal to open bankruptcy proceedings, and after its opening the bankruptcy trustee and the individual debtor would have the right to file for bankruptcy.[76]

Therefore, novelties in the Act can be distinguished as novelties in pre-bankruptcy and bankruptcy proceedings. The main novelties introduced in the Act are related to the submission of a proposal for opening pre-bankruptcy proceedings, appointment of the Commissioner, the preconditions for the appointment of the Commissioner have also been amended, voting and classification of creditors, deciding on the approval of the restructuring plan and its legal effects, temporary financing in pre-bankruptcy proceedings, the conclusion of pre-bankruptcy proceedings, filling legal gaps, bankruptcy plan, classification of participants in the plan.

The novelties in pre-bankruptcy proceedings are aimed at preventing insolvency in accordance with the objectives of the Directive and efforts to apply various measures to preserve business continuity. Under the amendments of the Act, only the debtor can submit a proposal to initiate proceedings.[77] If the restructuring plan has not been submitted with the proposal for opening pre-bankruptcy proceedings, the plan must be submitted to the court no later than 21 days from the day the decision on established and disputed claims becomes final, or from the day of delivery of the appellate court's decision.[78]

The rules on persons against whom pre-bankruptcy proceedings cannot be conducted have been amended,[79] Namely, the debtor has the right to submit a restructuring plan and the proposal of the restructuring plan must be amended in such a way that the proposal of the restructuring plan is extended.[80] Furthermore, it is now possible to encroach on the rights of separate creditors, stipulating that the rights of separate creditors may be limited by a restructuring plan without their

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76 Deković, D., *Prijedlog zakona o izmjenama i dopunama Stečajnog zakona*, [https://www.iusinfo.hr/aktualno/u-sredistu/49187], Accessed 14 March 2022

77 Art. 12 of the Law on Amendments to the Bankruptcy Act

78 *Ibid.*, Art. 13

79 *Ibid.*, Art. 3

80 *Ibid.*, Art. 15; see also Omar *et al.*, *op. cit.*, note. 30, p. 347

consent, but they must not be put in a worse position than they would be if there were no plan and that bankruptcy proceedings have been opened.[81]

The preconditions for the appointment of the Commissioner have also been amended. Namely, the preconditions for the appointment of a trustee in pre-bankruptcy proceedings remain the same as the preconditions for the appointment of a trustee in bankruptcy, except that the appointment of a trustee is now an obligation and not within the discretion of the court.[82]

The role of the court and the determination of claims has been clarified by stipulating that the court manages the examination hearing and does not examine the reported claims because the claims reported within the prescribed period are considered determined if they were not disputed by the debtor, trustee or creditor.[83]

Now, if there is an enforceable document for the disputed claim, the court will refer the disputant to the litigation to prove the merits of its dispute,[84] The manner in which the determination of the claim in the litigation may be requested is elaborated in further detail.[85]

Regarding voting and classification of creditors, the amended act now clearly states that the proposed restructuring plan must cover all identified and disputed claims,[86] Restructuring is encouraged by stipulating that creditors will be deemed to have voted in favor of the restructuring plan if they do not submit a voting form or submit a form from which it is not possible to determine unequivocally how they voted by the beginning of the voting hearing.[87]

Under the amended Act, after the creditors accept the restructuring plan and their consent to the debtor, the court will decide whether to approve the restructuring plan. The Act prescribed the situations in which the court will ex officio, upon the proposal of creditors, debtors, shareholders holding shares and holders of other founding rights, legal entities, deny confirmation of the restructuring plan,[88] If the preconditions for confirming the restructuring plan are not met, the court will deny the confirmation of the restructuring plan and suspend the pre-bankruptcy

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81 Art. 20 of the Law on Amendments to the Bankruptcy Act

82 *Ibid.*, Art. 17

83 *Ibid.*, Art. 23; see also Luca, De N., *European Company Law*, Cambridge University Press, Cambridge, 2021, p. 550

84 Art. 24 of the Law on Amendments to the Bankruptcy Act

85 *Ibid.*, Art. 25

86 *Ibid.*, Art. 26

87 *Ibid.*, Art. 28; see also Luca, *op. cit.*, note 83, p. 559

88 Art. 30 of the Law on Amendments to the Bankruptcy Act

proceedings, and if the preconditions for confirming the restructuring plan are met, the court will confirm the restructuring plan.[89]

The amended Act also regulates the right and conditions for filing an appeal against the decision approving the restructuring plan or denying the approval of the restructuring plan.[90]

An approved restructuring plan has legal effect on all its participants. Instead of 300 days, the pre-bankruptcy proceedings must be completed within 120 days, and exceptionally the court may, at the proposal of the debtor, creditor or trustee, allow an extension of a maximum of 180 days if it deems it expedient to conclude pre-bankruptcy proceedings.[91]

The amended Act expanded the reasons for the court to suspend the pre-bankruptcy proceedings,[92] and FINA's[93] treatment of payment bases after the opening of pre-bankruptcy proceedings is changing.[94]

The amended Act changes the provisions relating to the assumption of a new indebtedness in cash, and a new provision is added to regulate the protection of other transactions related to restructuring.[95]

When it comes to the claims and rights not affected by the pre-bankruptcy proceedings and proceedings affected by the pre-bankruptcy proceedings, the provisions relating to claims and rights not affected by the pre-bankruptcy proceedings are redefined in the amended Act.[96] It is now stipulated that on the day of the opening of the pre-bankruptcy proceedings the civil and arbitration proceedings are terminated, while new litigation and arbitration proceedings against the debtor in connection with claims affected by the pre-bankruptcy proceedings are prohibited.[97]

The period of prohibition of enforcement is now clearly prescribed, first 120 days, after which the court may, at the proposal of the debtor, trustee or creditor, extend

89 *Ibid.*, Art. 33

90 *Ibid.*

91 *Ibid.*, Art. 37

92 *Ibid.*, Art. 38

93 See Bodul, D., *Položaj Financijske agencije u predloženim izmjenama Stečajnog zakona*, Informator, No. 6723, 2022, [https://informator.hr/strucni-clanci/polozaj-financijske-agencije-u-predlozenim-izmjenama-stecajnog-zakona], Accessed 10 April 2022

94 Art. 44 of the Law on Amendments to the Bankruptcy Act

95 *Ibid.*, Arts. 35-36

96 *Ibid.*, Art. 39

97 *Ibid.*, Art. 42

it two more times for a further 90 days,[98] The amended Act introduced a new article regulating bilaterally agreements that have not been fulfilled by any of the contracting parties.[99]

The amended Act introduced a new provision on the conclusion of pre-bankruptcy proceedings stipulating that the court will issue a decision on the conclusion of pre-bankruptcy proceedings as soon as the decision on the confirmation of the restructuring plan becomes final.[100]

Furthermore, the novelties related to the bankruptcy procedure refer to several key issues, as laid out below.

The article regulating legal remedies and legal consequences of refuting the legal actions of the bankruptcy debtor is completely changed, so the legal actions of the bankruptcy debtor are authorized to be refuted by bankruptcy creditors and the bankruptcy trustee on behalf of the bankruptcy debtor.[101] The decision according to which the final hearing will be determined no later than one and a half years after the reporting hearing was revoked, and the deadline for continuing business operations has no longer been set.[102]

Measures of an economic, financial, legal and organizational nature now provide a far greater number of opportunities for the bankruptcy debtor to emerge from the crisis and settle his creditors in an acceptable manner. To file a bankruptcy plan, the debtor may submit the bankruptcy plan together with the proposal for the opening of bankruptcy proceedings, and after the opening of the bankruptcy proceedings the bankruptcy trustee and the individual debtor have the right to submit the bankruptcy plan to the court.

New provisions are added regarding the classification of participants in the bankruptcy plan,[103] Namely, creditors with small claims may be classified in a special group and the court will take special care of the protection of vulnerable creditors such as small suppliers when establishing groups.

Other amendments include the adaptation of the plan rejection rule to state that the court shall reject the bankruptcy plan ex officio within 15 days of its submis-

98 *Ibid.*

99 *Ibid.*, Art. 41

100 *Ibid.*, Art. 48; Bodul, *op. cit.,* note 75

101 Art. 72 of the Law on Amendments to the Bankruptcy Act

102 *Ibid.*, Arts. 283, 212

103 Art. 308 of the Bankruptcy Act

sion for reasons provided by law.[104] Furthermore, creditors will be deemed to have accepted the bankruptcy plan if in each group the majority of creditors voted for the plan and the sum of the claims of the creditors who voted for the plan exceeds twice the sum of the claims of the creditors who voted against the plan.[105]

## 6. INSTEAD OF A CONCLUSION: NEW REORGANIZATION TREND IN THE CROATIAN INSOLVENCY LAW OR JUST ANOTHER ONE MISSED OPPORTUNITY

The Directive 2019/1023 entered into force on 26 June 2019, and it was implemented into the Croatian legal framework through the amendments of the Croatian Bankruptcy Act enacted in 31 March 2022. Despite the long implementation process, it appears that three years were not enough time for the Croatian legislator to fully take advantage of the opportunities presented by the Directive.

Namely, it is apparent that the Croatia legislator repeated some common mistakes, and despite some good normative solutions, it remains uncertain whether preventive reorganizations will take root in the Republic of Croatia. Even a cursory review of the amended provisions of the Croatian Bankruptcy Act indicate the legislator's unrealistic expectations and a lack of consideration for the traditional ailments of the Croatian insolvency law that lacks a developed culture of preventive restructuring.

It is not clear how administrative support will be provided to debtors in distress, since the provisions of the Bankruptcy Act are not specific in this respect, and the implementation guidelines that should enable the application of the amended provisions of the Bankruptcy Act have not entered into force.

Furthermore, despite the provisions related to the work and the profession of bankruptcy administrators, it appears that their position and duties have not changed substantially. In addition, it remains unclear how the bankruptcy administrators can provide effective help to debtors seeking reorganization and whether they will possess sufficient motivation and knowledge without constant and systematic professional support of the Croatian Ministry of Justice and Administration. There is also the question of oversight over the work of the bankruptcy administrators, since the Republic of Croatia is one of the countries without a Chamber of bankruptcy administrators, which was not addressed in the new amendments.

[104] *Ibid.*, Arts. 317-318

[105] *Ibid.*, Art. 330; Bodul, *op. cit.*, note 75

In any case, it remains to be seen how these matters will unfold in practice, regardless of the good intentions of the legislators. Often the enactment of a good law does not guarantee effective enforcement, and vice versa. The key stakeholders for the implementation of the potential changes will be the entrepreneurs whose conduct will determine the situation in the unstable EU market, in light of the consequences of the Covid-19 pandemic and the current situation east of the EU. Practice will soon provide answers to the ideas put forth in the legislation, and it remains to be seen whether Croatia will become a recognized oasis for the reorganization of businesses, or if bankruptcy with liquidation will remain the norm.

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UDK 658:004.7]:328.34
330.112(497.5)
Professional paper

# REGULATORY SANDBOXES AND EXPERIMENTATION CLAUSES: AN ATTEMPT TO MAKE THE (CROATIAN) LEGAL SYSTEM MORE ENTREPRENEURIAL

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***ABSTRACT***

*There is a growing need to develop a suitable regulatory framework for innovative business models. Entrepreneurs who seek to explore new opportunities, test out new technologies and offer new services or products are constrained by the existing legal framework, which in most cases does not allow any experimentation and requires the implementation of strict rules. The EU Council Conclusions 13026/20 of 16 November 2020 on Regulatory Sandboxes and Experimentation Clauses highlight that better regulation is one of the key drivers of sustainable, inclusive growth, fosters innovation, digitalisation, and job creation, increases transparency and ensures public support for EU legislation. This paper explores the design of regulatory sandboxes and the distinctions of experimentation clauses. The starting hypothesis is that innovative business is often unrecognised by the legal system. The second hypothesis is that legal requirements and public interest in diligent entrepreneurial behaviour and customer protection should not be compromised. The research and analysis have reinforced and proved that both hypotheses are reasonable. The findings impact on the raising of the regulators', entrepreneurs', customers' and any other stakeholders' awareness of the need for proper application and creation of the law in accordance with current social needs, while preserving the fundamental social values achieved.*

***Keywords:*** *entrepreneurs, experimentation clauses, innovative business, opportunity, regulatory framework, regulatory sandbox, social system*

## 1. INTRODUCTION

Both law and entrepreneurship are facing a complex world. The relation between law and entrepreneurship is an emerging field of study. Law is often understood as a restriction of behavioural choices. However, the law can be understood as

support for the behaviour which would not be possible without the law.[1] In some instances, legal rules and practices are tailored to the entrepreneurial context, and in some other cases, rules of law find novel expression in the entrepreneurial context. As a result, studying the ties between law and entrepreneurship offers unique insights into both of them.[2]

Entrepreneurship is seen as the process through which new economic activities and organisations come into existence.[3] Global Entrepreneurship Monitor (GEM)[4] Global Report 2021/2022 sustains entrepreneurship as a key driver of economic development and a vital source of new jobs and income, so policymakers will increasingly consider entrepreneurship a crucial component of the repair solution for national economies in the post-pandemic era.[5]

Already Drucker asserted that innovation is an economic or social rather than a technical term.[6] The EU Regulation 2021/819 on the European Institute of Innovation and Technology (EIT)[7] provides for The EIT's mission to contribute to sustainable Union economic growth and competitiveness by reinforcing the innovation capacity of the Union and Member States to address significant challenges faced by society. It shall do this by promoting synergies, integration and cooperation among higher education, research, and innovation of the highest standards, including by fostering entrepreneurship, thereby strengthening the innovation ecosystems across the Union.[8] The EU Regulation 2021/819 sees innovation as the process, including its outcome, by which new ideas respond to societal, economic or environmental needs and demand and generate new products, processes, services, or business, organisational and social models that are successfully intro-

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1 Luhmann, N., *Law as a Social System*, Oxford University Press, 2004, p. 151

2 Ibrahim, D. M.; Smith, G. D., *Entrepreneurs on Horseback: Reflections on the Organization of Law*, Arizona Law Review, Vol. 50, pp. 71 – 89, 2008, p. 85, [https://ssrn.com/abstract=1030503], Accessed 10 March 2022

3 Davidsson P., *Entrepreneurial opportunities and the entrepreneurship nexus: A re-conceptualization*, Journal of Business Venturing, Vol. 30, No. 5, 2015, pp. 674 – 695, p. 675 [https://www.sciencedirect.com/science/article/abs/pii/S0883902615000130], Accessed 7 January 2022

4 Global Entrepreneurship Monitor (GEM) is the most comprehensive longitudinal global research of entrepreneurship since 1999. For more visit: [https://www.gemconsortium.org/], Accessed 15 January 2022

5 *GEM 2021/2022 Global Report: Opportunity Amid Disruption*, London, 2022 (GEM 2021/2022 Global Report), p. 29, [https://www.gemconsortium.org/report/gem-20212022-global-report-opportunity-amid-disruption], Accessed 15 January 2022

6 Drucker, P. F., *Innovation and Entrepreneurship*, Harper & Row Publischers Inc. 1985, p. 33

7 Regulation (EU) 2021/819 of the European parliament and of the Council of 20 May 2021 on the European Institute of Innovation and Technology, OJ L 189, 2021, pp. 61–90 (Regulation (EU) 2021/819)

8 *Ibid*., Art. 3

duced into an existing market or that are able to create new markets and that provide value to society.

Artificial intelligence (AI)-based applications and information technologies (IT) often require a normative regulation that allows for innovation and upholds high standards of protection. In that context, the legal system is challenged to create the necessary infrastructure to facilitate the testing of innovations. Another great challenge is to keep legal framework constantly updated in a responsible and targeted manner.

This paper explores the phenomenon of regulatory sandboxes[9] as testing environments created by regulatory authorities for new business ventures. Legal instruments for regulatory sandboxes embodiment are experimentation clauses, as legal provisions that enable the exercise, on a case-by-case basis, of a degree of flexibility in the testing of innovative entrepreneurial models.

## 2. RESEARCH DESIGN

### 2.1. Hypotheses

Our starting hypothesis is that innovative business is often unrecognised by the legal system. Legal systems are often seen as lagging behind the evolution of society and technology,[10] while business is looking for quick changes. The slowness of law is due to complex legislative procedures and regulatory authorities' decision making. Furthermore, new business models face significant regulatory issues.

The second hypothesis is that there are legal requirements and public interest in diligent entrepreneurial behaviour and customer protection that should not be compromised. Even if the necessity of constant and rapid change is accepted as inherent to modern society, it is also true that the same society has achieved a high degree of civil rights and liberties and the high quality of relations that it wants to preserve.

Thus, the assertions from our hypotheses may be somehow opposed. In this paper, we are checking whether they can exist simultaneously and whether regulatory

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9 The word 'sandbox' originally refers to the box filled with sand where children play. Occasionally the term has acquired new meanings. In the computer science, a sandbox stands for a closed testing environment designed for safe experimenting with web or software projects

10 Ranchordas, S., *Sunset Cluses and Experimental Regulations: Blessing or Curse for Legal Certainty?,* Statute Law Review, Vol. 36, 2015, No. 1, pp. 28 – 45, p. 28; Parenti, R., *Regulatory Sandboxes and Innovation Hubs for FinTech, Study for the Committee on Economic and Monetary Affairs*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p. 16

sandboxes and experimentation clauses are suitable solutions to the mentioned conflict.

## 2.2. Methodology, methods, and theoretical background

Instead of dealing with law based on legal principles alone, the methodological approach taken in this work consists of dealing with the law as a social system that exists in a complex setting (ecosystem). We are interested in understanding how the legal framework works in a given environment, examining its efficiency, advocating changes, helping with finding solutions to problems (normative analysis vs empirical analysis). Our methods focus on trying to describe, understand, and discover the meaning of the phenomenon by interpreting its characteristics and features (qualitative research). The data were found primarily in European Union (EU) legislation, regulators' webpages, agencies' webpages, and publications. We analyse relevant EU legislation and implement a multidisciplinary approach to the use of literature and research (law, economy, and social systems theories). The analysis of legal sources relies mainly on the objective teleological (target) method of interpretation of law and the appropriate additional use of normative economic analysis of law.

When we use the term "legal framework" or "legal system" in this paper, we primarily think of it as a formal and written expression (text) recognised and defined by the legal system, made by a legislator, authorised governmental institutions, even contracting parties. However, the initial motivation for empirical research did not arise from the desire to explain the content of the law itself, but rather from the desire to show that legal rules are embedded in social relations. Thus, we are not predominantly interested in the doctrinal content of the law, nor are we interested in pure economic analysis of law. We will instead pay more attention to behavioural and social dynamics of entrepreneurial and legal actions that will help us understand how entrepreneurs and the law deal with innovativeness and contingency – future uncertainty, and the limits of the legal system in this regard.

## 2.3. Social systems theory

System theories recognise the legal system as a separate social system (a sub-system of the social system).[11] The same applies to the economic system.[12] Each of the systems represents the environment (ecosystem) of the other system. We could get lost by defining the parts of an enormous social system network, e.g., culture,

[11] Luhmann, N., *Law as … op. cit.*, note 1, p. 89

[12] *Ibid.*, p. 391

art, political system etc. Nevertheless, for our discussion in this paper, it is worth noticing that each system has its structure, distinguishing elements, and internal functioning programs (processes).

Luhmann finds that social systems are operatively closed, meaning that each social system can regenerate only by applying its distinguishing elements regardless of its environment. That is the autopoiesis of a system – system self-creation.[13] However, this does not exclude the relations between different social systems provided through structural couplings, meaning that one system presupposes certain features of its environment and relies on them structurally.[14] Understanding how various social systems function and the possibilities of their mutual communication[15] lights up the complexity of contemporary ecosystem as a whole.

## 3. ENTREPRENEURIAL UNCERTAINTY AND LEGAL CERTAINTY

A new product or service environment is unclear and unknown because there is no market experience. Uncertainty arises mainly because the future is not bound or determined to emerge from the present in a stochastically predictable way.[16] Moreover, today's actions are themselves sources of the changes that render the future uncertain. Uncertainty is a part of real-world economies.[17] As part of such an environment, the legal system cannot predict nor respond to all the challenges of innovative entrepreneurship. But, let us suppose the legal framework is not structured to respond adequately to new factual circumstances. In that case, the result of a legal operation, i.e., deciding whether an endeavour is illegal, will disappoint the stakeholders.

A too strict legal framework can merely decide not to deal with the uncertainty: it will not recognise innovation or will declare illegal an idea. Case-closed! However,

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13 *Ibid.*, p. 381; We rely here to the theory of social systems and organizations that reproduce themselves through their own operations irrespective of the environment, as described and named by Niklas Luhmann as *Autopoietic systems*. For more about defining the Autopoiesis of social systems please see e.g., Luhmann, N., *Organization and decision*, Cambridge University Press, 2018, pp. 29 – 36; Luhmann N., *Introduction to Systems Theory,* Polity Press Cambridge, 2013, pp. 70 – 83 or Lauc, A.: *Metodologija društvenih znanosti,* Sveučilište J. J. Strossmayera, Pravni fakultet, 2000, pp. 483 – 489

14 Luhmann, N., *Law as … op. cit.,* note 1, p. 382

15 Geyer F., *Autopoiesis and Social Systems*, International Journal of General Systems, Vol. 21, No. 2, pp. 175 – 183, p. 180, [http://dx.doi.org/10.1080/03081079208945068], Accessed 15 January 2022

16 Boudreau D.J.; Holcombe, R.G., *The Coasian and Knightian theories of the firm*, in: Sarasvathy S.D.; Dew N.; Venkataraman S. (eds.), *Shaping Entrepreneurship Research Made, as Well as Found*, Routledge, 2020, pp. 221 – 236, p. 229

17 *Ibid.,* p. 230

by applying the legal coding "legal – illegal," the legal system will absorb even future uncertainty, but will not effectively resolve the issue.

We presume two main features of entrepreneurship and law. The first is that each business event has a factual ground, meaning that it is based on a real deal of the involved parties. The second is that the legal system tells an abstract story of imagined future behaviour, providing what is expected from the actors – their mutual commitments – and how each of the actors will be sanctioned if these expectations are not meet – the parties' liabilities.

When a legislator creates a law, i.e., parliamentary acts, and when the authorised institutions apply it or even when they develop a second-level law, i.e., ordinances, all lawmakers expect reduced uncertainty in future events. Also, parties to a contract have the same motive to avoid or manage possible unwanted side effects. Nevertheless, legal professionals, especially attorneys supporting their clients, try to predict future events and provide solutions for possible problems by drafting statements, contracts and other documents. In that sense, legal framework is also a tool for dealing with future uncertainty.

Legal certainty can be defined as the possibility of knowing in advance what legal consequences will follow from one's conduct.[18] Dimensions of legal certainty are stability and predictability. Stability of law stands for an expectation that the law will not be arbitrarily changed. Predictability tells it is possible to foresee the legal consequences of one's behaviour.[19] However, the principle of legal certainty should not be interpreted as a request for the immutability of legal rules. Instead, a certain degree of gradual or temporary uncertainty may be necessary to ensure that laws continue to mirror society and grant sufficient certainty.[20]

On the other hand, it would be wrong to think that certainty is an unwanted feature of entrepreneurial endeavours. It is simply that in real life, it is accepted that things do not last forever and are not unchangeable. In entrepreneurial science, it is known as the Strong Premise of Entrepreneurship. This premise holds that even if some markets approach a state of equilibrium and stability for some time, the human condition of the enterprise, combined with the temptation of profits and advancing knowledge and technology, will in due course destroy the equi-

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18 Ranchordás, S., *Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty,* Statute Law Review, Vol. 36, No. 1, 2015, pp. 28 – 45, p. 36 [https://academic.oup.com/slr/article-abstract/36/1/28/1614369?redirectedFrom=fulltext], Accessed 10 February 2022

19 *Ibid*., p. 37

20 *Ibid*., p. 38

librium.[21] In simple words, entrepreneurial endowers need some lasting stability while inevitably being disposed to constant change. Therefore, legal rules as formal expressions of commitments and social artefacts can never be completed and immutable but should nonetheless reflect both equilibrium and ability to change.

## 4. THE DESIGN OF REGULATORY SANDBOXES

### 4.1. Innovation Principle

The European Commission has recognised the importance of a more innovation-oriented European Union (EU) acquis, exploring how EU rules can support innovation. It is the result of increasing awareness among policymakers of the importance of well-designed regulations to promote innovation. The Directorate-General for Research and Innovation of the European Commission has given an articulate and consistent role to the Innovation Principle to ensure that the impact on innovation is fully assessed whenever a policy is developed.[22]

The Innovation Principle encompasses three essential components.[23] The first is The Research and Innovation Tool, which provides activities to assess the impacts of EU legislation on all forms of innovation, including consultations with stakeholders, evaluating the potential effects of EU initiatives on research and innovation, considering the impact of legislative design on research and innovation, and improving the design of EU initiatives to make them more innovation-friendly. The second component are the Innovation Deals which aim to remove the perceived barriers to innovation arising from the implementation of existing EU legislation by clarifying current rules and using the existing flexibility in the EU legislative framework. The third component of the Innovation Principle is Foresight and Horizon Scanning, a technique for detecting early signs of potentially significant developments through a systematic examination of potential threats and opportunities, with an emphasis on new technology and its effects on the issues at hand.

All the aforementioned components of the Innovation Principle are non-legislative tools. They represent an approach achieved through cooperation among the

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21 Venkataraman S., *The Distinctive Domain of Entrepreneurship Research,* Advances in Entrepreneurship, Firm Emergence and Growth, Vol. 3, 1997, pp. 119-138, p. 121, [https://www.researchgate.net/publication/228316384_The_Distinctive_Domain_of_Entrepreneurship_Research], Accessed 12 February 2022

22 Simonelli, F.; Renda, A., *Study supporting the interim evaluation of the innovation principle: final report,* European Commission, Directorate-General for Research and Innovation, Publications Office, 2019, p. 8, [https://data.europa.eu/doi/10.2777/620609], Accessed 10 March 2022

23 *Ibid*., p. 9

European Commission, the relevant Member State authorities and businesses.[24] In any case, understanding the notion of innovation and its significance is vital for understanding the concept of regulatory sandboxes, which is shown in our further discussion.

### 4.2. Regulatory Sandboxes

There is still no broadly accepted definition of a regulatory sandbox. That is not surprising when bearing in mind that it goes for a relatively new phenomenon.[25] There are even different terms that are often used as synonyms: regulatory sandboxes, living labs, innovation spaces, regulatory testbeds, real-life experiments and similar.[26] The social sciences frequently look at regulatory sandboxes as experimental spaces at the interface of innovation, science and society. Solutions are primarily sought for societal challenges and transformation processes.[27]

Regulatory experiments can be defined as means to deliberately deviate from the current regulatory framework to try out new or different rules in a real-world setting.[28] Entrepreneurs experiment with new technologies to create new products and services, and regulatory authorities should do the same with legal rules and regulations. Regulatory sandboxes are frameworks for testing innovation and allowing to try new technologies, business models, products, and services in real life. They are intentionally established instruments of economic and innovation policy.

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[24] The European Commission's regulatory fitness and performance programme (REFIT) [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en#documents], Accessed 5 March 2022

[25] The concept of regulatory sandbox emerged firstly in the financial sector of developed countries shortly after the Global Financial Crisis of 2007. Please see: Wechsler, M.; Perlman, L.; Gurung, N., *The State of Regulatory Sandboxes in Developing Countries,* SSRN 2018, p. 8, [http://dx.doi.org/10.2139/ssrn.3285938]; Pop, F.; Adomavicius L., *Sandboxes for Responsible Artificial Intelligence,* EIPA Briefing 2021/6, p. 1, [https://www.eipa.eu/wp-content/uploads/2022/03/EIPA-Briefing_Sandboxes-for-Responsible-Artificial-Intelligence.pdf]; Leimüller G.; Wasserbacher, S., *Regulatory Sandboxes - Analytical paper for BusinessEurope*, Winnovation consulting gmbh Vienna, 2020, p. 4, [https://www.businesseurope.eu/sites/buseur/files/media/other_ docs/regulatory_sandboxes_-_winnovation_analytical_paper_may_2020.pdf], all Accessed 23 January 2022

[26] *Making space for innovation - The handbook for regulatory sandboxes*, Federal Ministry for Economic Affairs and Energy of Germany (BMWi) 2019, (Making space for innovation) p. 9, , [https://www.bmwk.de/Redaktion/EN/Publikationen/Digitale-Welt/handbook-regulatory-sandboxes.html] Accessed 24 January 2022

[27] *Ibid*.

[28] Bauknecht D. *et al.*, *How to design and evaluate a Regulatory Experiment? A Guide for Public Administrations*, Öko-Institut e.V., Freiburg, 2021, p. 4, [https://www.oeko.de/fileadmin/oekodoc/Regulatory_Experiments-Guide_for_Public_Administrations.pdf], Accessed 13 April 2022

A regulatory sandbox can come to life only if interactions are established between various stakeholders, from governments and public administration to business, science, and other fields, e.g., customer protection associations. Regulatory authorities grant permissions for running a novel business model. The stakeholders enter into a cooperation agreement establishing the parameters of the cooperation and ensuring that the support they need is in place. In addition, principles guiding action and rules and hierarchies for decision-making can be clarified and stipulated amongst the partners with different instruments such as statements, certifications, or other forms.[29]

We found in Germany an example of a structured approach to the construction of a regulatory sandbox frame in the EU. The German Federal Ministry for Economic Affairs and Energy adopted the Regulatory Sandboxes Strategy in December 2018, intending to bring together public policymaking experts and authorities, entrepreneurs, associations, research establishments, civil society, and other participants on regulatory sandboxes. The Strategy was intended to improve the degree of expertise relating to regulatory sandboxes, investigate the variety of ways in which regulatory sandboxes were used, and provide recommendations and practical examples. Very soon, in spring 2019, the Ministry set up the Regulatory Sandboxes Coordinating Office to implement the Strategy and follow its progress. A few months after the establishment, the Coordinating Office counted around 400 members.[30]

### 4.3. EU Council's Regulatory Sandbox Initiative

In November 2020, during German Presidency, the EU Council issued its premier Conclusions on Regulatory Sandboxes and Experimentation Clauses (EU Council Conclusions).[31] It was a clear and straight massage to all Member States' delegations. The EU Council recognised regulatory sandboxes as instruments to create an innovation-friendly and future-proof legal framework.[32] The EU Council Conclusions highlight that better regulation is one of the crucial drivers of

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29 *Making space for innovation*, *op. cit.,* note 26, p. 29

30 *Ibid.*, pp. 2-3 and 14-17

31 EU Council Conclusions 13026/20 of 16 November 2020 on Regulatory Sandboxes and Experimentation Clauses (EU Council Conclusions), [https://www.consilium.europa.eu/en/press/press-releases/2020/11/16/regulatory-sandboxes-and-experimentation-clauses-as-tools-for-better-regulation-council-adopts-conclusions/], Accessed 5 March 2022

32 *New flexibility for innovation – Guide for formulating experimentation clauses*, Federal Ministry for Economic Affairs and Energy of German (BMWi) 2020, (New flexibility for innovation), p. 7, [https://www.bmwk.de/Redaktion/EN/Publikationen/Digitale-Welt/guide-new-flexibility-for-innovation-en-web-bf.pdf?__blob=publicationFile&v=2 ], Accessed 24 January 2022

sustainable, inclusive growth. The legal system can be used to foster competitiveness, innovation, digitalisation, and job creation. The EU Council emphasised the need to ensure that EU regulation is transparent and straightforward while always considering a high level of consumer and employees protection, health, climate and the environment.[33] The EU Council advocates a regulatory framework that is competitive, effective, efficient, coherent, predictable, innovation-friendly, future-proof, sustainable and resilient as possible.[34]

The intended regulatory framework may be developed by applying the Innovation Principle, which entails taking into account the impact on research and innovation in developing and reviewing regulation in all policy domains. The Member States are called to include the perspective of innovation-friendly and future-proof regulation as part of their discussions on existing national regulations.[35] The EU Council sees regulatory sandboxes as concrete frameworks that, by providing a structured context for experimentation, allow, where appropriate in a real-world environment, the testing of innovative technologies, products or services for a limited time and in a narrow part of a sector or area under regulatory supervision ensuring that appropriate safeguards are in place.[36] Regulatory sandboxes can offer significant opportunities to innovate and grow for all businesses, especially small and medium enterprises (SMEs), including micro-enterprises and start-ups in the industry, services, and other sectors.[37]

Regulatory sandboxes are currently being increasingly used, particularly in the context of digitalisation in a range of sectors. So far, they have been used in finance, health, legal services, aviation, transport and logistics, as well as energy sectors, where there is need or room for the use of new, emerging technologies – such as artificial intelligence and blockchain/distributed ledger technologies (DLT) – or for innovative use of the existing technologies. Regulatory sandboxes are seen as tools for making regulatory progress and proactive regulatory learning. They enable regulators to gain better regulatory knowledge and find the best means to regulate innovations based on real-world evidence, especially at a very early stage, which can be particularly important in the face of high uncertainty and disruptive challenges and when preparing new policies.[38]

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33 EU Council Conclusions, *op. cit.,* note 32, Point 1

34 *Ibid.*, Point 2

35 *Ibid.*, Point 3

36 *Ibid.*, Point 8

37 *Ibid.*, Point 11

38 *Ibid.*, Points 5 and 10

The EU Council places regulatory boxes in the ecosystems of Member States and at the Single Market level.[39] The exchange of information and good practices regarding regulatory sandboxes between the Member States is encouraged to analyse how learning from regulatory sandboxes at the national level can contribute to evidence-based policymaking at the EU level.

## 5. EXPERIMENTATION CLAUSES AS DRIVERS OF INNOVATION

### 5.1. Dealing with legal obstacles

In the narrow sense, legal consideration starts with the question whether an innovation can be allowed for launch on the market under the existing legal framework. If there are doubts about the positive answer to this question, it is necessary to determine the legal barriers that stand in the way. Designing efficient legal rules from scratch or adapting them to new factual circumstances has always been challenging. Legislators typically use *ex-ante* impact assessments, which rely on past experiences and many assumptions about future which is uncertain. The actual effects of a regulatory framework often differ from the expected ones because the legal *status quo* simply cannot anticipate all current developments and reactions of individuals or groups whom the regulation addressed. Furthermore, today's digital technologies have increased the gap between the quick emergence of business innovations and regulatory timeframes. As Elster noted, 'history is the result of human action, not human plans.'[40]

The solution to this problem was found by creating experimentation clauses and inserting them in the existing legal framework. The experimentation clauses are temporary exemptions from current legal rules. The exemptions or adaptations remove direct legal barriers for a part of the entire innovation that otherwise is not allowed. The exemptions refer to economic obstacles, i.e., the experiment is not economically viable under the current regulatory framework.[41]

Experimentation clauses serve two primary purposes:[42] firstly, where the existing legal framework does not permit specific innovations, they create the opportunity for entrepreneurs and public authorities to test innovations in a controlled manner in a regulatory sandbox, and, secondly, experimentation clauses allow legisla-

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39 *Ibid.*, Point 14

40 Elster, J., *Uvod u društvene znanosti, Matice i vijci za objašnjenje složenih društvenih pojava*, Croatian edition: Jesenski i Turk, 2010, p. 195

41 Bauknecht D., *et al.*, *op. cit.* p. 7

42 *New flexibility for innovation*, *op. cit.*, note 32, p. 5

tors and public authorities to learn at an early stage about innovations, their effects under real conditions and about the appropriate legal framework for innovations, and to develop further the general legal framework based on the information obtained from the regulatory box life.

Experimentation clauses are an attempt to deal with the challenges mentioned above. They can be part of responsive governance that adequately addresses new developments. By using experimentation clauses, regulatory authorities can advance regulation through proactive regulatory learning, enabling regulators to gain better regulatory knowledge and find the best means to regulate innovations based on real-world evidence. That is significant, especially for a business project at a very early stage, which can be particularly relevant in the face of high uncertainty.

It is, however, correct that the law serves to protect citizens and social values. Therefore, experimentation clauses must also consider legal provisions and principles outside the experimental scope. That certainly applies to the fundamental principle of equality, which may become relevant when people are confronted with different legal regulations due to the experimentation clauses with time-limited validity for selected stakeholders, allowed to test the innovation, and maybe due to the limited location. Also, conflicts with other national legislative acts, e.g., consumer protection regulation, social laws, or EU legislation, are possible. High-risk innovations should be subject to additional risk-related requirements, especially liability issues.[43] Here, the authorised regulator should make an assessment of public interest and individual rights for granting exceptions. A significant legal issue is the regulation of liability during experimentation in regulatory sandboxes. The legal framework will have to provide a solution based on an appropriate balance between applying a strict type of liability based on risk and fault liability based on negligence.[44]

The knowledge about how the experimental clauses work and about their effectiveness is essential for their review, improvement, and, as the case may be, transfer into "regular operation."[45]

### 5.2. The design of experimentational clauses

Experimentation causes mainly relate to:

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43 *Ibid.*, pp. 12 – 14

44 Truby. J. *et al., A Sandbox Approach to Regulating High-Risk Artificial Intelligence Applications*, Cambridge University Press, 2021, p. 28, [https://doi.org/10.1017/err.2021.52] Accessed 20 March 2022

45 *Ibid.*, p. 10

- Exemptions, by a predefined degree, from the existing legal requirements aimed at conducting a specific commercial activity;
- Exemptions from particular approvals or documentation requirements, technical standards or rules;
- Exemptions from taxes or fees;
- Funding or compensation of costs that would be incurred under current regulatory framework;
- Limited period duration of the exception.

Such clauses explicitly authorise governmental institutions or other authorities with decision-making powers to deviate from the existing law.[46] That means the ability of discretional deciding: "can", "may", "is entitled to" and the like. The authority may determine whether to apply the clause and how.

An experimentation clause cannot be designed as a 'general' clause applicable to all innovations. Such a clause would not be even efficient as innovative projects defer in their characteristics and require different actors' conditions. The phrasing of the experimentation clause should meet an appropriate balance between specificity and flexibility. The specificity of the norm ensures legal certainty and transparency. Flexibility ensures sufficient openness for innovation. In order to achieve the right balance between specificity and flexibility, it is preferable to describe what is to be tested rather than to provide a detailed definition.[47]

Experimentation clauses provide for exceptions, and therefore their duration in time is limited, making them sunset clauses. The period of validity needs to be long enough to permit sufficient testing of the innovative model and to allow the achievement of meaningful findings.[48] The duration of experimentation clauses and regulatory sandboxes generally ranges between six and 24 months.[49]

Here are some examples of experimentation clauses. We have chosen experimentation clauses applied in the German legal system.

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46 Bischoff, T. S. *et al., Regulatory experimentation as a tool to generate learning processes and govern innovation – An analysis of 26 international cases,* Sofia-Diskussionsbeiträge, Vol. 20-7, Darmstadt, 2020, [https://www.sofia-darmstadt.de/fileadmin/Dokumente/Diskussion/2020/Netzversion Portmann-Regulatory.pdf], Accessed 17 February 2022, p. 11

47 *New flexibility for innovation*, *op. cit.,* note 32, p. 14

48 Feser, D. *et. al., Institutional conditions for the up-take of governance experiments – A comparative case study*, IFH - Universität Göttingen Working Papers No. 28202, p. 10, [https://www.ifh.wiwi.uni-goettingen.de/upload/veroeffentlichungen/WP/ifh_wp-28_2021.pdf], Accessed 17 February 2022

49 Wechsler, M.; Perlman, L.; Gurung, N., *The State of Regulatory Sandboxes in Developing Countries,* SSRN 2018, p. 12, [http://dx.doi.org/10.2139/ssrn.3285938], Accessed 23 January 2022

Based on a general experimentation clause in the German Public Transport Act, exemptions have been approved, for example, for testing autonomous driving and delivery, as well as new forms and business models of car/ride-sharing. The wording of the clause is:[50]

"(§ 2 Abs. 7) For the purpose of practically testing new types or means of transport, the authorising authority may, upon application in individual cases, approve deviations from provisions of this Act or from provisions issued on the basis of this Act for a period not exceeding four years, provided that public transport interests are not opposed thereto)."

The Media Act of North Rhine-Westphalia (Germany), Section 10b, the clause states:[51]

(1) The implementation of temporary pilot trials is permissible for the purpose of the introduction and development of digital terrestrial transmission technologies. The duration should not normally exceed three years. These pilot trials serve the preparation of decisions on the future use of digital terrestrial transmission technologies.

(2) The Minister-President shall announce the transmission capacities available for the purpose of the trial and shall work to ensure that the participants agree on an objective allocation. If an agreement is reached, the Minister-President shall allocate the transmission capacities and shall inform the relevant committee of the Landtag about this.'

The Trust Services Act (Germany) Section 11 subsection 3, the wording of the clause is:[52]

"[…] 3) Innovative identification methods which are not yet recognised by an order in the official journal can be provisionally recognised by the Federal Network Agency in consensus with the Federal Office for Information Security and following a hearing of the Federal Commissioner for Data Protection and Freedom of Information for a period of up to two years as long as a conformity assessment body has confirmed the equivalent security of the identification method within the meaning of Article 24(1)(2)(d) of Regulation (EU) No 910/2014. The Federal Network Agency shall publish the provisionally recognised identification methods on its website. The Federal Network Agency and the Federal Office for Information Security shall supervise the suitability of the provisionally recognised

50 *New flexibility for innovation*, *op. cit.,* note 32, p. 7

51 *Making space for innovation*, p. 80

52 *Ibid.*, p. 85

identification methods during the entire period of the provisional recognition. If the supervision identifies security-relevant risks in the provisionally recognised identification method, the supervisory body can in consensus with the Federal Office for Information Security instruct the qualified trust service provider to take additional measures to remedy these risks where this makes sense in terms of security. If additional measures cannot ensure sufficient security of the provisionally recognised identification method, the supervisory body shall prohibit the qualified trust service provider from using this identification method."

We can summarise the main issues to be considered when drafting an experimentation clause and present them in a table.

**Table 1.** Creation and life of experimentational clause

<table>
<tr><th>Preparation</th><th>Drafting</th><th>Implementation</th><th>Evaluation</th></tr>
<tr><td>Determine a factual need – innovation</td><td>Choose the appropriate type of clause</td><td>Monitor the implementation</td><td>Evaluate clause application in order to learn</td></tr>
<tr><td>Determine a legal barrier – obstructive norm or legal gap</td><td>Define clause duration– per experiment</td><td>Adapt clause design, if needed</td><td>Assess clause impact on the legal framework</td></tr>
<tr><td>Define the objective of the experiment</td><td>Define the powers of competent authorities – discretion degree</td><td>Involve the stakeholders – activity audit</td><td>Recommendations:<br>• Clause termination<br>• Clause modification<br>• Keeping the clause after the experiment</td></tr>
<tr><td>Clarify possible legal issues – risks</td><td colspan="2" rowspan="2"></td><td rowspan="2">Adapt the existing law based on evaluation results</td></tr>
<tr><td>Prepare evaluation and learning</td></tr>
</table>

### 5.3. EU approach to experimentation clauses

We have already examined the EU Council Conclusions of 16 November 2020, where the 27 EU Member States called on the European Commission to make greater use of experimentation clauses and regulatory sandboxes.

The EU Council understands experimentation clauses as:

" ...legal provisions which enable the authorities tasked with implementing and enforcing the legislation to exercise on a case-by-case basis a degree of flexibility in

relation to testing innovative technologies, products, services or approaches, [...] experimentation clauses are often the legal basis for regulatory sandboxes [...]."[53]

However, the application of experimentation clauses should be cautious. It is underlined that experimentation clauses always need to respect the fundamental values of the EU legislation and Member States. They must be designed to foster the application of the principles of subsidiarity and proportionality, as well as the precautionary principle. A high level of protection of citizens, consumers, employees, health, climate and the environment, legal certainty, financial stability, and fair competition always need to be ensured, and the existing levels of protection need to be respected.[54]

Finally, the EU Council encourages the EU Commission to continue considering the use of experimentation clauses on a case-by-case basis when drafting and reviewing legislation and evaluating the use of experimentation clauses in ex-post evaluations and fitness checks.[55] We can presume that there would be changes in the way the EU legislation is drafted, which certainly poses a challenge to legal professionals who have an important role in law designing.

## 6. POSSIBLE IMPACTS ON THE (CROATIAN) REGULATORY FRAMEWORK

New businesses bring new jobs, increased income and added value, often by introducing new ideas, technologies and products to society. Successful new business accelerates social structural changes.[56] A recent research of the Global Entrepreneurship Monitor on the social, cultural and economic context of a business shows that policymakers can make better-informed decisions to help entrepreneurs. Such help will be essential in the post-pandemic era but has proven to be highly relevant even in the throes of the economic chaos and volatility currently being experienced across the globe.[57] In the GEM study, two groups of government policies towards entrepreneurship have been examined: the policies that identify priorities and support for entrepreneurship and tax and regulatory framework policies. The ratings of both groups of government policies in Croatia during the reference period of ten years are lower than the EU Member States' average. In 2020, Croatia had the lowest-rated regulatory framework policies of all EU countries. Of the ten lowest-rated statements related to the components of

53 EU Council Conclusions, *op. cit.,* note 31, Point 9

54 *Ibid.*, Point 12

55 *Ibid.*, Point 13

56 *GEM 2021/2022 Global Report, op. cit.,* note 5, p. 22

57 *Ibid.,* p. 30

entrepreneurial environment, five are related to government policies: it is difficult for new and growing businesses to deal with bureaucracy, legal and regulatory requirements; inability to obtain all the necessary permits and certificates within reasonable time; the regulatory framework is still complicated and the administration is slow.[58] That should be taken into account when seeking investments. The limiting nature of these components of the business environment is probably the reason for some lost business opportunities that could have been realised through domestic and foreign investments. The regulatory framework of any country can either support or hamper entrepreneurial initiatives. As a component of entrepreneurial environment, the effect of the Croatian legal system on entrepreneurial activity is more restrictive than stimulating.

We believe our paper has succeeded in pointing out the strength of changes in modern society and the need for the legal system to follow these changes. There are fears of change and ignorance about how to carry out a change. Regulatory sandboxes are a recent phenomenon. However, numerous economies, including the Croatian, already have significant experience with business incubators like entrepreneurship hubs and technology parks.[59] The complexity of modern society often requires complex solutions to challenges. Such solutions arise from the synergistic work of all segments of society. Regulators, public institutions and business sector need to communicate. Through communication they exchange knowledge and experience and learn. Communication also builds trust. Science should not be left out in the participation either. The same applies to legal science and legal professionals. Scholars from different fields are called to strengthen multidisciplinary approaches.

We have noticed a significant development of e-government services in Croatia. Today, Croatian citizens and entrepreneurs can use more than 100 public services through the e-Citizens Information and Services Portal (e-Citizens).[60] The COVID-19 epidemic influenced a rapid development of e-Citizens. Although legally equivalent to standard administrative systems, this e-service portal is still an alternative. E-Citizens is a valuable project, but it does not satisfy many needs.

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58 Singer, S. *et. al., What makes Croatia a (non)entrepreneurial country? 2019 – 2020*, GEM Croatia - CEPOR – SMEs and Entrepreneurship Policy Center Zagreb, 2021, pp. 68 – 98

59 Examples of business incubators in Croatia: Tehnološki park Zagreb (TPZ), established 1994 [https://investcroatia.gov.hr/wp-content/uploads/2016/12/67-Tehnoloski-park-Zagreb-ZAGREB.pdf]; BIOS – Poduzetnički inkubator Osijek, established 1996 [https://inkubator.hr/o_biosu]; TechPark Varaždin - poduzetnički kampus, established 2007 [https://www.techpark.hr/home]; STeP Ri –Science and Technology Park of the University of Rijeka, established 2008, [https://www.step.uniri.hr/]; TCS – Tehnološki centar Split, established 1997 [http://tcs.hr/], all accessed 10 April 2022

60 e-Citizen Information and Services Portal / e-Građani, is available in Croatian and English language, see: https://gov.hr/en, Accessed 10 April 2022

Unfortunately, the progress of the e-Citizens was not the result of regulatory experimentation and synergy of various stakeholders, especially final users. Croatia has not yet developed regulatory sandboxes. One of the reasons is the insufficiently developed communication culture between public institutions, business sector, and citizens. Social and political consensus is needed to change the legal system. Furthermore, there is still not sufficiently reliable infrastructure to implement innovative solutions in Croatia. The Croatian legal system and the legal systems of other countries have the opportunity to become stimulators of innovative entrepreneurial activities and market growth by introducing experimentation clauses in the system. At the same time, due to the social values, about which they care, legal systems can influence the elimination of destructive and undesirable forms of entrepreneurial behaviour. Of course, regulatory sandboxes do not eliminate the risk of business failure.[61] But a well-established legal framework can reduce the unwanted consequences of the testing on consumers and reduce risks.

A modern legal framework should be flexible, enable innovation and uphold high standards of protection. In this context, experimentation clauses are a valid legal instrument that provides the necessary space to test innovations in the controlled environment of regulatory sandboxes. They also allow the legal framework to be updated in a responsible and targeted manner.[62] Experimentation clauses are placed in an 'area of conflict'[63] between various legally protected interests and the promotion of innovation. The need for the legal system to be predictable and reliable is not lost with the application of experimentation clauses. Their objective is also to make legal effects predictable for those affected – innovators, competitors, customers, and similar third parties. The main parameters around which the experimentation clauses should be formulated to ensure legal compliance are openness to innovation, responsibility for innovation and efficacy, as already shown.

We have to change the concept of validity of law from static, with relative invariance, to dynamic.[64] It is broadly accepted in various legal systems that the change of law happens through court decisions tailored for specific cases. Already here, judges as case-law makers during the decision-making process, consider significant risk of future uncertainty. This shows that introducing experimental clauses and allowing certain discretionary space for the regulators' decisions is not unknown to the legal system, especially when such conduct comes hand in hand with ac-

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61 Alaassar, A.; Mention A.L.; Aas. T.H., *Exploring a new incubation model for FinTechs: Regulatory sandboxes,* Elsevier Technovation, 2021, p. 3, [https://doi.org/10.1016/j.technovation.2021.102237], Accessed 10 January 2022

62 *New flexibility for innovation*, *op. cit.,* note 32, p. 3

63 *Ibid.*, p. 9

64 Luhmann, N., *Law as … op. cit.,* note 1, p. 473

countability and transparency. Furthermore, the notion of rationality as understood in the legal framework also changes. Traditionally, legal rationality was seen as the will of the legislator,[65] whereas now, it is more and more perceived as the rational decision-making of various authorised decision-makers.

Today, there is high time-related instability of the structures of legal norms. The law cannot guarantee security if a society sees its future as a risk contingent on decision-making. Should there ever be socially adequate legal concepts, they will have to be found by testing and re-testing solutions to establish possible eigenvalues of the legal system in modern society.[66] A legal system that does not change lacks risk awareness.

## 7. CONCLUSION

This paper provides the most significant characteristics of regulatory sandboxes and experimentation clauses. We were primarily interested in understanding the reasons why regulatory sandboxes occur. They result from dynamic changes in a modern society that require quick reaction, quality communication among stakeholders, and the ability to quickly adapt.

A regulatory sandbox should not be seen just as a legal institution or a 'legal creature.' It is a phenomenon that includes elements of economic, legal, social, and even cultural matters. Honestly, no big plan can satisfy all the challenges a society faces in the constant pursuit of welfare and safety. Regulatory sandboxes are about learning by acting. This research raises the awareness about why and how a legal system should be made to support entrepreneurial action. The law aims to protect the stakeholders involved. Nevertheless, it should also embrace the opportunity and give room for future events by allowing changes in the legal framework. We believe that in this process legal professionals are essential, since they closely participate in entrepreneurial endeavours when drafting legal acts, programs, contracts, and other documents.

Our first hypothesis is that innovative business is often unrecognised by the legal system. We find that the legal system changes best by learning: constant interpretation of rules, accompanied by the recognition of social dynamics. By putting in effort to understand social dynamics and applying suitable law interpretation methods, the legal system can use experimentation clauses as building blocks to create a flexible and reliable legal framework with regulatory sandboxes as limited testing environments. The EU Member States have already expressed their will-

[65] *Ibid.,* p. 474

[66] *Ibid.,* p. 473

ingness and readiness in that direction. The second hypothesis is that there are legal requirements and public interest in diligent entrepreneurial behaviour and customer protection that should not be compromised. Experimentation clauses liein a zone of conflict between a wide variety of legally protected interests and the promotion of innovation. The requirement for the legal system to be reliable is not lost with the application of experimentation clauses. Their objective is to make the legal effects predictable for those affected – innovators, competitors, customers, and similar third parties. The legal system has developed control and check mechanisms, primarily by employing the judiciary system. The proper functioning of the latter is a separate, demanding, topic of another research. We find that the research and the analysis have proven the validity of both hypotheses, and that our work contributes to the raising of regulators', entrepreneurs' and all other stakeholders' awareness of the need for proper interpretation and creation of laws, which keep pace with accelerated changes in the ecosystem, especially in conditions of constant IT and AI growth, while preserving the achieved fundamental social values. We believe that Croatia could be an excellent place for the development of regulatory sandboxes once that the communication between regulatory authorities, business sector and citizens is strengthened.

There is still plenty of room for further research on regulatory sandboxes and experimentation clauses. Currently, there are no significant works of legal scholars on these issues. Economics science literature shows that efforts are being made to gather and analyse samples of sandboxes in different countries and their influence on economic growth. Further legal research could focus on specific models of regulatory sandboxes and types of experimentation clauses, as well as on a comparative analysis of statutory solutions in various legal systems. There will undoubtedly be abundant opportunities for future research on completed regulatory sandboxing projects and the influence of experimentation clauses on the change(s) in legal framework change.

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UDK 349.6:336.71(4-67EU)
Preliminary communication

# THE RISE OF CLIMATE CHANGE LITIGATION: IS THERE A (REAL) LEGAL RISK FOR EU BANKING SECTOR?*

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***ABSTRACT***

*Banks had a crucial role in both major crises that hit the globe in the last fifteen years. While they were held responsible for onset of the global financial crisis in 2007, banks, oppositely, greatly contributed in mitigating the negative effects of recent health crisis caused by COVID-19. The latter calamity showed us that certain natural events can represent significant threat not only to human lives and health but also to financial markets. Apart from pandemic, there is another nature related threat on the financial market horizon – the climate change. Recent actions on EU and international level show that role of the banks in tackling climate change crisis would not be negligible.*

*For decades there were multiple attempts to encourage governments to take bolder measures to combat climate change by signing various international agreements. Nonetheless, only the Paris Agreement, that aims to reduce greenhouse gas emission to achieve a climate neutral world by 2050, proved to be a real game changer. Ever since the Agreement entered into force in 2015, there is a continuous and significant rise in climate change litigations. Such litigations are initiated primarily against governments for not reaching the Paris Agreements goals, but also against private sector – notably the emitters of CO2. However, not only are CO2 emitters held personally responsible for environmental damage in legal proceedings conducted, but also other parties that could influence CO2 emissions.*

*Banks can indirectly influence CO2 emission, for example by providing credit lines to carbon-intensive sectors. However, this indirect influence of banks to climate change is still not specifically recognized and regulated.*

*Analysis of the climate change litigation landmark cases shows that national jurisdictions do not contain the legal basis for climate change responsibility stricto sensu. This legislative short-*

* Views expressed herein are personal to the author and not necessarily attributable to the Croatian National Bank

*coming is, however, overcome by interpreting legal principles and human rights obligations that arise from various international documents.*

*Against this backdrop, it is necessary to ascertain is there a real climate change litigation risk for EU banks? Could banks, as private entities, be held responsible for contribution to climate change by invoking human rights? If the answer is affirmative, what can banks do in order to mitigate this risk? And finally, according to existing legal framework, are Croatian banks exposed to climate change litigation risk?*

***Keywords:*** *banks, climate change, climate change litigation, crises, human rights*

## 1. INTRODUCTION

The outbreak of COVID 19 pandemic has certainly changed our view of potential unforeseen events that could harm our health, our jobs, businesses and economies in general. Now, more than two years into pandemic, the necessity to anticipate such seemingly distant events in a timely manner became evident more than ever.

Climate change was for a long time considered as a distant threat or even as a threat that is fictional, unreal.[1] However, its consequences (heatwaves, hurricanes, floods etc.) are already detrimentally affecting our lives.[2] Unlike pandemic, climate change cannot cease on its own. As it is a global threat, it requires worldwide action aiming to prevent its further adverse effects. Big steps towards that direction have already been made. In 2015, 195 countries, including the EU, reached the Paris Agreement[3] with the purpose to achieve a goal of keeping a global temperature rise well below 2º (preferably 1.5º) above pre-industrial levels and to limit greenhouse gas (GHG) emissions in order to achieve net zero carbon emissions by 2050.[4] While governments are taking effort to reach the mentioned goal by creating and complying with the nationally determined contributions[5], citizens are also doing their part by initiating legal proceedings aiming to prevent further contributions to climate change. Those proceedings, collectively known as

1 See Busch, T.; Judick, L. *Climate change—that is not real! A comparative analysis of climate-sceptic think tanks in the USA and Germany*, Climatic Change, Vol 164, No. 18, issue 1-2, 2021

2 Working Group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2022 Impacts, Adaptation and Vulnerability, Summary for Policymakers*, pp. 10-21, [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf], Accessed 15 April 2022

3 Paris Agreement, United Nations, Treaty Series, Vol. 3156, adopted on 12 December 2015, entered into force on 4 November 2016 (Paris Agreement)

4 Art. 2(1)(a) and Art. 4(1) of the Paris Agreement

5 Art. 4(2) of the Paris Agreement

climate change litigation, are rising exponentially, especially after the Paris Agreement came into force.[6]

Targets of climate change litigations are primarily addressees of the Paris Agreement, i.e. governments that fail to align with its objectives.[7] Howbeit, the recent trends show that plaintiffs are now shifting their focus on the private stakeholders, claiming their responsibility for preventing to achieve the Paris Agreement goals.[8] Although the private entities are not obliged to act under the Paris Agreement, plaintiffs are finding the way to argue and prove their responsibility.[9] This so-called private climate change litigation is notably initiated against the biggest global direct GHG emitters. Nevertheless, according to publicly available data[10], private climate change litigation can touch the entities that are considered as indirect GHG emitters as they facilitate and enable direct GHG emissions.[11] Banks are obvious example of indirect GHG emissions. The most obvious case of facilitating direct GHG emission would be financing the projects in carbon intense sector. The question that arises is can banks be held legally accountable for providing the finance to carbon intensive sector if lending is their core business? Indeed, is there a legal basis that would oblige banks to cease such financing?

The answer is – there is not, at least there is not any known national or supranational hard law that would set forth such obligation. Nevertheless, the intention that lies behind adoption of the Paris Agreement as well as the current EU legislative proposals oriented towards the aim of strengthening the bank resilience to climate change suggest that banks must scale up their efforts in order to reduce GHG emissions. In addition to that, the Paris Agreement stressed as one of its goal the necessity to make the finance flows towards low GHG emissions and climate-resilient development. How should financial institutions answer to those

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6 By way of comparison, between 1986 and 2017 there were in total 720 cases initiated in the US jursidiction, while from 2017 until 15 April 2022 there were already 680 cases initiated. In the other jurisdictions, the rise is even more evident: between 1994 and 2017 there were altogether 137 cases initiated, while in the last five years there were 242 cases recorded. See Sabin Center for Climate Change Climate Litigation Chart available at: [http://climatecasechart.com/search/], Accessed 15 April 2022

7 By way of example, on the global level (excluding US jurisdiction) there were in total 461 reported cases initiated against the governments, while 99 against other stakeholder, see *Ibid.*

8 *Ibid.*

9 *E.g. see* judgement of the The Hague district court in the case C/09/571932 *Milieudefensie et al. v Royal Dutch Shell* [2021] ECLI:NL:RBDHA:2021:5337, Sabin Center, *op. cit.,* note 6

10 Sabin Center, *op. cit.*, note 6

11 *E.g.* see *ClientEarth v Belgian National Bank, ibid.,* Lawsuit was initiated on 13 April 2021 before the Brussels court of first instance against the Belgian National Bank for purchasing of bonds issued by the direct GHG emitters, available at: [http://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank/], Accessed, 15 April 2022

requirements is not specified. Even so, the largest EU banks are finding their way to align with the mentioned objectives primarily by setting the stricter conditions for providing credit lines to carbon intensive sector or by ceasing completely financing of projects that contribute to climate change.[12]

The purpose of this paper is to determine what is the prospect of success in a climate change litigation against banks? Can they really be held liable for merely doing their job? In order to answer those questions, author of this paper will give an insight with regard to the meaning and the scope of climate change litigation, determine where exactly banks and climate change meet and can the legal arguments, already used in climate change litigation against the biggest direct GHG emitters, also be used in the possible climate change litigation against banks.

## 2. SETTING THE SCENE: MEANING AND THE SCOPE OF THE CLIMATE CHANGE LITIGATION

Scholars and experts with the interest in legal aspects of climate change have strongly contributed to determination of the meaning and the scope of climate change litigation.[13] Solana, for example, understands climate change litigation as "any case of an adversarial nature that has climate change as a central issue and that is presented before a judicial authority or an administrative body with regulatory enforcement powers and the authority to issue binding decisions."[14] Setzer *et. al.* identify climate change litigation with "an issue of law or fact regarding the science of climate change and/or climate change mitigation and adaptation policies or efforts as a main or significant issue."[15] Peel and Osofsky, on the other hand, argue that "notions of climate change litigation may extend beyond cases that are centrally 'about' climate change to ones where climate change is one of many is-

[12] BNP Paribas, for example, publicly announced that it will reduce its support for activities with the highest GHG emissions and that will firmly support the energy transition of its retail, corporate and investment customers by issuing dedicated loans. Bank Santander decided to eliminate all exposure to thermal coal mining worldwide by 2030. Similarly, Société General committed to progressively reduce to zero its exposure to the thermal coal sector, at the latest in 2030 for companies with thermal coal assets located in EU or OECD countries and 2040 elsewhere, while UniCredit Group SpA has committed to fully exiting thermal coal mining projects by 2023. The latter bank also decided not support the companies involved in the deforestation of rainforests. Deutsche Bank AG publicly announced that it will subject the provision of financial services to the availability of credible diversification plans for all clients depending more than 50% on coal. See, *inter alia*: [www.banktrack.org], Accessed 15 April 2022

[13] Peel, J.; Lin, J., *Transnational Climate Litigation: the Contribution of the Global South*, The American Journal of International Law, Vol 113, No. 4, 2019, p. 686

[14] Solana, J., *Climate Change Litigation as Financial Risk*, Green Finance, Vol. 2, No. 4, p. 345

[15] Setzer, J.; Higham, C.; Jackson, A.; Solana, J., *Climate Change Litigation and Central Banks*, Legal Working Paper, European Central Bank, No. 21, 2021, p. 5

sues in the litigation, or where addressing climate change is a clear motivation for, or consequence of, bringing a case but is not part of the legal arguments put to the court".[16]

In order to fully understand these various definitions, it is necessary to ascertain the meaning of the substance of climate change litigation. The starting point should be, therefore, defining the notion of "climate change" and determining the requirements that arise from climate change law and policies.

## 2.1. THE CONCEPT OF CLIMATE CHANGE

The United Nations Framework Convention on Climate Change in 1992 (UNFCCC)[17] is the first legal document containing the internationally accepted definition of the climate change. Pursuant to the UNFCCC, climate change means such change in climate that is caused by human activity that directly or indirectly alters the composition of global atmosphere.[18] It is understood from the remaining text of the UNFCCC that the global atmosphere can be altered by increasing concentration of GHG, which ultimately leads to global warming. [19] Although the document does not specify what kind of human activity leads to this atmospheric pollution, the conclusions of climate change scientist and experts presented in the World Climate Conference held in 1979, upon which the UNFCCC is built, pointed out to gasses emitted from industrial activities, burning of forests and grasslands, as well as ploughing and over-grazing, resulting in dust being lifted up into the atmosphere.[20] Those activities, performed on a large scale, can significantly alter the climate with detrimental effects not only on nature itself, but also on human health, wealth, political stability and world peace.[21]

Definition given in the UNFCCC and conclusions from the World Climate Conference suggest that climate change should be viewed as phenomenon that only refers to atmospheric pollution (*i.e.* GHG emissions) which is exclusively caused by human activity and which inevitably leads to global warming. Therefore, climate

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16 Peel, J.; Osofsky, M., *Climate Change Litigation*, Annual Review of Law and Social Science, vol. 16, 2020, p. 23

17 The United Nations Framework Convention on Climate Change, United Nations, Treaty Series, Vol. 1771, adopted on 9 May 1992, entered into force on 21 March 1994 (UNFCCC)

18 Art. 1(2) of the UNFCCC

19 *E.g.* par. 2 of the Preamble to the UNFCCC

20 World Climate Conference - Extended Summaries of Papers Presented at the Conference, World Meteorological Organization, Geneva, 1979, p. 102, available at: [https://library.wmo.int/doc_num.php?explnum_id=6320], Accessed 15 April 2022

21 *Ibid.* p. 6

change should not be mistaken for purely environmental hazards such as air, water and soil pollution (*e.g.* toxic emissions, hazardous waste or oil spill accidents).

## 2.2. Obligations arising from climate change law and policies

The above-given illustrative differentiation is in line with what is known in academic discourse as *climate exceptionalism* – regulatory differentiation of environmental and climate change issues.[22] Climate exceptionalists suggest that the climate change is and should be regulated under the specific area of law, i.e. climate law[23], which is different and independent from environmental law.[24] Namely, the purpose of environmental law is *prevention* of immediate negative impacts of human behaviour on the environment[25], while the purpose of the climate law is *adaptation* to the adverse impact of climate change and *mitigation* of human activity attributable to future adverse impacts of climate change phenomenon.[26] It is the course of action, therefore, that differentiates these two areas of laws.[27]

Mitigation measures aim to stabilize concentration of the GHG in the atmosphere by reducing and limiting their emissions in order to achieve net zero carbon emissions by 2050.[28] By way of example, mitigation measure is setting the cap of own GHG emissions. Adaptation measures, on the other hand, are measures that can help to increase the ability to adapt to the adverse impacts of climate change.[29] The content of adaptation measures is not so obvious, nonetheless, those could be any measure created in the adaptation process which is defined as "the process of adjustment to actual or expected climate and its effect",[30] "the efforts aimed at

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22 Hilson, C., *It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law*, Journal of Environmental Law, Vol. 25, No. 3, 2013, p. 361

23 Odozor, C.; Odeku, K. O., *Explaining the Similarities and Differences between Climate Law and Environmental Law*, Journal of Human Ecology, Vol. 45, No. 2, 2014, p. 128

24 *Ibid*., pp. 128-129; Hilson, *loc. cit.,* note 22

25 Odozor; Odeku, *op. cit*., note 23, p. 129. *E.g.* German Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibration and Similar Phenomena, as last amended on 11 August 2009, available at: [https://www.bmuv.de/fileadmin/Daten_BMU/Download_PDF/Luft/bimschg_en_bf.pdf], Accessed 15 April 2022

26 Odozor; Odeku, *op. cit*., note 23, p. 129

27 Although the above described exceptionality approach is plausible, it cannot be denied that climate change is an issue of the environment. Climate change litigations so far demonstrate that judicial bodies are willing to derive climate change accountability from purely environmental law.

28 Art. 2(1)(a) and Art. 4(1) of the Paris Agreement. *See* Mayer, B., *Climate Change Adaptation and the Law: Is there Such a Thing?*, in: Mayer, B.; Zahar, A. (eds.): Debating Climate Law, Cambridge University Press, Cambridge, 2021., p. 1

29 Art. 2(2) of the Paris Agreement

30 Peel, J.; Osofsky, H., *Rights Turn in Climate Change Litigation?*, Transnational Environmental Law, Vol. 7., No. 1, 2018, p. 44

reducing exposure and vulnerability to physical events that climate change makes more likely"[31], or "any measure that seeks to reduce the harm caused by climate change"[32]. It could be concluded that adaptation measures mainly focus on climate change risk management. Against this backdrop, climate change litigation *stricto sensu* should refer only to legal proceedings in which the legal argument is based on proving the climate related detrimental effects of (i) activities that increase the GHG in such extent which already causes or will inevitably cause the atmospheric pollution (failure to mitigate) and/or (ii) poor or non-existing climate change risk management (failure to adapt).

However, it is worth to mention that publicly available databases of climate change litigations include so-called "incidental" litigations[33] with climate change as only peripheral issue, which is in line with broader definition of climate change litigation given by Peel and Osofsky.[34] This type of litigation includes *e.g.* the request for injunction against environmental activists attempting to disrupt the operations of an airport for the purpose of organizing climate change awareness event (*Heathrow Airport Ltd. and Another v. Garman and Others*)[35] or greenwashing cases (*Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*).[36] Those cases, in which the main legal argument focuses on issues other than failure to mitigate and failure to adapt in the context of climate change science, but in any way incidentally touch the climate change, could be seen as a climate change litigation in a broader sense.[37]

## 3. WHAT BANKS GOT TO DO WITH CLIMATE CHANGE?

When thinking about private subjects that can fail to mitigate or fail to adapt and, therefore, be subject of the climate change litigation, most of us will picture natural gas plants, coal power plants and any other fossil fuel facility. They are, indeed,

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31 Mayer, B., *Climate Change Adaptation and the Law*, p. 19, available at: [https://benoitmayer.com/wp-content/uploads/2021/03/Climate-Change-Adaptation-and-the-Law.pdf], Accessed 15 April 2022

32 *Ibid.,* p. 14

33 Ganguly, G.; Setzer, J.; Heyvaert, V.*, If at First You Don't Succeed: Suing Corporations for Climate Change*, Oxford Journal of Legal Studies, Vol. 38, No. 4, 2018, p. 843

34 See *supra 2. Setting the scene: meaning and the scope of the climate change litigation*

35 See judgement of the High Court of Justice, the United Kingdom [2007] EWHC 1957 (QB), available at: [http://climatecasechart.com/non-us-case/heathrow-airport-ltd-another-v-joss-garman-others/], Accessed 15 April 2022

36 See lawsuit initiated by Greenpeace France on 2 March 2022 before the Tribunal Judiciaire de Paris, available at: [http://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/], Accessed 15 April 2022

37 Cf. Setzer; Higham; Jackson; Solana, *loc. cit.,* note 15

the largest source of the atmospheric pollution.[38] But to maintain the existing ones and to create new carbon intensive projects, money is indispensable. According to Fossil Fuel Finance Report 2022[39], as of conclusion of the Paris Agreement, global banks have steered 4.6 trillion USD into fossil fuel projects, with 742 billion USD investments in 2021 alone.[40] The mentioned data generally would not be considered as problematic since banks' core business is providing banking and financial services, such as lending, investments, issuance of guarantees and advisory services. However, the Paris Agreement should be seen as the game changer in this regard as it paved the way for structural changes in financial decision-making and banking business agenda, going in divestment direction.[41]

### 3.1. Mitigating and adapting the adverse impacts of climate change within the banking sector

The Paris Agreement binds the agreeing states to strengthen the global response to the detrimental climate change by "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".[42] In order to determine the more precise content of this objective, it should be read together with the Paris Agreement primary goal of limiting the global average temperature to well below 2°C above pre-industrial levels. Having this in mind, it should be concluded that the mentioned objective could be achieved by ensuring prudent financing of carbon intensive sector and by redirecting finance to low emissions technologies.[43]

The impact of finance flows on climate change was recognized long before the adoption of the Paris Agreement. As of 2001, GHG Protocol serves the private sector to account their GHG emissions.[44] GHG Protocol differentiates Scope 3

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38 Heeds, R., *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010,* Climatic Change, Vol. 122, 2014, pp. 229–241

39 BankTrack *et al.*, *Fossil Fuel Finance Report 2022*, available at: [https://www.bankingonclimatechaos.org//wp-content/themes/bocc-2021/inc/bcc-data-2022/BOCC_2022_vSPREAD.pdf], Accessed 15 April 2015

40 *Ibid.* p. 3

41 Köppl, A.; Stagl, S., *A Plea for a Paradigm Shift in Financial Decision-Making in the Age of Climate Change and Disruptive Technologies*, SUERF Policy Note, Issue No 45, 2018, p. 2, available at: [https://www.researchgate.net/publication/328693170_A_plea_for_a_paradigm_shift_in_financial_decision-making_in_the_age_of_climate_change_and_disruptive_technologies], Accessed 15 April 2022

42 Art. 2(1)(c) of the Paris Agreement

43 Köppl, Stagl, *op. cit.*, note 41, p. 3

44 GHG Protocol Corporate Accounting and Reporting Standard, 2001, World Business Council for Sustainable Development and World Resources Institute, available at: [https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf], Accessed on 15 April 2022

GHG emissions which are considered as a consequence of the activities of the company, but which occur from sources not owned or control by the company[45], *i.e.* emissions that occur along the value chain of the organization.[46] These are, by way of example, banking activities such as lending, investment and advisory services, that are directed towards the carbon intensive sector.[47] As GHG Protocol provides the indirect GHG emitters with a toolkit to calculate their indirect emission, banks have a mechanism to calculate and, consequently, to limit their carbon exposure.

Having in mind the Paris Agreement objective regarding the desirable direction of finance flows and considering that banks are already identified as a potential indirect GHG emitters whose indirect emission can be calculated, it can be concluded that banks are required to do their part in achieving carbon neutral world by 2050. In this regard, the banks should both mitigate and adapt to the adverse effect of climate change. With regard to mitigation measures, banks could set the cap of both their direct and indirect GHG emission; tighten the conditions for financing the carbon intensive sector (e.g. by setting higher interest rates or by obliging the client to guarantee the carbon offset)[48]; completely cease to finance the carbon intensive sector; steer the finance flows towards carbon neutral industries or even perform the carbon offset themselves. With regard to adaptation measures, banks could perform the climate change due diligence prior to providing a credit lines or use the specific financial instruments such as climate derivatives.[49]

Against this backdrop, it can be concluded that banks have unique, two-folded role in the climate change arena. They could be a key factor for achieving the Paris Agreement goals, while on the other hand they can obstruct them by continuing recklessly financing carbon intensive sector.

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45 *Ibid.,* p. 25

46 Furrer, B.; Hamprecht, J.; Hoffmann V. H., *Much Ado About Nothing? How Banks Respond to Climate Change*, Business & Society, Vol. 51, No. 1, 2012, p. 80

47 GHG Protocol, Technical Guidance for Calculating Scope 3 Emissions, Supplement to the Corporate Value Chain (Scope 3) Accounting & Reporting Standard, 2013, World Business Council for Sustainable Development and World Resources Institute, pp. 136-152, available at: [https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf], Accessed 15 April 2022. See also: Teubler, J.; Kühlert M., *Financial Carbon Footprint: Calculating Banks' Scope 3 Emissions of Assets and Loans*, Wuppertal Institute for Climate, Environment and Energy, 2020, available at: [https://epub.wupperinst.org/frontdoor/deliver/index/docId/7587/file/7587_Teubler.pdf], Accessed 15 April 2022

48 A carbon offset means reduction in GHG emissions or compensating for emissions by *e.g.* planting of trees.

49 See: Little, R. L. *et al.*, *Funding Climate Adaption Strategies with the Climate Derivatives*, Climate Risk Management, Vol. 8, 2015, pp. 9-15

### 3.2. Identifying and conceptualizing the climate change litigation risk for banking sector

Since it can be argued that banks are required to mitigate and to adapt to the adverse impacts of climate change, it is indisputably that failure to do so could amount to certain degree of the climate change litigation risk against the banks. Notwithstanding the outcome, such litigation represents both reputational and financial risks for banks.[50]

Central Banks and Supervisors Network for Greening the Financial System (NGFS) has already detected that banks can be exposed to the risk of climate change litigation *stricto sensu* if they provide financing for carbon intensive sector that is not aligned with the Paris Agreement goals.[51] Namely, plaintiffs can initiate litigations against banks seeking injunctive measures (e.g. to stop providing such finance or to reduce it).[52] It is worth to mention that the US banks, for example, have already been prosecuted for lending money or approving loan guarantees to carbon intensive sector, before the adoption of the Paris Agreement. Those claims were based primarily on federal environmental laws seeking prior consulting and environmental assessment in order to consider the substantial impacts of the financed project on human health and environment.[53] The adoption of the Paris Agreement provoked initiation of similar litigations in Europe. By way of example, it is worth to mention the pending litigation against UK Export Finance's decision to provide a loan for construction of liquefied natural gas project that will allegedly result in total combustion emissions of 4.3 billion tonnes of $CO_2$, more than the total annual emissions for all 27 countries within the EU.[54] Specific climate change litigation was initiated before the Dutch and the Polish National Contact Points for the OECD Guidelines for Multinational Enterprises against

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50 Solana, *op. cit.*, note 14, pp. 354-356

51 Central Banks and Supervisors Network for Greening the Financial System, *Climate-related litigation: Raising awareness about a growing source of risk*, 2021, p. 7, available at: [https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf], Accessed 15 April 2022

52 Giabardo, C. V., *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, Diritto & Processo, University of Perugia Law School Yearbook, 2019, p. 374

53 *See*: *Center for Biological Diversity et al. v Export-Import Bank of the US*, No. 16-15946, initiated in 2012, available at: [http://climatecasechart.com/case/center-for-biological-diversity-v-export-import-bank/], Accessed 15 April 2022; *Chesapeake Climate Action Network, et al. v Export-Import Bank of the US*, No. 13-1820(RC), initiated in 2013, available at: [http://climatecasechart.com/case/chesapeake-climate-action-network-v-ex-im-bank-of-the-us/], Accessed 15 April 2022 and *Friends of the Earth, Inc., et al. v Spinelli, et al.*, No. 02-4106, initiated in 2002, available at: [http://climatecasechart.com/case/friends-of-the-earth-v-watson/], Accessed 15 April 2022

54 See *Friends of the Earth v UK Export Finance*, No. CO/3206/2020, initiated in 2020, available at: [http://climatecasechart.com/non-us-case/friends-of-the-earth-v-uk-export-finance/], Accessed 15 April 2022

two banks for financing carbon intensive sector without prior consideration of the adverse impact of financed projects under the mentioned soft law instrument.[55]

Second type of detected risk of climate change litigation *stricto sensu* refers to failure to disclose and manage climate related risks. The plaintiffs could, following the example of climate change litigations against Commonwealth Bank of Australia, seek the access to internal documents that relate to the bank's involvement with fossil fuel projects or seek the banks to create a detailed report with information on their current direct and indirect GHG emissions and on plans to mitigate those emissions.[56] With regard to EU banks, this claims could be potentially supported by bank's internal acts, national law transposing e.g. Non-Financial Reporting Directive[57] or international soft law such as the OECD Guidelines for Multinational Enterprises.[58]

The last group of identified risks are connected to climate change litigation in the broad sense. These could be breaching of fiduciary duties of bank's management board by continuing to decide to finance intensive fossil fuel projects or by avoiding to plan the strategies to address the climate change risks.[59] Another climate change litigation risk could arise from breaching of contract relating to green financial products.[60] Mentioned risks will exponentially grow by the rise of the new climate oriented EU regulation regarding the corporate sustainability due diligence[61] and transparency.[62] Finally, as banks are, especially recently, prone to pub-

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55 See *BankTrack, et al. v ING Bank*, available at: [http://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank/], Accessed 15 April 2022 and *Development Yes Open-Pit Mines NO v Group PZU S.A.*, available at: [http://climatecasechart.com/non-us-case/development-yes-open-pit-mines-no-v-group-pzu-sa/], Accessed 15 April 2022

56 See *Abrahams v Commonwealth Bank of Australia*, available at: [http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/], Accessed 15 April 2022

57 Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1

58 *Infra.*

59 See *Ewan McGaughey et al v Universities Superannuation Scheme Limited,* available at: [http://climatecasechart.com/non-us-case/ewan-mcgaughey-et-al-v-universities-superannuation-scheme-limited/], Accessed 15 April 2022

60 Central Banks and Supervisors Network for Greening the Financial System, *op. cit.* note 51, p. 7

61 Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final (Proposal of the EU Corporate Sustainability Due Diligence Directive)

62 European Banking Authority, *EBA advises the Commission on KPIs for transparency on institutions' environmentally sustainable activities, including a green asset ratio*, available at: [https://www.eba.europa.eu/eba-advises-commission-kpis-transparency-institutions%E2%80%99-environmentally-sustainable-activities], Accessed 15 April 2022

licly announce their climate related goals[63], they can also be exposed to a liability risk arising from misleading advertisement or greenwashing (climate-washing).[64]

## 4. CAN BANKS BE LIABLE FOR CONTRIBUTING TO CLIMATE CHANGE BY SIMPLY DOING THEIR JOB?

Although there are various climate related litigation risks that could arise within the banking sector, the purpose of this paper is to determine whether EU banks can be held liable for financing the carbon intensive projects. As stated above, this activity has already been recognized as climate change litigation risk for banks, but unlike other identified risks, this risk does not arise from specific regulation that would oblige banks to cease with funding of carbon intensive sector. Nonetheless, Roger Cox, attorney at law who represented the plaintiffs (NGOs) in the first EU based successful climate change litigation against a corporation – *Milieudefensie v. Royal Dutch Shell*, recently prophetically declared that "the next step is to start also litigating against financial institutions who make these emissions and fossil fuel projects possible".[65]

In anticipation of this potential wave of litigation, it is necessary to ascertain are there plausible legal arguments that would support such claims against banks. In order to do so, this Section will focus on the relevant climate related case law and will test potential banking liability against the arguments that, more or less successfully, supported the claims against the direct GHG emitters.

### 4.1. Brief overview of private climate change litigation case law

When thinking about how to successfully hold a private entity liable for climate change, the question that imposes itself is: how to prove that heatwaves in Spain or rising of sea levels in the Netherlands are caused by global warming? Furthermore, how to prove that global warming is the consequence of the anthropogenic pollution? And if we manage to overcome these obstacles, the following question would be how to attribute those heatwaves and rise of sea levels to an activity or omission of a specific corporation?

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63 See note 12

64 For more information and examples see Climate Social Science Network, *Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, 2022, available at: [https://www.cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf], Accessed 15 April 2022

65 CNBC, *Governments and Big Oil were first. The next wave of climate lawsuits will target banks and boards*, 2021, available at: [https://www.cnbc.com/2021/11/11/cop26-climate-campaigners-to-target-banks-after-shell-court-ruling.html], Accessed 15 April 2022

This illustrative example gives an insight to the biggest hurdle in the private climate change litigation – multi-tier climate change causality.[66] Recent developments in the climate change science, resolved some of the problems regarding the causal nexus, as they led on global consensus on anthropogenic climate change. Advancement in climate science have even enabled to trace the GHG emissions in the specific percentage to the specific emitter.[67] These findings have been increasingly used by the plaintiffs in their litigations against the direct emitters.[68] The national courts in the EU took so far the opposite approaches regarding the mentioned causality issues. They either applied strict causality theories of tort law or took much more liberal, holistic approach to determine the climate related liability of a corporation by invoking the universally accepted human rights, legal principles and supranational soft law.

German court followed the strict causality approach in the landmark climate change case *Lliuya v. RWE AG*. In a nutshell, Mr Lliuya, Peruan farmer from Huarazu, lodged in 2015 several claims against RWE arguing that its GHG emissions contributed to global warming that eventually caused melting of the glacial lake near Huarazu. Mr Lliuya argued that RWE should bear the costs of applied measures to prevent damages arising from a flood risk, proportionately to its global GHG emission calculated by the climate science in the amount of 0.47%. The Court dismissed the claims considering that there is no sufficient causal nexus between RWE AG's GHG emissions and a supposed flood risk, with the following elaboration:

"The pollutants, which are emitted by the defendant, are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted. Every living person is, to some extent, an emitter. In the case of cumulative causation, only the coaction of all emitters could cause the supposed flood hazard (...) Even the emissions of the defendant, as a major greenhouse gas emitter, are not so significant in the light of the millions and billions of emitters worldwide that anthropogenic climate change and therefore the supposed flood risk of the glacial lake would not occur if the defendant's particular emissions were not to exist".[69]

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66 Duffy, M., *Climate Change Causation: Harmonizing Tort Law & Environmental Law*, Temple journal of science, technology & environmental law, Vol. 28, No. 2, 2009, p. 189

67 For more *see* note 38

68 Ganguly; Setzer; Heyvaert, *op. cit.,* note 33, p. 851

69 Decision of the District Court Essen in the case *Luciano Lliuya v RWE AG*, No. 2 O 285/15, 15 December 2016, available at: [http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/], Accessed 15 April 2022

Indeed, holding RWE AG liable for a glacial flood risk in Peru could lead to absurd situations in which practically everyone who takes flights in Europe can be held liable for melting down of the lake at the opposite side of the world. On the other hand, without a proper discouragement, the biggest direct GHG emitters could continue to cause anthropogenic pollution with no backlash. *A fortiori*, indirect GHG emitters such as banks could also continue recklessly fund these direct emitters and in that way, facilitate further pollution. It should be concluded, then, that if the litigation is based solely on the traditional mechanisms of a tort law, due to unique features of climate change litigations, they are sure to fail. However, as some other examples show, these legal obstacles are sometimes prevailed by innovative approaches in a form of judicial activism or by the use of tort-based mechanisms that are not used solely for reparation of damages.

The sheer example of such judicial activism is the judgment of The Hague District Court, the Netherlands, in the case *Milieudefensie et al. v. Royal Dutch Shell*. This landmark judgment switched the course of the private climate change litigation in Europe. As the first European judgment that determined corporate liability for a climate change, it opened the floodgate for a new wave of private climate change litigation across the Europe. What lied at the core of the dispute was whether the Royal Dutch Shell, as a parent company of Shell group, has the obligation to mitigate the adverse impacts of climate change by reducing (more progressively) the $CO_2$ emissions of the Shell group's entire energy portfolio. The Shell did not deny that its GHG emissions indeed contribute to global warming, but, similar as the reasoning of the German court, it denied the possibility to establish the strong causal nexus between its actions and climate change, as the climate change cannot be attributable solely to the Shell. However, the Court accepted the claim and, on the basis of the Dutch Civil Law, ordered Shell to reduce the entire volume of Shell group $CO_2$ emissions in the amount that corresponds to the last calculation of percentage to which the global GHG emissions must be reduced in order to achieve the Paris Agreement goals, provided by the climate change science. The Court derived this conclusion from the tort law provisions according to which the tortious act implies violation of duty of care and proper social conduct. The meaning of these two standards is not specified under the Dutch law. Nonetheless, the Court interpreted the mentioned standards by invoking universally accepted human rights enshrined in the international human rights conventions, specifically the right to life and the right to respect for private and family life. The Court, namely, held that Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention of Human Rights (ECHR) offer protection against the serious consequences of climate change. This approach corresponds to *reflex effect* doctrine that same Court invoked in the prior *Urgenda* cli-

mate change case against the Dutch government. Pursuant to the *reflex effect* doctrine, all international law obligations that cannot be directly invoked by citizens, serve to interpretation of national legal standards, such as "duty of care" or "proper social conduct".[70] Howbeit, unlike in *Urgenda* case, the Court, in the *Milieudefensie* case, needed to enhance this elaboration by invoking the soft law instruments under which the companies as well should respect human rights, since the Shell as a private entity, is not duty bearer of human rights under the international human rights convention. The Dutch court, therefore, applied liberal holistic approach in legal interpretation and overcame the necessity to establish the sufficient causation between Shell actions and climate change. In that way, it held Shell responsible for merely contributing to global warming:

"This issue, the not-disputed responsibility of other parties and the uncertainty whether states and society as a whole will manage to achieve the goals of the Paris Agreement, do not absolve RDS of its individual responsibility regarding the significant emissions over which it has control and influence. There is also broad international consensus that each company must independently work towards the goal of net zero emissions by 2050 (see legal ground 4.4.34). Due to the compelling interests which are served with the reduction obligation, RDS must do its part with respect to the emissions over it has control and influence. It is an individual responsibility that falls on RDS, of which much may be expected."[71]

The Dutch court judgment in *Milieudefensie* was received with mixed opinions in the academic circle. While one praised the conclusions in the judgment as "revolutionary and groundbreaking"[72] and supported its innovative approach[73] considering it as "a vehicle for speeding up and enforcing the obligations negotiated within the UNFCCC process"[74], the others implied that judgment as this leads to a dikastocracy.[75] Nevertheless, beyond this debate, the constitutionalization of

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70 Judgement of the Den Haag district court in the case *Urgenda Foundation v The State of The Netherlands*, ECLI:NL:RBDHA:2015:7196, 24 June 2015, confirmed by the judgment of the Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 20 December 2019

71 See note 9

72 Spijkers, O., *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, Chinese Journal of Environmental Law, Vol. 5, 2021, p. 242; *see* also Nollkaemper, A., *Shell's Responsibility for Climate Change, an International Law Perspective on a Groundbreaking Judgment*, available at: [https://verfassungsblog.de/shells-responsibility-for-climate-change/], Accessed 15 April 2022

73 Peel, J.; Markey-Towler, R., *Recipe for Success? Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, German Law Journal, Vol. 22, p. 1494

74 Macchi, C.; van Zeben, J., *Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell*, Review of European, Comparative & International Environmental Law, Vol. 30, No. 3, 2021, p. 414

75 Spijkers, *op. cit.,* note 72, p. 237

private climate change litigation caused a domino effect in the EU jurisdictions. By way of example, *Milieudefensie* judgment gave an impulse for private climate change litigations against direct GHG emitters in Germany on the same or similar grounds, i.e. on national tort law and the Paris Agreement basis, enhanced by invoking of human rights arguments.[76]

## 4.2. Possible legal basis for holding EU banks liable for indirect emissions of GHG

Although the relevant case law deals with the direct GHG emitters, it gives valuable insight of possible legal basis for holding banks, as indirect GHG emitters, liable for climate change in the future proceedings.

In the following chapter, it shall be examined whether the climate change litigation against banks has prospect of success if built upon arguments arising from tort law, human rights regime and soft law. The hypothetical question is: if a bank financed the coal power plant construction that was not aligned with the Paris Agreement goals and, consequently, released an excessive amount of GHG emissions and caused climate harm (*e.g.* flood), could the bank be held liable for facilitating the climate harm?

### 4.2.1. *Tort-based approach*

Banks' lending activity is recognized as an indirect GHG emission when it is steered to a carbon intensive sector. The climate change science has already developed methodology for calculating the carbon footprints of banking lending portfolios.[77] In those new circumstances, where banks are aware of potential harm of their lending activities, it can be argued, at least intuitively, that banks are acting tortious every time they are financing carbon intensive sector or projects whose direct GHG emissions are not aligned with the Paris Agreement goals. This intuitive conclusion, however, is not enough to determine their tort liability for merely lending the money.

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[76] See *Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG (BMW),* availabe at: [http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/], Accessed 15 April 2022*, Deutsche Umwelthilfe (DUH) v Mercedes-Benz AG*, available at: [http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/], Accessed 15 April 2022, *Barbara Metz et al. v Wintershall Dea AG*, available at: [http://climatecasechart.com/non-us-case/barbara-metz-et-al-v-wintershall-dea-ag/], Accessed 15 April 2022

[77] *Supra*

National jurisdictions within the EU have adopted different approaches and different tort law theories for determining tort law liability.[78] Analysis of all those peculiarities goes well beyond the scope of this paper. Nonetheless, establishing causal nexus is a common feature of tort law liability[79] and, as already shown, the biggest obstacle for holding the direct GHG emitters liable for climate harm. The causal nexus is even more dubious between the indirect GHG emitter and climate harm.

Determination of causal nexus, as a prerequisite for tort liability, is performed in two phases: determining factual causation[80] and determining legal causation[81]. In all European countries, factual causation is determined under the *condicio sine qua non* test or equivalence theory (analogous to common law "but for" test)[82] pursuant to which the cause is only that of several circumstances without which the damage could not have occurred.[83] The test requires determination of whether absent the defendant's actions, the harm would have occurred.[84] Application of the *condicio sine qua non* test in a hypothetical climate change proceedings initiated against a bank for financing the construction of coal power plant would hardly lead to a conclusion of factual causation between the performed lending and climate harm. Namely, under the *condicio sine qua non* test, the bank could be potentially held liable for climate harm only and only if without the bank's financial assistance, the coal power plant construction could not be realized.[85] This means that the claimant must prove that the financial assistance of a bank was indispensable for realization of the project, that the project would not have gone forward but for bank's financial assistance. Nevertheless, if it is evident that such project will occur regardless of the bank's involvement (i.e. the project owner provided most of its

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78 Infantino, M.; Zervogianni, E., *Summary and Survey of the Results* in: Infantino, M.; Zervogianni, E. (eds.) Causation in European Tort Law, Cambridge University Press, Cambridge, 2017, p. 601

79 Spitzer, M.; Burtscher, B., *Liability for Climate Change: Cases: Challenges and Concepts*, Journal of European Tort Law, Vol. 8., No. 2., 2017, p. 155-156

80 Infantino; Zervogianni, *op. cit.,* note 78, p. 590

81 *Ibid.*

82 *Ibid.,* p. 601

83 *Ibid.*

84 Duffy, M. *op. cit.,* note 66, p. 188

85 *E.g.* in Order Denying Defendants' Motion for Summary Judgment, No. C 02-4106 JSW, rendered in the case *Friends of the Earth, Inc. v. Spinelli*, US District Court for The Northern District of California concluded, by applying "but for" test that plaintiffs have sufficiently demonstrated causation: "Plaintiffs submit evidence demonstrating a stronger link between the agencies' assistance and the energy-related projects. For example, ExIm has stated that it "supports export sales that otherwise would not have gone forward." (...) And OPIC has stated that when it determines which projects to support, it evaluates them "to ensure they would not have gone forward but for OPIC's participation.", available at: [http://climatecasechart.com/case/friends-of-the-earth-v-watson/], Accessed 15 April 2022

own funding or is prepared to obtain funding from other sources, including other banks if a defendant bank's money is unavailable), then the bank could not be held liable under the *condicio sine qua non* causality test.[86] *Condicio sine qua non* test, therefore, demands a strong link between the performed lending and the climate harm itself, which is hard or even impossible to establish.

If in any case factual causation could be established, legal causation is furthermore required for attributing the tortious act to a specific alleged tortfeasor. The most common theory used in the continental law is *the adequacy theory* pursuant to which the defendant action or omission must be adequate cause of the plaintiff's harm[87], it must typically cause the harm[88] that occurred. This means that if multiple human actions led to a damage, the cause of the damage will only be the one that is closest to the damage.[89] By way of our hypothetical example, pursuant to *the adequacy theory*, bank could not be liable for climate harm in a form of flood, as flooding is not typical and regular consequence of lending activity.

Against this backdrop, it can be concluded that under the current conditions of the prevailing *condicio sine qua non* test and the *adequacy theory* within the continental law jurisdictions, successful climate change litigation against EU banks, based solely on tort law, seems pretty much far-fetched. Croatia follows this continental law approach and accepts *the adequacy theory* developed through the court practice.[90] However, as the law does not prescribe the process of determination of causal nexus, it can be argued that there is enough "manoeuvring space" to introduce new causation theories. Indeed, some argue that for combating climate change in the judicial arena, tort law should be redefined.[91]

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86 *E.g.* US Court of Appeals for The Ninth Circuit in its Opinion, No. 16-15946, as of 28 June 2018, by applying "but for" test concluded: "Plaintiffs did not offer a sufficient basis to determine that there was a reasonable probability the Projects would be halted if the Ex-Im Bank's funding was vacated. The district court highlighted that funding from the Ex-Im Bank constituted a relatively small percentage of the costs of the Projects and that the Projects had already begun before securing Ex-Im Bank approval and had made substantial progress to that point. The district court also noted the large financial resources available to the principals behind the Projects. The district court noted that another LNG project."; available at: [http://climatecasechart.com/case/center-for-biological-diversity-v-export-import-bank/], Accessed 15 April 2022

87 Infantino; Zervogianni, *op. cit.,* note 78, p. 603

88 Klarić, P., *Uzročna veza kod odgovornosti za štetu u medicini*, Zbornik radova aktualnosti zdravstvenog zakonodavstva i prakse, II. znanstveni skup, 2011, p. 143

89 Klarić, P.; Vedriš, M., *Građansko pravo, Opći dio, stvarno, obvezno i nasljedno pravo*, *XIV. izmijenjeno i dopunjeno izdanje*, Narodne novine, 2014, p. 595

90 Gorenc, V. (ur), Komentar Zakona o obveznim odnosima, Narodne novine, Zagreb, 2014, p. 1704

91 Giabardo, C. V., *op. cit.*, note 52, p. 382; *see* also Hinteregger, M., *Civil Liability and the Challenges of Climate Change: A Functional Analysis*, Journal of European Tort Law, Vol. 8, No. 2, 2017, p. 260

With regard to possible re-defining of the tort law for establishing climate change tort liability, certain common law legal theories should be addressed, having in mind that it is not unusual for continental law to accept common law solutions.[92] By way of example, tort liability for indirect GHG emissions could be inferred from the *secondary liability theory* that has been developed within the framework of copyright and trademark law. Namely, pursuant to this theory, the defendant could be held liable for tortious act even if he did not directly commit it.[93] The defendant will be held liable if he somehow facilitated or encouraged tortious act. As Bartholomew and Tehranian simply explained: "(...) an indirect participant A may encourage direct participant B to throw rocks during a riot. One of the rocks thrown by B injures victim C. Even though A does not throw any rocks himself, A is subject to liability to C as a contributory tortfeasor."[94] Under this theory, the contributor shall be held liable only if his/her contribution is substantial and only if he/she had actual and sufficient knowledge that direct tortfeasor's conduct constituted a breach of duty.[95] However, such contributory act will not constitute contributory infringement if it is universally accepted that it regularly serves for legitimate, unobjectionable purposes.[96] Under this theory, banks could be seen as indirect tortfeasors for facilitating the direct tort. It is, however, true that the bank's lending activity regularly serves for non-infringing purposes. On the other side, it can be argued that, non-critical and reckless funding of carbon intensive sector could be considered as an indirect, contributory tort. This especially having in mind that under the Paris Agreement financial institutions are invited to do their part for achieving its goals. Furthermore, in the present conditions, it is impossible for banks to ignore the climate change science that is developed to the point that it can determine the exact share of a bank's client in a global contribution of GHG and the carbon footprint of bank's lending portfolio.[97]

Further to the above-mentioned solutions for possible future re-defining of the tort law, it is worth to mention that EU law is also doing its part with regard to tort-based climate change litigation. Civil liability for climate change could be re-

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92 *E.g.* defective product liability first appeared in the US before being developed in the European countries – *see* Baretić, M., Odgovornost za neispravan proizvod in: Kuzmić, M.; Šumelj, A. (eds.), Zakon o obveznim odnosima : najznačajnije izmjene, novi instituti, Inžinjerski biro, Zagreb, 2005, p. 222

93 Bartholomew, M.; Tehranian, J., *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 Berkeley Tech. L.J. 1363, Vol. 21, No. 4, 2006, p. 1366

94 *Ibid.*

95 *Ibid*., p. 1367

96 Powell, C. D., *The Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions,* Akron Intellectual Property Journal, Vol. 3, No. 1, p. 193

97 *Cf.* Giabardo, op. *cit.,* note 52, p. 377

sorted in the future EU Corporate Sustainability Due Diligence Directive[98], as the proposal of this Directive introduces civil liability of big corporations[99], including banks[100], for damages that occurred as the result of failing to take appropriate measures to prevent or to mitigate adverse human rights and environmental impacts of their business. However, it is unclear whether this civil liability regime would be incorporated into the existing national tort law regimes (and, therefore, be affected with the same obstacles regarding the causation), or the Member States would be required to re-define national tort law regimes for the purpose Directive transposition. If adopted with the proposed text, the Directive will hardly ensure the level-playing field with regard to climate change liability due to its limited scope of application.[101]

#### 4.2.2. *Rights-based approach*

As the tort law contains obvious obstacles for successful climate change litigation, it was necessary to find another route to prosecute climate change harm. The idea of basing climate change lawsuits solely or additionally on human rights is not a new thing.[102] Indeed, it is becoming more and more evident that detrimental effects of climate change are substantially affecting human rights.[103] Even the Paris Agreement itself bashfully declared that states, as agreeing parties, should respect human rights when addressing climate change.[104] This human rights reference should not be neglected as it, at least, indicates that the Paris Agreement should be interpreted by reference to existing international human rights law, following the principle of systemic integration that arises from the Vienna Convention on the Law of Treaties.[105,106] Howbeit, only recently has human rights-based climate change litigation achieved success. While successful rights-based litigation against a state is not a surprise, as only the states are duty-bearers of human rights obliga-

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98 European Banking Authority, *op. cit.,* note 62

99 Art. 2 of the Proposal of the EU Corporate Sustainability Due Diligence Directive

100 Art. 3(a)(iv) of the Proposal of the EU Corporate Sustainability Due Diligence Directive

101 *See* note 102, *see* also: Euractiv, *LEAK: EU due diligence law to apply only to 1% of European companies,* available at: [https://www.euractiv.com/section/economy-jobs/news/leak-eu-due-diligence-law-to-apply-only-to-1-of-european-companies/], Accessed 15 April 2022

102 Peel, Osofsky, *op. cit.,* note 30, p. 46

103 *Ibid.,* p. 40

104 Par. 11 of the Paris Agreement Preambule

105 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, adopted on 23 May 1969, entered into force on 27 January 1980

106 Savaresi, A., *Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages* in: Duyck, S.; Jodoin. S., Johl A. (eds.), Routledge Handbook of Human Rights and Climate Governance, Routledge, London, 2017, p. 18

tions[107], holding a corporation liable for climate change based on human rights violations arguments, as in *Milieudefensie* judgment, is an indeed unexpected novelty. Nevertheless, the *Milieudefensie* judgment is in line with the new tendencies of clarifying corporate responsibility with regard to human rights[108] and of growing recognition that the corporations as well should act in a way that ensures the respect of human rights deriving from international law[109].

In the *Milieudefensie* judgment, the court invoked right to life and right to respect for private and family life enshrined both in the ECHR and in the International Covenant on Civil and Political Rights (ICCPR) as interpretative tools for holding corporation liable in the climate change context. The court acknowledged that although these human rights cannot be directly applied in the private dispute, they offer a protection against the detrimental consequences of climate change.[110] Such conclusion of the court is plausible, having in mind that both right to life and right to respect of private and family life are, *rationae materiae*, the most suitable for addressing the climate change adverse impact. Namely, pursuant to the developed Strasbourg *acquis*, the right to life implies guarantee of protection from environmental or industrial disasters that represent the risk to human lives[111], while the right to respect of private and family life includes protection from unsafe or disruptive environmental conditions[112]. In addition, Human Rights Committee, body that monitors implementation of the ICCPR by its States parties, declared that climate change constitutes a serious threat "to the ability of present and future generations to enjoy the right to life".[113]

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107 Savaresi, A.; Auz, J, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, Climate Law, Vol. 9, 2019, p. 247

108 *Ibid.,* p. 259

109 See Ratner, S. R., *Corporations and Human Rights: A Theory of Legal Responsibility*, The Yale Law Journal
Vol. 111, No. 3, 2001, pp. 443-545; or BankTrack, *Human Rights, Banking Risks, Incorporating Human Rights Obligations in Bank Policies*, p. 9, available at: [https://www.banktrack.org/download/human_rights_banking_risks_1/1_0_070213_human_rights_banking_rrisks.pdf], Accessed 15 April 2022

110 Judgment in Case C/09/571932 *Milieudefensie v Royal Dutch Shell*, [2021] ECLI:NL:RBDHA:2021:5337, paras. 4.4.9.-4.4.10.

111 Council of Europe, Registry of the ECtHR, *Guide on Article 2 of the European Convention on Human Rights*, 2021, pp. 12-13, available at: [https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf], Accessed 15 April 2022

112 Council of Europe, Registry of the ECtHR, *Guide on Article 8 of the European Convention on Human Rights*, 2021, pp. 42-43, available at: [https://www.echr.coe.int/documents/guide_art_8_eng.pdf], Accessed 15 April 2022

113 Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 2018, p. 14., available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf], Accessed 15 April 2022

The *Milieudefensie* judgment is an example of constitutionalization of climate change litigation that can be expected to rise in the future. Namely, unlike tort law, human rights are transnational and unified with regard to their meaning and the scope, at least in the EU territory, as all EU members are parties to the ECHR. Therefore, the attempts of the replication of *Milieudefensie* rights-based arguments against other direct GHG emitters could be expected, especially in the EU. But if there is a tendency of holding direct GHG emitters liable for climate change based on human rights arguments, could banks also be held liable for financing the businesses that evidently hurt climate, i.e. for facilitating the direct violation of human rights?

It is considered that banks can indirectly complicit in violation of human rights committed by their clients by enable them to operate through opening bank accounts or through funding.[114] Indirect complicity implies that banks "do not directly contribute to the violation of human rights, but rather support, in a general way, the ability of the perpetrator to carry out systematic human rights violations".[115] Based on this argument, banks have already been called in for facilitating violation of labour rights, environmental rights, or even for crimes against humanity.[116] Hence, it does not come as a great surprise that banks have already been prosecuted for human rights violations in relation to their lending activity. By way of example, in *In re South African Apartheid Litigation* case, several banks, including Commerzbank and Deutsche Bank AG, were prosecuted for aiding and abetting violations of international law and human rights by financially supporting apartheid regime.[117] In *Arab Bank* case, the mentioned bank was prosecuted before US court for providing financial services to terrorist's organizations that sponsored attacks in Israel.[118] Both of the cases were eventually dismissed – latter for procedural reasons (even though the bank was at first found liable for deliberate support of terrorist activities), while former under the conclusion that the funding provided by banks is not sufficiently connected to the primary violation of international law.[119]

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114 Foley Hoag LLP and the United Nations Environment Programme Finance Initiative, *Banks and Human Rights: A Legal Analysis*, 2015, p. 29, available at: [https://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf], Accessed 15 April 2022

115 Wettstein, F., *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, Journal of Business Ethics, Vol. 96, No. 1, 2010., p. 36

116 BankTrack, *op. cit.*, note 109

117 For more information on the case see: Gubbay, I., *Towards Making Blood Money Visible, Lessons Drawn from the Apartheid Litigation* in: Bohoslovsky, J. P.; Černič, J. L. (eds.), Making Sovereign Financing and Human Rights Work, 2014, pp. 337-356

118 Foley Hoag LLP and the United Nations Environment Programme Finance Initiative, *op. cit.* note 112, pp. 29-30

119 *Ibid.*, pp. 30-31

The former failure to establish liability for human rights violation does not mean that banks can disregard human rights. Under the UN Guiding Principles on Business and Human Rights (UNGPs)[120], international soft law instrument, all corporations, including banks, should refrain from any conduct that could harm universally recognized human rights. To be more precise, banks should, pursuant to UNGPs, avoid both causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; as well as seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business.[121] As it is explained in the UNGPs, "activities are understood to include both actions and omissions; and its business relationships are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services."[122] Although the UNGPs is not legally binding, it has a significant power of authority over the EU corporations, especially since EU Commission officially declared in 2011 that it expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UNGPs.[123]

Another valuable soft law instrument that attaches human rights to corporate responsibility are the OECD Guidelines for Multinational Enterprises (OECD Guidelines)[124] that draws upon the UNGPs and, same as the UNGPs, recognize the importance of ensuring respect of human rights within corporations' activities. The OECD Guidelines declare that corporations should prevent or mitigate adverse human rights impacts that are directly linked to their business operations, even if they do not contribute to those impacts.[125] The corporations could meet this requirement by using their leverage to influence the entity with whom the business relationship is established (e.g. client) causing the adverse human rights

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120 United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Project, Respect and Remedy" Framework*, 2011, available at: [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf], Accessed 15 April 2022

121 *Ibid*., Principle 13

122 *Ibid.,* Commentary to Principle 13

123 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final, Brussels, 25 October 2011, p. 14, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0681&from=EN], Accessed 15 April 2022

124 OECD, OECD Guidelines for Multinational Enterprises, 2011, available at [https://www.oecd.org/daf/inv/mne/48004323.pdf], Accessed 15 April 2020

125 *Ibid.*, part IV, par. 3

impact to prevent or mitigate that impact.[126] In addition to that, the OECD Guidelines require corporations to take a due account on environmental impacts of their business.[127] Although they serve only as a guidance for responsible business conduct, the significance of the OECD Guidelines is reinforced by possibility to report non-compliance before the National Contact Points (NCPs) established by the governments of the adhering parties. NCPs, however, act only as *sui generis* mediation and advisory bodies, as they do not have mandate for imposing sanctions or any other punitive measure for failure to comply with the OECD Guidelines. [128]

Although the UNGPs and the OECD Guidelines do not refer to climate change issues, having in mind close interplay between the climate change and human rights, it could be ascertained that banks should, regardless, follow those guidelines and consider adverse impacts on human rights arising from their lending activities in the context of climate change. Both instruments have already served for upholding *Milieudefensie* judgment against Shell.[129] On the other hand, NCPs are increasingly dealing with climate-related reports against corporations.[130]

## 5. CONCLUSION

It is undeniable that banks could contribute to the adverse impacts of climate change by merely performing their core activities. Lending and investments are already recognized as "indirect GHG emissions" as they, if steered to carbon intensive sector, could facilitate GHG emissions of the direct polluters. Banks, therefore, have key role in achieving the Paris Agreement goal of "making finance consistent with a pathway towards low greenhouse gas emissions and climate-resilient development." On the other hand, banks could contribute to the failure of reaching the mentioned goal by providing reckless funding towards companies that produce the significant carbon footprint. One way of preventing such outcome could be initiating climate change litigations against bank. Climate change litigation is in exponential rise, especially since the adoption of the Paris Agreement. The recent wave of such litigations targeted energy companies, i.e. the direct

126 *Ibid.*, part IV, par. 43

127 *Ibid.*, part VI

128 OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*, p. 9, available at: [https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf], Accessed 15 April 2022

129 *Supra*

130 *See* note 50. Also, see Seck, S., *Climate Change, Corporate Social Responsibility, and the Extractive Industries*, 2018, p. 15, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244047], Accessed 15 April 2022

GHG emitters. The litigations were mostly based on a tort law and were mostly unsuccessful. The ones that did succeed were further developed through invoking of necessity to protect human rights violated by climate change adverse impacts and through a framework set up by soft law. We can anticipate that the same argument will be used in the expected climate change litigations against indirect GHG emitters, such as banks. Namely, it is already recognized that banks are exposed to climate change litigation risks that arise from their lending activities. However, as we have seen from the above analysis *supra*, unless a significant re-definition of the tort law takes place, chances of success against the banks are very low, primarily due to impossibility to establish the causal nexus between indirect emissions and climate harm. Such redefinition could take place in form of introduction of new mechanisms introduced elsewhere, such as some sort of no-fault liability mechanism, or in a form of applying non-traditional tort law theories on causation, like common law secondary liability theory.

Additionally, as the established climate-related case law shows, there is an increase in the use of human rights based claims against the corporations as well, even though corporations are not duty holders in the regard of human rights. So far, human rights arguments have been used only supplementary to the arguments arising from tort law. Same arguments could be invoked against the banks as well. It would not be the first time that the banks were prosecuted for their role in the violation of human rights, albeit outside the climate change context. However, as in the case of tort law argumentation, the application of human rights in the context of banking activities still largely depends on wide discretion of judicial bodies and their activism as invoking human rights in private disputes is still a novel approach. Additionally, the alternative venue for rights-based climate change litigations against banks could be a specific procedure before NCPs under the soft law OECD Guidelines.

As this basic analysis has shown, climate change litigation with the goal of holding banks responsible for contribution to climate change by their lending activities seems unlikely to succeed. Yet, it does not diminish the risk of appearance of such claims against the banks in the near future. Indeed, it could be expected that such litigations shall appear, but mostly as a method of applying additional pressure to the banks to align their business and policies with the Paris Agreement goals.

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UDK 341.231.14(496.5):614.4
Original scientific paper

# THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY DURING THE COVID-19 PANDEMIC IN THE LIGHT OF ECHR STANDARDS*

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***ABSTRACT***

*The COVID-19 crisis confronted states with the challenge of finding an immediate balance between public health measures and the principles of the rule of law. The rapid spread of the virus associated with the severe consequences on human health and life required prompt action, without the necessary scientific evidence to assess the effectiveness of the measures taken. Being faced with such a situation, numerous countries opted for drastic measures, like lock down and the restriction of some fundamental human rights and freedoms. This paper analyses the freedom of peaceful assembly during the COVID-19 pandemic in Albania, addressing the research question of whether and to what extent the response of the Albanian government to the COVID-19 pandemic was in compliance with the European Convention of Human Rights (ECHR). In this attempt, it will briefly introduce the measures taken by the Albanian government in the face of the situation and their impact. Following, it will focus on the recent decision of the Constitutional Court of Albania (D-11/21) in relation to the constitutionality of Order 633/2020 of the Ministry of Health and Social Protection which restricted the right of assembly. It will also analyze the extensively-discussed Order 633/2020 in the light of the ECHR and EU standards. The paper concludes that the measures taken by the Ministry of Health and Social Protection of Albanian lacked clarity on ratio legis and most importantly,*

* ACKNOWLEDGMENT: A short version of this paper has been published at Jean-Monnet-Saar Europarecht Online blog titled as follow: "The Right to Freedom of Peaceful Assembly during the COVID-19 pandemic in the light of the Albanian Constitutional Court's Decision 11/2021 and the ECHR". Available at: [https://jean-monnet-saar.eu/?page_id=102519], 15 April 2022

*information on how these measures would be implemented and to what extent they would restrict human rights.*

***Keywords:*** *COVID-19, ECHR, Order 633/2020, restriction of peaceful assembly*

## 1. INTRODUCTION

The COVID-19 crisis confronted states with the challenge of finding an immediate balance between public health measures and the principles of the rule of law. The rapid spread of the virus associated with the severe consequences on human health and life required prompt action, without the necessary scientific evidence to assess the effectiveness of measures that were taken. Being faced with such a situation, numerous countries opted for drastic measures, like lock down and the restriction of some fundamental human rights and freedoms.

This paper analyses the freedom of peaceful assembly during the COVID-19 pandemic in Albania, addressing the research question of whether and to what extent the response of the Albanian government to the COVID-19 pandemic was in compliance with the ECHR. To answer this question, the paper briefly describes several measures taken by the Albanian government during the COVID-19 pandemic and then provides an overview of the recent decision of the Constitutional Court of Albania (D-11/21) concerning the constitutionality of Order 633/2020 of the Ministry of Health and Social Protection, which restricted the right of assembly. It also analyses Order 633/2020 in the light of the ECHR standards. The paper concludes that the measures taken by the Albanian Ministry of Health and Social Protection lacked clarity on *ratio legis* and, most importantly, citizens were not presented with clear information on how these measures would be implemented and to what extent they would restrict human rights.

## 2. COVID-19 AND THE MEASURES UNDERTAKEN IN ALBANIA

The very first COVID-19 cases were identified in Albania on March 8 2020. The Albanian government commenced to take temporary measures immediately. According to the Order 132/2020 "For Closing Public and Non-Public Activities and Annulling Mass Gatherings in Closed or Open Places",[1] adopted on 8 March

[1] Order 132/2020 For Closing Public and Non-Public Activities and Annulling Mass Gatherings in Closed or Open Places (Order 132/2020), 2020, first point, available at: [https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-132-Mbylljen-e-aktiviteteve-publike-dhe-jopublike-dhe-anullimin-e-grumbullim-eve-masive_.pdf], Accessed 1 March 2022

2020, all public and non-public activities were prohibited until 3 April 2020.[2] Also, the second point canceled all indoor and outdoor gatherings until 3 April 2020.[3] The third point of Order 132/2020 conferred the power of enforcement authority to the Health State Inspectorate, the Institute of Public Health and responsible institutions for organization of sports and cultural activities, academic conferences, festivals, concerts, protests and public consultations.

On March 11, 2020, the same day the World Health Organization (WHO) declared COVID-19 a 'pandemic',[4] the Albanian Ministry of Health and Social Protection issued Order 156/2/2020 "On the declaration of the state of Epidemic" in Albania.[5] Order 156/2/2020 declared the state of epidemic in the country, up to a second order.[6] The Institute of Public Health and other institutions stipulated in Law 15/2016 were given the task to implement the necessary protocols and measures to deal with COVID-19.[7] Furthermore, other central institutions[8] or self-local government units were also urged to take all appropriate measures.

On March 15, 2020, the Council of Ministers, led by the Prime Minister of Albania, issued the Normative Act 3/2020 "On special administrative measures during the period of infection caused by COVID–19". The purpose of this normative act was to determine the necessary measures to be taken against Albanian or foreign natural/legal persons or individuals, regardless of their place of residence, who violate the rules, decisions, orders and instructions issued by the competent authorities, during the entire duration of the COVID-19-pandemic.[9] To ensure the implementation of these measures, the normative act set out strict administrative

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2 The first point of Order 132/2020 lists as public and non-public activities the following: sports activities, cultural activities and conferences

3 The second point of Order 132/2020 lists as indoor and outdoor gatherings the following: festivals, concerts, protests and public consultations

4 Jami, Ducharme, *World Health Organization Declares COVID-19 a Pandemic*, 2020, available at: [https://time.com/5791661/who-coronavirus-pandemic-declaration/], Accessed 2 March 2022

5 Order 156/2/2020 On the State of the Epidemy from Covid 19 infection, (Order 156/2/2020), 2020, available at: [https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-156.2-Shpalljen-e-Gjendjes-se-Epidemise-nga-Infeksioni-COVID-19.pdf], Accessed 4 February 2022

6 The Order 156/2/2020 did not prescribed the date when the state of the epidemy will end

7 Law 15/2016 For Prevention and control of infections and infectious diseases" [2016] Official Journal 46

8 Point 2 of the Order 156/2/2020 mention the following institutions: The Institute of Public Health, the Health State Inspectorate, Central Operator of Health Care, all health care institutions, State Policy, General Directory of Civil Emergency

9 Normative Act 3/2020 On special administrative measures during the period of infection caused by COVID-19, [2020], available at: [https://www.asp.gov.al/wp-content/uploads/2020/03/akt-normativ-2020-03-15-3.pdf], Accessed 5 March 2022, Art. 1

sanctions.[10] This act, among others, in Article 3 (2) foresaw a fine of 5 000 000 ALL (Albanian lek) – roughly more than 40 000 euros - for entities or individuals that organized public or/and non-public activities, such as sports, cultural activities and conferences, or mass gatherings in closed or open areas, such as concerts or public hearings.

Only on March 24, 2020, the Council of Ministers enacted Decision 243/2020 "On the declaration of the state of natural disaster" in which it declared the state of natural disaster throughout the territory of the Republic of Albania, due to the epidemic. This decision was accompanied by the restriction of several constitutional rights (Articles 37[11], 38[12], 41 points 4[13], 49[14] and 51[15]) to the extent considered necessary for the protection of the citizens' health. As part of the emergency measures it was decided that public bodies have the obligation, *inter alia*, "d) to restrict access to public places which are widely frequented; dh) to stop gatherings, manifestations and strikes; and e) to limit the activities to the necessary minimum for all public bodies".[16]

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10 Normative Act 3/2020 On special administrative measures during the period of infection caused by COVID-19, [2020], available at: [https://www.asp.gov.al/wp-content/uploads/2020/03/akt-normativ-2020-03-15-3.pdf], Accessed 5 March 2022

11 Art. 37 of the Law 8417/1998, Constitution of Republic of Albania [1998] Official Journal 28 (Constitution of Republic of Albania) reads as follows:
1. The inviolability of the residence is guaranteed.
2. Searches of a residence, as well as premises that are equivalent to it, may be done only in the cases and manner provided by law.
3. No one may be subjected to a personal search outside a criminal proceeding, with the exception of cases of entry into, or exit from, the territory of the state, or to avoid a danger that threatens public security

12 Art. 38 of the Constitution of Republic of Albania reads as follows:
1. Everyone has the right to choose his place of residence and to move freely to any part of the territory of the state.
2. No one may be hindered from leaving the state freely

13 Art. 41 point 4 reads as follows: "Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation"

14 Art. 49 reads as follows:
1. Everyone has the right to earn the means of living by lawful work that he has chosen or accepted himself. He is free to choose his profession, place of work, and his own system of professional qualification.
2. Employees have the right to social protection of labor

15 Art. 51 of the Constitution of Albania reads as follows:
1. The right of an employee to strike in connection with labor relations is guaranteed.
2. Limitations on particular categories of employees may be established by law to ensure essential social services

16 Decision of Council of Ministers (DCM) 243/2020 On the declaration of the state of natural disaster was declared the state of natural disaster, [2020], available at: [https://rm.coe.int/jj9020c-tr-005-231-en-annex-1/16809e0fe7], Accessed 10 March 2022, point 6.1

As the COVID-19 pandemic situation continued, on 29 May 2020, the Albanian Ministry of Health and Social Protection issued Order 351/2020 "On special measures and restrictions to prevent the spread of COVID-19" which allowed the free movement of individuals without time restriction, except only for the dates 30-31 May 2020 for individuals, who, wanted to move from red areas to green one or *vice versa*. This exception was justified on the grounds to not spread the COVID-19 from red areas to green one or *vice versa.* From 24 March until 29 May, the free movement between the two areas was prohibited. Also, during this time, the free movement was allowed only for specific purposes and after obtaining the permission from the responsible institution.

While the Order 351/2020 introduced other relief measures, point 4 stipulated: "the prohibition of mass gatherings in closed or open areas, conferences, gatherings, national holidays activities, wedding ceremonies and funeral ceremonies, up to a second order".[17]

On November 17, 2020, the Albanian Ministry of Health and Social Protection issued yet another order. Point 1 of Order 633/2020 "On the prohibition of gatherings in open and closed areas" stipulated: "the banning of gatherings of more than 10 people in closed or open areas, conferences, gatherings, political rally, national holiday events, wedding ceremonies and funeral ceremonies, up to a second order."[18]

## 3. THE CONSTITUTIONAL COURT OF ALBANIA DECISION 11/2021

As Albania was entering the phase of the electoral campaign, before the local elections in April 2021, the Republican Party of Albania filed a lawsuit to the Constitutional Court of Albania asking to repeal the Order 633/2020 "On the prohibition of gatherings in open and closed areas" deeming it unconstitutional, due to the following reasons.

First, in their view, Order 633/2020 violated Article 9 - in relation to political parties - and Article 18 - in relation to the principle of equality before the law - of the Constitution of Albania. Article 9 (1) of the Constitution of Albania stipulates

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17 Order 351/2020 On special measures and restrictions to prevent the spread of Covid 19, [2020], available at: [https://shendetesia.gov.al/wp-content/uploads/2020/05/Urdher-Nr.351.pdf], Accessed 12 March 2022

18 Order 633/2020 On the prohibition of gatherings in open and closed places, [2020], available at: [https://shendetesia.gov.al/wp-content/uploads/2020/11/Urdher-nr.633-2.pdf], Accessed 12 March 2022

that "Political parties are created freely. Their organization shall conform with democratic principles"; whereas Article 18 of the Constitution of Albania provides equality before the law and prohibits discrimination on the basis of gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage without a reasonable and objective justification. Order 633/2020 banned all sorts of gatherings of more than 10 people. The Republican Party argued that such prohibition in the pre-election period led to a disproportionate situation for political parties, as it banned almost all potential political activities of the Republican Party and of any other opposition political force and favored the Socialist Party as the one, at the time, in power.

The Constitutional Court of Albania found that the complaint was unfounded, because the Order 633/2020 was addressed to all political parties, including the governing Socialist Party. Consequently, all political parties had the obligation to comply with the requirements set out in the referred order. However, the Court recognized that Order 633/2020 needed to be clarified as well as be accompanied with the necessary explanatory report, for the assessing of whether such restrictions fulfill principles and constitutional standards. In this context, the Constitutional Court of Albania maintained that Order 633/2020 had to clarify "why some activities, such as gatherings, political rally and family ceremonies, were grouped and treated differently from other activities, which also involved people's gathering but are not covered by the Order 633/2020".[19]

Second, in the view of the Republican Party, Order 633/2020 violated the freedom of assembly guaranteed by Article 47 of the Constitution of Albania, in relation to the freedom of expression as provided by Article 22 (1) of the Constitution of Albania, because it prohibited electoral gatherings, hence, limiting the possibility to exchange political ideas among members of the opposition political parties. According to Article 47 of the Constitution of Albania: "1. The freedom to have peaceful meetings, without arms, and to participate in them is guaranteed. 2. Peaceful meetings in squares and places of public passage are held in accordance with the procedures foreseen by the law." Article 22 (1) of the Constitution of Albania provides that "Freedom of expression is guaranteed".

To answer this claim, the Constitutional Court of Albania examined whether any violation of Article 17 of the Constitution of Albania occurred. Article 17 (1) of the Constitution of Albania reads as follows: "The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a

[19] Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, par. 26 (translated by the authors)

public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it". The criteria for restriction of human rights, pursuant to Article 17 of the Constitution of Albania, are as follows: i) foreseen by law; ii) on grounds of public interest and iii) in respect of the principle of proportionality.

In assessing whether the restriction was done "by law", the Constitutional Court of Albania analyzed the approach followed by the public authorities when drafting strategies and special measures during the OVID-19 situation. Order 633/2020 was based, to a considerable extent, on the suggestions of the Technic Committee of Experts established to deal with the COVID-19 situation.[20] Such an approach, in the Court's view, has two consequences. First, it risks undermining the role of the Assembly in the context of the principle of checks and balances, which is vital for the rule of law and for democracy. Second, considering the significance of the situation caused by the pandemic, the Constitutional Court of Albania emphasized the involvement of citizens in the legislative process concerning the legal regulation of their rights and in the monitoring the situation.[21] The Constitutional Court of Albania also suggested that public authorities follow the practice of publicly justifying "the scope, object and purpose of bylaws". In practice, this approach tends to increase the clarity of legal measures. Also, the Court suggested that public authorities provide citizens with the necessary information on how the referred measures are in compliance with the constitutional principles of legality, equality and proportionality.[22] Furthermore, a good practice proposed by the Court was the periodic reporting of public authorities to the Assembly, in relation to the taken measure. The practice is expected to increase the role of the Assembly in controlling and guaranteeing the accountability of the executive.

Regarding the second criterion, of whether the law protects the public interest, the Constitutional Court of Albania relied on a document published by the Council of Europe dealing with the present unprecedented and massive scale of sanitary crisis.[23] The Constitutional Court of Albania held that Order 633/2020 aims to

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20 The Technic Committee of Experts, composed by well known experts in health issues, was established to assist the Ministry of Health and Social Protection during the Covid-19 situation. Its main task was to monitor the situation and to provide opinion to the Ministry of Health and Social Protection

21 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

22 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

23 Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states*, 2020, (Information Documents SG/Inf (2020) 11, available at: [https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40], Accessed 7 April 2022

protect public health.[24] In this context, although the Constitutional Court of Albania stated that it is not its role to assess whether the measures taken by the public authorities are appropriate and suitable for the coping with the pandemic situation, regarding the restriction of the right to assembly, the Court emphasized that the Albanian Ministry of Health and Social Protection has pursued a "legitimate goal", namely that of "protecting the health of the population from an infectious disease with excessive impact", which is included in the concept of public interest as proclaimed in Article 17 of the Constitution of Albania.[25] After assessing all these criteria, the Constitutional Court of Albania considered the complaint of the Republic Party unfounded, as the restriction of freedom of assembly was foreseen in Article 7 of Law 15/2016 and was based on grounds of public interest.[26]

Third, from the point of view of the Republican Party, Order 633/2020 violated the principle of proportionality due to lack of clarity in relation to the duration of the restrictive measures. As previously mentioned, the Order foresees the prohibition of all gatherings of more than 10 people to be in force until "a second order". In the Republican Party's view, Order 633/2020 was supposed to have a clarified period of implementation and, an end-date at a given time before the election campaign started.

In the face of this argument, the Constitutional Court of Albania emphasized that any restriction of rights must in itself include the element of temporality. Also, according to the principle of proportionality, the greater the limitation is, the more detailed and convincing its justification should be. Taking this in consideration, the Constitutional Court of Albania argued that "when these restrictions last indefinitely, losing the characteristic of temporality, and no justification is given during this period, they become a total prohibition of the right.".[27] As a conclusion for the third issue, the Constitutional Court found that the part "up to a second order" claimed in the first point of Order 633/2020 was unconstitutional and urged, *inter alia*, the competent authority to: i) provide a careful analysis of constitutional principles before adopting measures restricting constitutional rights; and ii) increase public confidence by informing citizens on the scope, subject and purpose of bylaws. Furthermore, the Court emphasized, once again, the role of the Assembly in monitoring and evaluating properly restrictions on constitutional rights.[28]

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24 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 54

25 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 57

26 Law 15/2016 For Prevention and control of infections and infectious diseases [2016] Official Journal 46

27 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 67

28 Constitutional Court of Albania, D-11/2021, judgment of 9 March 2021, *op. cit.*, note 19, par. 71

## 4. THE COMPLIANCE OF ORDER 633/2020 AND THE DECISION (D-11/2021) OF THE CONSTITUTIONAL COURT OF ALBANIA IN LINE WITH THE ECHR STANDARDS AND PRACTICE

On July 13, 1995, Albania signed the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1, 2, 4, 7, and 11. Following the obligation to ratify the Convention and its additional protocols within one year from the date of the signature, on July 31, 1996, Albania ratified the European Convention on Human Rights (ECHR) by Law 8137/1996[29] and deposited the instruments of ratification with the Secretary General of the Council of Europe on October 2, 1996.

In 1998 the Albanian Parliament adopted the Constitution of Albania and approved by a popular referendum.[30] The Constitution of Albania was drafted by national and international experts in line with International and European standards. The second section of Part VII of the Constitution of Albania is dedicated to the relationship of international law and domestic law. According to Article 122 of the Constitution, an international agreement ratified by the Assembly is part of domestic law, once it is published in the Official Journal and has supremacy over the domestic law. The ECHR, as an international agreement, has a special status in the Albanian legal system. It has been taken into consideration during the drafting of the Constitution and then reflected in Article 17 (2) of the Constitution of Albania which confers upon the ECHR a constitutional status. Article 17 (2) states as follows: "These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights." Thus, it follows that the human rights and freedoms provisions of the Constitution of Albania must be interpreted in accordance with the provisions of the ECHR providing the same rights, as long as Article 17 (2) requires that the limitations do not exceed the limitations provided in the ECHR.[31] Being part of the domestic legal system, standards and principles established by European Court of Human Rights (ECtHR) law have to be taken into consideration by the Albanian Ministry of Health and Social Protection in the present case and also by the judges of the Constitutional Court of Albania.

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29 Law 8137/1996 For Ratification of European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] Official Journal 20

30 Constitution of Republic of Albania

31 Bianku, L, *Albania's long path towards European human rights standards,* in: Iulia Motoc and Ineta Ziemele (eds), The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspective, Cambridge University Press, 2016, p. 18

Furthermore, the limitation of rights and freedom have been modelled in line with the ECHR. According to Article 17 (1) of Constitution of Albania, "the limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it." In the same vein, Article 11 (2) of the ECHR stipulates that

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

Thus, the limitation of is not absolute. An interference with the freedom of peaceful assembly will constitute a breach of Article 17 (1) of Constitution of Albania unless it is: i) "prescribed by law"; ii) pursues one or more legitimate aims and iii) is "necessary in a democratic society" for the achievement of the aims in question.[32] The following part assesses whether Order 633/2020 of the Albanian Ministry of Health was in compliance with the ECtHR practice and passes: i) the rule of law test; ii) the legitimate aims test; and iii) the democratic necessity test.

### 4.1. The Rule of Law Test

The purpose of the expression "prescribed by law" in Article 11 (2) of the ECHR is to ensure that the restriction of rights by the executive authorities is limited by domestic legislative or judicial authority. The ECtHR has identified a four-tier test to decide if any given interference with a specific right, or rights, is "legal". The questions are as follows: i) Does the measure in question have a legal basis in the domestic law? ii) Is the legal provision accessible to the citizens? iii) Is the legal provision sufficiently precise to enable the citizens to reasonably foresee the consequences a given action may entail? iv) Does the law provide effective safeguards against arbitrary interference with the respective substantive rights?[33]

In the *Kudrevičius and others v. Lithuania*, the ECtHR reiterated its practice to "the effect that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require for the impugned

[32] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 11

[33] *Huvig v France* (1990) 12 EHRR 528; *Kruslin v France* (1990) 12 EHRR 547, paras. 27-36

measure to have a legal basis in domestic law, but also refer to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects".[34] According to the ECtHR practice, particularly, "a norm cannot be regarded as a "law" unless it is formulated with sufficient precision" [35] and to be accessible to those concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[36] Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to interfere with the rights guaranteed by the Convention.[37] Finally, the ECtHR has reaffirmed that for the domestic law to meet the qualitative requirements, "it must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention".[38]

In the present case, Order 633/2020 was based on Article 7 of Law 15/2016 which authorizes the Albanian Ministry of Health and Social Protection to issue an order for the protection of the population from the infectious disease.[39] The Constitutional Court of Albania confirmed that Order 633/2020 was issued as an implementation measure of Article 7 of Law 15/2016 and concluded that there is no violation of the criterion of "restriction by law". Order 633/2020 meets the criteria of the relative legal reserve, meaning that by-laws are issued pursuant to requirement stipulated in Article 118 of Constitution of Albania.[40] In its previous case law, the Constitutional Court of Albania has argued that by-laws are issued in compliance with the criteria set out in Article 118 of the Constitution which,

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34 *Kudrevičius and others v Lithuania* (2015) ECHR 906, paras. 108

35 *Kudrevičius and others v Lithuania* (2015) ECHR 906, paras. 109

36 *Ezelin v France* (1992) 14 EHRR 362, par. 45; *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, par. 84; *Maestri v Italy* (2004) 39 EHRR 38, par. 30

37 *Liu v Russia* (2007) 47 EHRR 751, *Gülmez v Turkey* (2008) Application No. 16330/02, par. 49; *Vlasov v Russia* (2008) Application No. 78146/01, par. 125; *Lupsa v Romania* (2008) 46 EHRR 36, paras. 32 and 34; *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, par. 119

38 *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, par. 84; *Maestri v Italy* (2004) 39 EHRR 38

39 According to Art. 7 of the Law 15/2016 special measures to prevent infectious diseases are, inter alia, isolation and quarantine. Law 15/2016 "For Prevention and control of infections and infectious diseases" [2016] Official Journal 46

40 In its case law, the Constitutional Court of Albania has clarified that Art. 118(2) of the Constitution of Albania serves to define the concept of legal reserve which restrict or guide the normative power of executive institutions to regulate the certain relations with by laws. In the D-17/2008, the Constitutional Court of Albania distinguish between "relative legal reserve" and "absolute legal reserve". In the case of "relative legal reserve", bylaws are issued to regulate certain issues, except the case when the law has provided the main issues and principles on which these acts will be issued. Whereas in the case of absolute legal reserve, it is the constitutional norm that provides that certain relations have to be regulated only by law. Constitutional Court of Albania, D-17/2008, Judgment of 25 July 2008

firstly, oblige the legislator to strictly adhere to them and, secondly, orient and limit the normative power of state bodies in issuing by-laws.[41]

In analyzing the criteria "only by law", the Constitutional Court of Albania acknowledged that during the COVID-19 pandemic the preventive measures to stop the spread of the virus were taken by the Albanian Ministry of Health and Social Protection in a form of a legally binding instrument (Order), based mainly on the recommendations of experts, part of a special Technical Committee set up for this purpose.[42] Referring to this fact, the Court emphasized:

"[T]his approach, combined with the constitutional requirement that the restrictions of fundamental rights be limited by law, risks undermining the essential role of the Assembly in terms of separation and balance of powers, which is vital for the rule of law and democracy. Also, due to the importance of the situation caused by the pandemic, the expectations of the citizens require the involvement of the Assembly to a greater extent in the legal regulation of their rights and in monitoring the situation".[43]

As can be seen, the Constitutional Court of Albania acknowledges a greater role of involvement of the Assembly in the process of restricting human rights caused by COVID-19. The Assembly did not play any role during COVID-19 situation. All orders restricting freedom of movement or freedom of assembly were issued by the Albanian Ministry of Health and Social Protection. In the Albanian Constitutional Court's view, the Assembly guarantees the citizens that the authorities authorized for restriction of human rights do not abuse with the power conferred to them. In other words, if the Assembly had been involved in the restriction process, the criterion of "restriction by law" would provide greater guarantees against arbitrary intervention of the authorities.

On the other hand, the Constitutional Court of Albania did not further assess "the clarity test" elaborated by the ECtHR for the fulfillment of "restriction by law" criteria. In the case *Chumak v. Ukraine*, the ECtHR reckoned that "the actual scope of the prohibition on holding "pickets" could be open to various interpretations and lacked the necessary precision to enable the applicant to regulate his future conduct as an activist of the defendant Association."[44] In the Albanian

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41 Constitutional Court of Albania, D-12/2009, Judgment of 28 April 2009; Constitutional Court of Albania, D-24/2009, Judgment of 24 July 2009; Constitutional Court of Albania, D-7/2013, Judgment of 27 February 2013; Constitutional Court of Albania, D-25/2014, Judgment of 28 April 2014

42 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

43 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

44 *Chumak v Ukraine* (2018) Application no. 44529/09, par. 47

Constitutional Court's view, domestic legislation must define with sufficient clarity terms used to differentiate between types of assembly.

If the "clarity test" is applied, the Order 633/2020 does not clarify whether it prohibits any kind of gathering or only the gathering of more than 10 people. The clarification of such ambiguity is important because it leaves a large degree of discretion for the authority: i) to decide the annulment wholly or partly of the right to assembly (regardless of whether it has occurred in practice or not), or ii) to limit to more than 10 persons. From the literal interpretation of Order 633/2020, it results that gatherings are prohibited, without making differentiations on the number of participants. Even the proposal of the Committee of Experts on which the Ministry of Health and Social Protection based Order 633/2020 is vague on this issue. The Constitutional Court of Albania, in its analysis of the content of Order 633/2020, argues that Order 633/2020*:*

"should be understood to be allowing gatherings of any kind up to 10 people, including allowing political party meetings up to 10 people and gatherings up to 10 people. Understood in this way, the restriction it imposes does not affect the equality of parties in the electoral competition and does not bring differentiating consequences or preferential treatment for certain parties".[45]

In this specific paragraph, the Constitutional Court of Albania attempts to provide an interpretation in compliance with the constitutional human right provisions. It clarifies how the content of Order 633/2020 should be properly understood; it does not focus on how the Order could be understood when read by ordinary citizen. This argument is further reinforced by the dissenting opinion which acknowledges the uncertainties which arose from the literal interpretation of the Order, and, for the understanding and proper application of this provision the Court recommends its systematic and grammatical interpretation.[46] Acknowledging this, in their dissenting opinion, the Constitutional Court judges argued that the interested parties had to exhaust the administrative ways, by requesting the Albanian Ministry of Health and Social Protection for an interpretation of the Order.[47] As a conclusion, the approach of the Constitutional Court concerning the way how the order should be understood or its suggestions that the interested parties should follow the administrative way for interpretation, confirms that Order 633/2020 contains uncertainties.

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45 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 27

46 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, paras. 9 and 10

47 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, (dissenting opinion) par. 12

Furthermore, Order 633/2020 did not meet the standard of qualitative requirement elaborated by the practice of the ECtHR. The Order 633/2020 lacked legal clarity and, most importantly, the information on how these measures were to be implemented and to what extent they would restrict human rights. Although the Constitutional Court of Albania found that Order 633/2020 meets the criteria and standards of restriction of rights, Order 633/2020 is criticized emphasizing that:

"as a rule, the drafting of bylaws in a short and concise manner, without an introductory part and without explanatory reports that accompany them, makes it more difficult to assess whether a particular restriction of rights meets constitutional principles and standards and this situation deteriorates when rules change frequently or when approaches are *ad hoc*".[48]

### 4.2. Legitimate Aim Test

Restrictions on freedom of assembly are only permissible, if they are established by law and pursue a legitimate aim and "necessary in a democratic society". Article 11 (2) lists as a legitimate aim, *inter alia*, the protection of public health. In the information document released to deal with the Covid-19 situation, the European Council stipulated that the taken restrictive measures,

"may be fully justified in time of crisis, harsh criminal sanctions give rise to concern and must be subject to a strict scrutiny. Exceptional situations should not lead to overstatement of criminal means. A fair balance between the compulsion and prevention is the most appropriate, if not the only way, to comply with the Convention proportionality requirement".[49]

However, while the ECtHR leaves to the legislator the right to legislate for the public interest in general, the practice of the ECtHR rights does not leave room for maneuver for states to annul freedom of assembly. In order to justify a general ban, the state must demonstrate that there exists a real danger which cannot be prevented through other less restrictive measures.[50] In this context, the Constitutional Court of Albania suggests that "the drafting of bylaws in a short and concise manner, without an introductory part and without explanatory reports that ac-

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48 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, (dissenting opinion) par. 26

49 Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states*, *op. cit.*, note 23, p. 6

50 Bianku, L. *et al.*, *COVID-19 dhe Impakti mbi të Drejtat e Njeriut: Shikim i përgjithshëm mbi jurisprudencën përkatëse të Gjykatës Evropiane për të Drejtat e Njeriut*, The Aire Centre and Civil Rights Defenders, 2020, p. 110

companies them, makes it more difficult to assess whether a particular restriction of rights meets constitutional principles and standards".[51] While Constitutional Court of Albania acknowledged that the Order 633/2020 was drafted in a short and concise manner, it did not analysed whether the Order 633/2020 was necessary during the period when was into a force.

### 4.3. Democratic Necessity Test

Analyzing whether restrictions on the freedom of assembly can be considered "necessary in a democratic society", in the case *Barraco v France*, the ECtHR has emphasized that the Contracting States enjoy a certain but not unlimited margin of appreciation.[52] The interference must be justified by a "pressing social need" relating to one or more of the legitimate aims. In the present case, the legitimate aim is fulfilled because Order 633/2020 aims to protect the public health of the population.

In its jurisprudence, the ECtHR has not found a violation of Article 11 of the ECHR on restriction on public gatherings, either because of the place of gathering or number of the participation, where the aim was to protect public safety or maintain public order,[53] as well as in cases where the gathering has been dissolved to protect the health of the participants.[54] In these cases, the restrictions did not consist in a general ban on gatherings, but were limited only to contain the particular risk posed by the protests. In the case of Order 633/2020, while the objective of banning gatherings is sufficiently important and is linked to one of the aims listed in Article 11 (2) of the ECHR, the test of necessity in a democratic society does not seem to be satisfied.

Despite its binding effect, Order 633/2020 should have clearly and convincingly established that annulment or restriction of freedom of assembly is a consequence of the danger posed to the lives of individuals. Referring the time when the restriction measures were taken - including Order 132/2020 which cancelled all gathering - it can be observed that these measures were necessary since COVID-19 was spreading rapidly. For this purpose, states had to act urgently and most importantly, the orders did not leave any doubt or lack of *ratio legis*. On the contrary, the time when Order 351/2020 and Order 633/2020 were adopted corresponds to the period when Albania begun to adopt relief measures consisting on the removal

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51 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 26

52 *Barraco v France* (2009) ECHR 2139, par. 42

53 *Chappell v The United Kingdom* (1988) 10 EHRR CD 510; *Rai, Allmond and "Negotiate Now" v The United Kingdom* (1995) 19 EHRR CD-93

54 *Cisse v France* (2002) ECHR 400

of the the quarantine for the persons entering the country. It remains unclear why the right of gathering was restricted, while all other activities that could have a detrimental effect on public health were allowed, although subject to some limitation such as physical distance or mask-wearing in closed environments. Thus, the restriction established by Order 633/2020 suggested upon the recommendation of a group of technical experts does not seem fair and in a logical line with all the other measures that were taken.[55]

In the context of the democratic necessity test, the question arises whether the restriction of freedom of assembly is proportionate to the need to protect the public health of the population.

Ministry orders issued during pandemic situations prohibit the all gatherings. These orders did not support with scientific arguments the danger posed to individuals at such gatherings, in case physical distance was respected. On the other hand, several other activities were allowed without being subject to almost any restriction at all. The pandemic situation highlighted the need for careful approach in the case of restricting measures on the right to assembly and freedom of expression, which, in turn, are the guarantors of the rule of law, even in extraordinary situations. In the case *Informationsverein Lentia and Others v. Austria* and *Bączkowski and others v Poland,* the ECtHR described the state:

"as the ultimate guarantor of the principle of pluralism. Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation." [56]

A great example of this are the "Black Lives Matter" protests. Some of the activists of "Black Lives Matter" argued that the restriction on freedom of assembly posed a greater risk to their right to life and protection from inhuman and degrading treatment than the risk of Covid-19 proliferation.[57] Taking this in consideration, it could be maintained that the cancellation of the rally, in fact, could lead to more

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55 Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

56 *Informationsverein Lentia and Others v Austria* (1993) Application no. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90; *Bączkowski and others v Poland* (2007) Application No. 1543/06, par. 64

57 Bianku, L. *et al.*, *COVID-19 dhe Impakti mbi të Drejtat e Njeriut: Shikim i përgjithshëm mbi jurisprudencën përkatëse të Gjykatës Evropiane për të Drejtat e Njeriut*, The Aire Centre and Civil Rights Defenders, 2020, p. 112

serious consequences that what is aimed to be achieved in the framework of health protection with gathering restrictions.

Similarly, Order 633/2020 put a general ban on freedom to assembly without taking into account the importance of the freedom to assembly. Therefore, Order 633/2020 is not in line with the ECtHR practice and standards.

The ECtHR has already ruled on the compatibility of national measures restricting the freedom of assembly. The case *Communautégénévoised'action syndicale (CGAS) v. Switzerland* concerns the ban on demonstrations in the context of the COVID-19 pandemic. The applicant complained of being deprived of the right to organize and participate in public events following the adoption of government measures to tackle COVID-19. In this case the ECtHR considered that "at the outset that the outright prohibition of a certain type of conduct was a drastic measure which required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake".

In the situation, when all the activities of the plaintiff between March 17 and May 30, 2020 were banned, the ECtHR held that:

"[A] blanket measure of this kind required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake. Even assuming that such a reason had existed – namely the need to tackle the global COVID-19 pandemic effectively – it transpired from the Court's examination of the exhaustion of domestic remedies that no such scrutiny had been performed by the courts, including the Federal Supreme Court. Accordingly, the balancing exercise between the competing interests at stake, required by the Court for the purposes of assessing the proportionality of such a drastic measure, had not been carried out. This was especially worrying in terms of the Convention given that the blanket ban had remained in place for a significant length of time. [58]

Furthermore, the ECtHR acknowledged that the threat to public health from COVID-19 had been very serious and that states had to react swiftly. The Court added that, in view of the urgency of taking appropriate action to counter COVID-19, "it was not necessarily to be expected that very detailed discussions would be held at domestic level, and especially involving Parliament, prior to the adoption of the urgent measures deemed necessary to tackle this global scourge".

Another case is currently pending before the ECtHR. In the case *Magdić v. Croatia*, the applicants question the legality of measures adopted by Croatian authori-

[58] *Communautégénévoised'actionsyndicale* (CGAS) *v Switzerland* (2022) Application No. 21881/20

ties in the context of prevention of the spreading of the COVID-19 virus. The measures in question: (1) place restrictions on the ability to leave one's domicile and residence except under exceptional conditions and with official permission; (2) prohibit public gatherings of greater than five people; and (3) suspend religious gatherings. Accordingly, the Applicants challenge these measures based on Article 9 (freedom of religion), Article 11 (right of peaceful assembly), and Article 2 (1) of Protocol No. 4 (freedom of movement).[59]

## 5. CONCLUSION

To conclude, this paper demonstrated how the Albanian government responded to the situation created by the COVID-19 pandemic from a legal point of view. It analyzed the restrictions on the freedom of assembly in the light of the findings the Constitutional Court of Albania and assessed whether Order 633/2020 and the Court's Decision are in compliance with the ECtHR standards. It was pointed out that Order 633/2020 lacked legal clarity and most importantly, failed to inform Albanian citizens on the content of the regulation and its mode of implementation. It is, therefore, not in line with Article 11 of the ECHR standards.

The significance of this particular case is threefold. First, competent authorities have to make a careful analysis of constitutional principles before adopting measures restricting their citizens' constitutional rights. Second, the executive branch must show a higher level of transparency in decision-making, which should also be accompanied by the control and accountability of the Assembly. Third, the ECtHR's practice has to be taken into consideration by the executive authorities when dealing with the restriction of human rights, in spite of the conditions under which these restrictions are implemented.

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Topic 2

# EU criminal law and procedure

UDK 343.4(438:497.5)
342.727(438:497.5)
Review article

# COMPARATIVE VIEWS ON A PERMANENT CHALLENGE: HATE SPEECH SANCTIONING IN POLAND AND CROATIA*

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***ABSTRACT***

*Freedom of expression is one of the essential elements of modern democratic states' standard for basic civil rights and freedoms. It is most often guaranteed in the constitutions as well as in ratified acts of European and international law. Still, freedom of speech is not absolute, meaning in certain situations it may be restricted to protect another legal value. A prominent example is hate speech, as a means of spreading hatred, hostility and violence towards a person or a particular group. It is not a closed book but widely regarded as a significant violation of human rights. While there is no doubt it constitutes a freedom of speech abuse, the issue of its sanctioning falls within controversial and multifaceted challenges in terms of legislative regulation. The purpose of this article is to compare Polish and Croatian legal systems on this issue. The research will be based on the comparative method, designed to detect similarities, differences and possible patterns in the subject area of the study and to determine the variables affecting the evaluation of current and developed policies in the area of hate speech responsibility and sanctioning. The specific solutions contained in the national constitutional positions, criminal law, misdemeanor law, related body of doctrine and selected case law show a certain diversity of approaches. It can be said that in the area under consideration we are dealing with variants of the same general concept. The results of the conducted analyses will form the basis for further research in the field of amendment of regulations on the punishment of hate speech in the Polish and Croatian legal systems.*

***Keywords:*** *criminal law, Croatia, hate speech, misdemeanor law, Poland, sanctioning*

* This work has been supported in part by the Croatian Science Foundation under the project Croatian Misdemeanor Law in the European Context - Challenges and Perspectives (UIP-2020-02-6482)

## 1. SISYPHUS' WORK OF DEFINING HATE SPEECH

In everyday life, hate speech embodies discriminatory social phenomena.[1] There is no generally accepted (legal) definition of hate speech. States as the primary duty bearers are governed by the framework of their jurisdiction and legal terminology.[2] The challenges often arise due to usage in different contexts and (mis)understanding that occurs mostly from its colloquial use, so undoubtedly it does not belong to easily regulated social occurrences.[3] It has been adapted over time to address various situations and capturing a wide scope of expressions, having its lowest common denominator as any expression of discriminatory hate towards people that does not necessarily include a particular consequence.[4] Regardless of terminological expression, it is not limited to words. Whereas words are most common, there are symbols, images, gestures, music... "semantically oriented, aiming at expressing prejudiced, violently provoking opinions."[5] Evaluations and decisions in the hate speech field are usually inherently complex, aiming at balancing different rights, principles, or standards whether it is a matter of making a court decision or forming a legal provision that prohibits it.[6]

Among European legal systems, this speech is not included in the protective coverage of freedom of expression and is often penalized, with implementation of prohibiting provisions coming with difficulties. Existing regulations penalizing certain behaviors enable the reconstruction of the essence of hate speech − the intrinsic acts related to the incitement to violence or other forms of harm, some of them including hate speech as insulting or inciting hatred based on national-

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1 Herceg Pakšić, B., *Holding All the Aces? Hate Speech: Features and Suppression in Croatia,* in: Meškić, Z.; Kunda, I., Popović, D. V., Omerović, E. (eds.), Balkan Yearbook of European and International Law, Springer Cham, 2021, pp. 225-247, p. 227

2 Papcunová, J.; Martončik, M.; Fedáková, D.; Kentoš, M.; Bozogáňová, M.; Srba, I.; Móro, R.; Pikuliak, M.; Šimko, M.; Adamkovic, M., *Hate Speech Operationalization: A Preliminary Examination of Hate Speech Indicators and Their Structure*, Complex & Intelligent Systems, 2021; Howard, J. W., *Free Speech and Hate Speech*, Annual Review of Political Science, Vol. 22, No. 1, 2019, pp. 93-109, Yong, C., *Does Freedom of Speech Include Hate Speech?* Res Publica, Vol. 17, No. 4, 2011, pp. 385-403; Knechtle, J. C., *When to Regulate Hate Speech?*, Dickinson Law Review, Vol. 110, No. 3, pp. 539-578; Simpson R. M., *Dignity, Harm and Hate Speech*, Law and Philosophy, Vol. 32, No. 6, 2013, pp. 701-728

3 Kambovski, V., *Hate Crime and Criminal Aspects of Hate Speech: Macedonian Approach*, Megatrend Review, Vol. 10, No. 1, 2013, pp. 323-334, p. 330

4 Hate Speech' Explained; A Toolkit, ARTICLE 19 Free Word Centre, 2015, [https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf], Accessed 15 February 2022, pp. 9-10

5 Herceg Pakšić, B., *Tvorba novih standarda u slučajevima teških oblika govora mržnje: negiranje genocida pred Europskim sudom za ljudska prava*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 67, No. 2, 2017, pp. 229-253, p. 230

6 *Ibid*.

ity, race, ethnicity, or religion.[7] Pursuant Recommendation No. R (97)20[8], hate speech is considered as any form of expression that spreads, incites, promotes, or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed in aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, immigrants and people of immigrant origin.[9]

Despite the fact that the notion of hate speech does not exist in the Polish legal language, it is a permanent element of legal language – jurisprudence and legal doctrine.[10] The relevant Polish authors emphasize the current (legal) state of play creating a "hierarchy of protection for hate speech victims".[11] Polish public debates are familiar with numerous attempts aiming to build a definition taking into account the reasons of possible hate speech occurrence.[12] Non-governmental organizations in Poland dedicated to monitoring and combating manifestations of racism, anti-Semitism, xenophobia and other forms of discrimination and intolerance, most often refer to the definition formulated by S. Kowalski and M. Tulli.[13] Accordingly, hate speech includes statements (spoken and written), iconic representations that defame, accuse, mock or humiliate groups and individuals for reasons that are at least partly beyond their control, such as racial, ethnic and religious affiliation, as well as gender, sexual preference, disability or belonging to a "natural" social group, such as inhabitants of a certain territory, representatives of a certain profession, speakers of a certain language…etc.

There is no official hate speech notion in Croatian legal provisions, but its manifestation is prohibited under a different name through several acts. In principle, the main determinants of hate speech consist of public speech with specific content directed at particular protected groups. Its social occurrence as well as the ef-

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7 Simpson, *op. cit*., note 2

8 Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "hate speech", adopted by the Committee of Ministers on 30 October 1997. Also see Weber A., *Manual on Hate Speech*, Council of Europe Publishing, Strasbourg Cedex, 2009, pp. 9-10, [https://www.tandis.odihr.pl/bitstream/20.500.12389/20608/1/05895.pdf] Accessed 15 February 2022

9 For more see, Dadak, W., *Przestępstwa motywowane uprzedzeniami (o problemach z analizą przestępczości z nienawiści)*, Czasopismo Prawa Karnego i Nauk Penalnych, Vol. XXII, No. 4, 2018, pp. 21-34; Chetty, N.A.; Sreejith, A., *Aggression and Violent Behavior Hate Speech Review in the Context of Online Social Networks*, Aggression and Violent Behavior, Vol. 40, No. 5, 2018, pp 108-118

10 Hołyst, B., *Kryminologiczna ocena agresji werbalnej*, Ius Novum, Vol. 14, No. 2, 2020, pp. 17-46

11 Rogalska, E.; Urbańczyk, M., *Złożoność zjawiska mowy nienawiści w pozaprawnym aspekcie definicyjnym*, Studia Nad Autorytaryzmem i Totalitaryzmem, Vol. 39, No. 2, 2017, p. 124

12 Reed, C., *The Challenge of Hate Speech Online*, Information & Communications Technology Law, Vol. 18, No. 2, 2009, pp. 79-82

13 Kowalski, S., Tulli, M., *Mowa nienawiści. Raport, I. Próba definicji*, [http://or.icm.edu.pl/monitoring3.htm], Accessed 10 January 2022

fectiveness of social reaction are the subject of scientific analysis in the legal field, as we will see in this paper. Hate speech, especially on the Internet, has occupied Croatian public and scientific space in various contexts and there are non-governmental organizations that have been dedicated to this issue for years. One recently conducted research revealed that hate speech is quite common in everyday life and mostly oriented towards national and ethnic affiliation, with many respondents having repeated experience as victims, but unwilling to take necessary legal steps for its prosecution. Online content and social networks were labelled as leading challenges and Croatian suppression mechanisms were described as inefficient.[14] However, despite a relatively large public interest and a range of media-exposed cases, the hate speech topic in Croatia is assessed as marginalized.[15]

ECRI (European Commission against Racism and Intolerance) General Policy Recommendation No. 15 indicates that hate speech is based on the presumption that a person or a group are superior to others, incites acts of violence or discrimination, undermines respect for minority groups and damages social cohesion. Considering it can have many faces, it is essential to understand what constitutes it and distinguishes it from other speech or statements. Accordingly, hate speech entails the use of one or more particular forms of expression towards a non-exhaustive list of personal characteristics or status.[16] These forms are namely advocacy, promotion or incitement of denigration, hatred, or vilification as well as harassment, insult, negative stereotyping, stigmatization, or threat along with justification of such acts. Personal characteristics or status include race, color, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation. Yet, expressions such as satire or objectively based news reporting and analysis that merely offend, hurt or distress are excluded.[17] Seven years ago, this recommendation pointed out the increase of hate speech through electronic communication and the necessity of media literacy. The last ECRI Report on Croatia from 2018 stated racist and intolerant hate speech in public discourse is rising, mainly directed at Serbs, LGBT, and the Roma people. Also, there is a growth of nationalism, particularly among

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14 Herceg Pakšić, *op. cit.*, note 1, pp. 238-242

15 Munivrana Vajda, M.; Šurina Marton. A., *Gdje prestaju granice slobode izražavanja, a počinje govor mržnje?* Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, pp. 435-467, pp. 437-438

16 European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 15 on Combating Hate Speech: Adopted on 8 December 2015, [https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01], Accessed 9 March 2022, p. 16, point 9

17 *Ibid*, p. 17, point 13. For more see, Brown, A., *What is Hate Speech? Part 2: Family resemblances*, Law and Philosophy, Vol. 36, No. 5, 2017, pp. 561-613; Paz, M. A.; Montero-Diaz, J.; Moreno-Delgado, A., *Hate Speech: A Systematized Review*, SAGE Open, Vol. 10, No. 4, 2020, pp. 1-12

the youth. Public authorities rarely place anti-hate speech messages in public.[18] In the last ECRI Report on Poland from 2015 it was stated that homophobic statements are a recurrent feature of political discourse, the Muslim community has become a target of online hate speech, racist rhetoric is present, and nationalist groups are becoming more numerous joining with football supporters.[19] A strong remark was made regarding the lack of a Penal Code provision that would explicitly prohibit incitement to violence, hatred and defamation as well as threats based on sexual orientation or gender identity.[20]

## 2. LEGAL MECHANISMS FOR HATE SPEECH SUPPRESSION IN POLAND AND CROATIA

In both countries, the constitutional provisions guarantee freedom of expression. In general, Poland and Croatia have passed legislation criminalizing hate speech as one of the modalities to counteract discrimination. Both countries have faced this challenge by supporting the legal prohibition of hate speech, burdened with *inter alia*, criminal law sanctions. Comparison of individual criminal acts shows noticeable differences. The main rationale supporting the criminalization of hate speech is the invocation of other values whose protection "competes" with freedom of expression. It is mainly about human dignity and equality.[21] We start first with a brief overview of constitutional standards, followed by criminal law positions and finish with analysis of possible misdemeanor law reactions.

### 2.1. Constitutional Positions Regarding Hate Speech

The most important provision, which explicitly guarantees freedom of expression in the Constitution of the Republic of Poland, is the provision of Article 54 (1) according to which: Everyone shall be guaranteed freedom of expression, collection, and dissemination of information. This provision is a part of the chapter "Personal freedoms and rights", which undoubtedly influences the direction of interpretation. It has been recognized as a key provision for human functioning in

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18 European Commission against Racism and Intolerance Report on Croatia, CRI (2018)17, (fifth monitoring cycle), adopted on 21 March 2018, published on 15 May 2018, [https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/croatia] Accessed 21 March 2022, p. 9

19 European Commission against Racism and Intolerance Report on Poland, CRI (2015)20, (fifth monitoring cycle), adopted on 20 March 2015, published on 9 June 2015, [https://rm.coe.int/fifth-report-on poland/16808b59a09], Accessed 21 March 2022

20 *Ibid*, p. 10

21 Guzik, R., *Wolność słowa a mowa nienawiści. Analiza karnoprawna*, Wydawnictwo C.H. Beck, Warsaw, 2021, p. 297

a democratic state ruled by law. Moreover, everyone is entitled to this right, not only a person with the status of a Polish citizen.

The position of the Constitutional Tribunal in Poland, as expressed in the judgment of 25 February 2014[22] indicates that criminalization of incitement to hatred based on national, ethnic, racial, or religious differences or based on irreligion constitutes a restriction of freedom of speech. Freedom of expression is one of the fundamental human rights, essential for human development and self-realization and constitutive of democracy. Freedom of expression protects not only speech received favorably or perceived as harmless or indifferent, but also speech that expresses disapproval, dislike, or antipathy. At the same time, freedom of speech is not absolute.[23]

The jurisprudence of the Constitutional Tribunal in Poland stressed that the freedom of expression laid down in Article 54 (1) of the Polish Constitution[24] should be understood in the broadest possible sense. This means embracing not only the expression of personal judgments relating to facts and phenomena in all aspects of life, but also the presentation of opinions, suppositions, and forecasts, including information about facts, both real and presumed. In the Court's view, freedom of expression is one of the foundations of a democratic society, a condition for its development and the self-fulfillment of individuals, but it cannot be limited to information and opinions that are favorably received or perceived as harmless or indifferent.[25] The compatibility of the constitutional system with the international standards of human rights protection requires a "pro-European" interpretation of the constitutional provisions. This justifies the thesis that the scope of protection of speech in domestic law is, in principle, consistent with that resulting from the ECHR jurisprudence.[26] It follows that it is permissible to tune in the incrimination scope regarding speech to incitement to hatred and violence of a racist or

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22 Judgment of Constitutional Tribunal from 25 February 2014, SK 65/12

23 For more see, Mojski, W., *Prawnokarne ograniczenia wolności wypowiedzi w polskim porządku prawnym. Analiza wybranych przepisów*, Studia Iuridica Lublinensia, Vol. 12, 2009, pp. 177-196; Machowicz, K., *Jurydyczne uwarunkowania wolności wypowiedzi w Polsce jako kategoria praw człowieka*, Wydawnictwo KUL, Lublin, 2012, p. 124; Woiński, M., *O pojęciu przestępstwa z nienawiści (hate crime)*, in: Szczepłocki, P. (ed.), *Przestępstwa z nienawiści w Polsce. Publikacja pokonferencyjna*, Stowarzyszenie na Rzecz Lesbijek, Gejów, Osób Transpłciowych oraz Osób Queer „Pracownia Różnorodności", Toruń, 2011, pp. 7-28

24 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483, as amended)

25 Constitutional Tribunal of the Republic of Poland of 23 March 2006, K 4/06, OTK ZU 2006, No 3A, Item 32

26 Woiński, M., *Prawokarne aspekty zwalczania mowy nienawiści*, LexisNexis Polska, Warsaw, 2014, p. 117

xenophobic nature, in particular if it takes the form of public insult, slander or threat.

In Croatia, hate speech is described as a true constitutional category in the sense that related challenges are clearly positioned in the context of human rights and freedoms.[27] As in many other countries, freedom of expression has a constitutional level. It encompasses freedom of the press and other media, freedom of speech, public appearance, and freedom of establishing all media institutions. Invitation or incitement to war or use of violence; national, racial, or religious hatred; or any form of intolerance is forbidden and punishable.[28] The Croatian system belongs to the European models that, in the constitutional sense, do not stand on the positions of value neutrality, but with an approach advocating for certain fundamental values.[29] Manifestations of hate speech are unacceptable given the fact they do not accept equality of citizens, and reject the fundamental democratic postulates[30] as well as represent a violation of equality as one of the highest constitutional values.[31] The Croatian Constitutional Court gave its views many times in questions related to freedom of expression in general, but when it comes to hate speech specifically, in terms of invitation or incitement to violence, hate, intolerance or war, there were not that many opportunities. On several occasions, this court demonstrated general respect for standards related to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[32] Respecting the limited scope of this paper we point out that the Croatian legal science contains analyses of constitutional court positions regarding hate speech[33], so, we further focus on an interesting decision regarding a topic causing unequal court practice and significant social tensions: ideological symbols, namely those associated with totalitarian regimes. One of the media-covered decisions was the Šimunić case, which had its epilogue at the European Court of Human Rights. A football player was convicted for shouting "For Home" several times at a football match. While

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27 Gardašević, Đ. *Govor mržnje i hrvatski ustavnopravni okvir* in: Kulenović, E. (ed.) Govor mržnje u Hrvatskoj, Političke analize, Zagrebu, 2016, pp. 151-185

28 Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014. Arts. 35, 38, 39, 16, 17

29 Hlebec, I.; Gardašević, Đ., *Pravna analiza govora mržnje*, Pravnik: časopis za pravna i društvena pitanja, Vol. 55, No. 107, 2021, pp. 9-35, p. 17

30 Kulenović, E. *Sloboda govora i govor mržnje*, in: Kulenović. E. (ed.), Govor mržnje u Hrvatskoj, Fakultet političkih znanosti, Zagreb, pp. 21-61

31 Herceg Pakšić, B.; Lachner, V. *Hate Speech as a Violation of Human Rights: The Meaning, Implications and Regulation in Criminal Law*, in: Vinković, M. (ed.) New Developments in EU Labor, Equality and Human Rights Law, Faculty of Law, Osijek, pp. 295-320, p. 311; Herceg Pakšić, *op. cit*., note 1, p. 230

32 It is binding in Croatia since 5 November 1997 when the Act on Ratification of the ECHR came into force (Official Gazette-International Treaties No. 18/97)

33 See earlier mentioned sources of the Gardašević, Đ.

the original meaning was literary and poetic, it had also been used as an official greeting of the *Ustaše* movement (along with following reply "Ready"), which had originated from a totalitarian regime. First instance the misdemeanor court has declared it represents a manifestation of racist ideology, contempt for other people grounded on their religion and ethnicity affiliation[34], which was supported by the stance of the High Misdemeanor Court as the second instance rejecting the appeal.[35] The Constitutional Court made its point clear dismissing the applicant's constitutional complaint, finding that the misdemeanor sanctioning, taken place based on the Prevention of Disorders at Sports Competitions Act, had not been disproportionate. Suppression of expressing or inciting hatred based on racial or other affiliation at sporting events is a legitimate aim of punishment.[36] Since the procedure continued before the European Court of Human Rights, it was declared that Article 10 does not protect speech incompatible with the values proclaimed and guaranteed by the Convention.[37]

### 2.2. Hate Speech and Sanctioning Modalities within the Criminal Law Framework

In Polish criminal law, two provisions have the greatest legal weight: Article 256 and 257 of the Penal Code.[38] These criminal offenses are prosecuted ex officio.[39] Pursuant the provision of the Article 256 of the Penal Code, criminal law liability exists for anyone that publicly propagates the fascist or other totalitarian state system or calls for hatred based on national, ethnic, racial or religious differences or irreligion. The penalty could be in the form of a fine, a restriction/limitation

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34 Judgment of the Misdemeanor Court in Zagreb No. PpJ-4877/13 of 8 December 2015

35 Judgment of the High Misdemeanor Court of the Republic of Croatia No. Jž-188/2016 of 27 January 2016

36 Decision of the Constitutional Court of the Republic of Croatia, U-III-2588/2016 from 8 November 2016

37 European Court of Human Rights, Case of Šimunić v Croatia, Application no. 20373/17, decision on 29 January 2019. It is interesting that ECtHR did not find it necessary to address the applicability of Article 17 considering it should only be resorted to exceptionally, in extreme cases, so here it was used only as an aid to interpretation. See Guide on Article 17 of the European Convention on Human Rights, Prohibition of abuse of rights, 2021, [https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf], Accessed 2 April 2022, p. 25; Herceg Pakšić, *op. cit.,* note 1, p. 232

38 Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2021, item 2345, as amended). There are no official titles of Polish criminal acts. However, in literature titles are informally assigned: Art. 256 as Propagation of fascism or totalitarianism; Art. 257 as Insulting a group or individual

39 Demczuk, A., *Wolność wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w polskim prawie i praktyce sądowej*, in: Haczkowska, M.; Tereszkiewicz, F. (eds.), *Europejska konwencja o ochronie praw człowieka – praktyka stosowania i funkcjonowanie w przestrzeni europejskiej*, Oficyna Wydawnicza Politechniki Opolskiej, Opole, 2016, pp. 145-156

of liberty (meaning various forms of community service, various obligations referred to in Article 72 § 1), or imprisonment of up to two years. In turn, Article 257 criminalizes public insult of a group of people or public insult or violation of bodily inviolability of a person because of his/her national, ethnic, racial, religious affiliation or irreligiousness. In the case of this offense, the perpetrator is subject to imprisonment for up to three years.

These provisions create certain practical doubts and disputes. Jurisprudence and judicature emphasize the difficulty in interpreting the phrase "incitement to hatred", meaning that the lack of intent to cause negative emotions to others when publicly speaking in a negative or discriminatory manner to others, leads to the conclusion that a person cannot be attributed with the realization of the elements of this offense.

The essence of inciting to hatred comes down to the content that objectively may cause strong dislike, hostility, anger, or negative evaluation, in relation to a particular group of people, characterized by the differences listed in the provision. Incitement to hatred from article 256 § 1 of the Penal Code is a prohibited act that is very strongly saturated with motivation. This hatred occurs for specific reasons. According to doctrine, the subjective part of the act consists of direct intention. The motivation indicated in the provision is made more specific using the phrase "incites to hatred". Hatred is a feeling; it expresses a strong negative emotional attitude towards someone or something. However, it is not about hatred nourished by the perpetrator. The perpetrator may also have such an emotion, but it is not necessary for the realization of the elements of this prohibited act. Even if the perpetrator feels hatred towards a certain group of people or a person, he or she may not realize the real reason for such an emotion, or he or she realizes it, but for some reason does not want to admit it aloud and "masks" it by raising national or ethnic issues, etc. From the perspective of the provision of Article 256 § 1 of the Penal Code, this is of no significance. In Poland, the doctrine does not distinguish models of victim selection.

The aim of hate speech is always directed at a group, based on social or biological characteristics, even if its addressee is an individual. It is not only the real group affiliation, but also the perceived one.[40] Inciting hatred on the grounds of indicated differences is not only the expression of controversial views, but also an obvious abuse of freedom of expression, aimed at national, ethnic, or religious conflicts.[41]

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[40] Pałka, K.; Kućka, M., *Ochrona Przed Mową Nienawiści – Powództwo Cywilne Czy Akt Oskarżenia?*', in: Wieruszewski, R.; Wyrzykowski, M.; Bodnar, A.; Gliszczyńska-Grabias, A. (eds.), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Wolters Kluwer Polska Sp. z o.o., Warsaw 2010, pp. 42-54

[41] Mojski, *op. cit.*, note 23, pp. 177-196

The perpetrator does not have to be driven directly by hatred towards the victim. It is enough for the expressed statement to arouse aversion, anger, lack of acceptance and even a feeling of rage towards individual people or social groups, or to maintain or intensify this attitude.[42] Expressed hateful opinions are becoming more radical, often connected to dangerous brutalization.

The challenge associated with provisions of Articles 256 and 257 of the Penal Code is the boundary concerning freedom of speech. It arises through questions whether the hate speech criminalization poses a threat to freedom of expression and whether this speech should be considered as overstepping the limits of freedom of speech.[43] Its criminalisation itself is not allowing it to be considered as speech that deserves legal protection. However, it is often the case in public debates that the strength of arguments as well as respect for human dignity lose importance instead of representing standards of public communication. The initial purpose of speech as exchanging arguments is shifting to evoking emotions, humiliation, presenting a person or a group in a negative light, followed by feelings of aversion or hostility towards a person, a group or a view defined as different or strange, supported with low-quality media reports and the possibility of the Internet reaching a wide audience. An example of such a situation is the occurrence of negative attitudes and speech towards doctors, nurses and their families who cared for people infected with COVID-19.[44]

Incitement to hatred contains a specific direction.[45] The real reason for directing negative social feelings towards, i.e., some national or ethnic group, can be irrelevant and the motivation may be complex; it regards an attitude, emotions, knowledge, or expectations. The main motive does not have to be a specific ideology,

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42 Guzik, *op. cit.,* note 21, p. 297

43 For more on the limits of freedom of expression see Biłgorajski, A., *Granice wolności wypowiedzi czy wolność wypowiedzi ponad granicami? Kilka uwag na temat zakresu wolności wypowiedzi w Rzeczypospolitej Polskiej*, in: Biłgorajski A., (ed.), Wolność wypowiedzi i jej granice. Analiza wybranych zagadnień, Prace Naukowe Uniwersytetu Śląskiego, Katowice 2014, pp. 11-35; Demenko, A., *Prawnokarna ochrona wolności wypowiedzi. Zarys problemu*, in: Biłgorajski A., (ed.), Wolność wypowiedzi i jej granice. Analiza wybranych zagadnień, Prace Naukowe Uniwersytetu Śląskiego, Katowice 2014, pp. 36-49

44 Dąbrowska, I., *Internetowy hejt wobec chorych oraz pracowników służby zdrowia w czasach pandemii wirusa SARS-CoV-2 w Polsce*, Media-Kultura-Komunikacja, Vol. 1, No. 17, 2021, pp. 89-113

45 Michalska-Warias, A., *Przestępstwa przeciwko porządkowi publicznemu*, in: Królikowski, M.; Zawłocki, R. (eds.), Kodeks karny. Część szczególna. Tom II. Komentarz. Art. 222-316, Wydawnictwo C.H. Beck, Warsaw, 2017, pp. 309-463; Herzog, S.,*Przestępstwa przeciwko porządkowi publicznemu*, in: Stefański, R.A. (ed.), Kodeks karny. Komentarz, Wydawnictwo C.H. Beck, Warsaw, 2020, pp. 1688-1769; Wiak, K., *Przestępstwa przeciwko porządkowi publicznemu*, in: Grześkowiak A.; Wiak, K. (eds.), Kodeks karny. Komentarz, Wydawnictwo C.H. Beck, Warsaw, 2019, pp. 1228-1313; Ćwiąkalski, Z., *Przestępstwa przeciwko porządkowi publicznemu*, in: Wróbel, W.; Zoll, A., (eds.) Kodeks karny. Część szczególna. Tom II. Komentarz do art. 212-277d, Wolters Kluwer, Warsaw, 2017, pp. 482-605

e.g., fascist or totalitarian, nor does it have to be on religious grounds. Sometimes revealing the real reason or motive could prevent achieving the goal. The phrase "incites to hatred" is understood as conduct containing persuasion, encouragement, inducement, and incitement to strong dislike or hostility.[46] For the incitement to be achieved, it is sufficient that the perpetrator aims at the occurrence of the hostility towards specified persons.[47] It is irrelevant whether the provocation had an effect. The Supreme Court in Poland has twice interpreted this phrase. In the first decision the court explained that "(…) incitement to hatred, comes down to type of statements that cause feelings of strong dislike, anger, lack of acceptance, even hostility to individuals or entire social or religious groups, to the form of expressions that sustain and intensify negative attitudes and emphasizes the privilege and superiority of a particular nation, ethnic group, race or religion."[48] Moreover, in a decision a decade ago this court held that "(...) the causative act of incitement to hatred involves the desire to trigger the strongest negative emotion (akin to "hostility") towards a particular nationality, ethnic group or race. It does not regard evoking feelings of disapproval, antipathy, prejudice, dislike".[49]

In Poland, rather frequent proposals to amend the criminal law provisions typifying hate speech offenses[50] were dictated by the reaction to the changes taking place in the world related to characteristics of certain social groups. Over the years, (unsuccessful) attempts to change the Penal Code provisions were submitted to Parliament several times, aiming to extend the scope of incrimination for hate crimes and hate speech, considering, among others, persons with disabilities.[51] In

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46 Herzog, *op. cit*., note 45, p. 1702; Haręża, A., *Wolność słowa w Internecie*, Nowa Kodyfikacja Prawa Karnego, Vol. XX, No. 2882, 2006, pp. 343-344

47 Lach, A., *Przestępstwa przeciwko porządkowi publicznemu*, in: Konarska-Wrzosek V. (ed.), Kodeks karny. Komentarz, Wolters Kluwer, Warsaw 2016, pp. 1103-1167; Gruszecka, D., *Przestępstwa przeciwko porządkowi publicznemu*, in: Giezek J. (ed.) Kodeks karny. Część szczególna. Komentarz, Wolters Kluwer, Warsaw, 2021, pp. 1022-1144

48 Decision of the Supreme Court of 8 February 2019, IV KK 38/18

49 Decision of the Supreme Court of 1 September 2011, V KK 98/11

50 Płatek, M., *Mowa nienawiści – przesłanki depenalizacji*, in: Wieruszewski, R.; Wyrzykowski, M.; Bodnar, A.; Gliszczyńska-Grabias, A. (eds.), Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne, Warsaw 2010, pp. 55-92; Woiński, M., *Projekty nowelizacji art. 256 k.k.*, in: Wieruszewski, R.; Wyrzykowski, M.; Bodnar, A.; Gliszczyńska-Grabias, A. (eds.), Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne, Warsaw 2010, pp. 21-41

51 See: Parliamentary bill to amend the Act - Penal Code, 6th term, Sejm. No. 4253, [https://orka.sejm.gov.pl/Druki6ka.nsf.], Accessed 10 February 2022; Parliamentary bill to amend the Act - Penal Code, 7th term, Sejm. No. 340, [https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=BCB32B331B-21B732C12579EB00408447], Accessed 10 February 2022; Parliamentary bill to amend the Act - Penal Code, 7th term, Sejm. No. 2357, [https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=AF-063793536190B7C1257CD10030930], Accessed 11 February 2022; Parliamentary bill to amend the Act - Penal Code, 8th term, Sejm. No. 878, [https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?documen-

this regard, amendment of certain provisions was directed at additional protection to groups defined by gender, age, disability, and sexual orientation. The similarities of the proposed changes consisted in adding protective features to the existing catalogue such as disability, gender, gender identity, age, and sexual orientation. The failure to adopt changes covering persons with disabilities was related to challenges of sufficiency in the statutory definition of the "disability" concept and inadequate justification of the inclusion of this additional criterion. In this respect, the Supreme Court in Poland took the stance that systemic and analytical work and research must precede such proposals.[52] Effective identification of the risks arising from a particular victim characteristic is possible based on an individual assessment, carried out at the earliest possible stage. Such an assessment should be possible for all victims, to determine what specific protective measures they need.[53] The personal characteristics along with the nature and circumstances of the act should be considered.[54]

The criminal offense of public denial of Nazi or communist crimes, as well as other criminal offenses against peace, humanity or war crimes are defined in Act of 18 December 1998, at the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation. Colloquially, though imprecisely, it is called "Holocaust denial". Pursuant Art. 55 of this Act "Who publicly and contrary to the facts denies the crimes referred to in Article 1 point 1, shall be subjected to a fine or imprisonment for up to three years. The judgment shall be made public."

The Croatian criminal law accepts the view of a limited protection of the freedom of expression and allows interference, due to a necessary balancing with other legal values also deserving criminal law protection (honour and reputation, discrimi-

tId=F8E907EAD05C3F95C1258037003977B7], Accessed 11 February 2022; Parliamentary bill to amend the Act - Penal Code, 9th term, Sejm. No. 465, [https://sejm.gov.pl/Sejm9.nsf/druk.xsp?documentId=D40686B750C74B51C125859F00357459Sejm], Accessed 11 February 2022; Parliamentary bill to amend the Act - Penal Code, 9th term, Sejm. No 2024, [https://sejm.gov.pl/Sejm9.nsf/druk.xsp?documentId=2851BC6F8739C593C12587F10042EF6E], Accessed 11 February 2022. For more on this topic see Kolendowska-Matejczuk, M., *Ochrona praw ofiar przestępstw z nienawiści w polskim prawie karnym,* in: Mazowiecka, L.; Klaus, W.; Tarwacka A. (eds.), Z problematyki wiktymologii. Book dedicated to Professor Ewa Bieńkowska, Warsaw 2017, pp. 257-278, p. 266

52 Habrat, D., *Protection of Human Dignity as a Basis for Penalization of Hate Speech Against People with Disabilities in Polish Criminal Law*, Studia Iuridica Lublinensia, Vol. XXX, No. 4, 2021, pp. 259-279, p. 272

53 Art. 55 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA

54 *Ibid.*, Art. 22 and 56

nation prohibition, confidentiality obligation…etc.).[55] The main incrimination enabling hate speech sanctioning is *Public Incitement to Violence and Hatred* (Article 325 of the Penal Code). This incrimination goes back in Croatian criminal law history - though it existed under a different title in the previous Penal Code versions; however, accompanying judicial standards were almost non-existent due to a general absence of competent decisions (in both courts and state attorneys' offices).[56]

Incrimination was moved several times between chapters with different dominant protected values. In the Penal Code of 1977, I*ncitement to National, Racial, and Religious Hatred*, *Division or Intolerance* was placed among offenses against the Republic of Croatia; afterwards in 1997 *Racial and other Discrimination* was placed among offenses against international values, and finally, in 2011 *Public Incitement to Violence and Hatred* found its place among offenses against public order.[57] It follows the standards established by Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[58] but has wider scope including some grounds not mentioned in the Framework decision. Article 325 has five paragraphs. Pursuant to the first, "Whoever by means of press, radio, television, computer system or network, at a public gathering or otherwise publicly incites or makes publicly available leaflets, images or other materials invoking to violence or hatred towards a group or its members because of their racial, religious, national or ethnic affiliation, language[59], origin, skin color, gender, sexual orientation, gender identity, disability or any other characteristics, shall be punished by imprisonment for a term not exceeding three years." As evident, in addition to extensive casuistry, the provision abounds in general clauses, leading to the conclusion that any manner of public incitement to violence and hatred towards a group or its members based on any characteristic is punishable. The incrimination scope is rather wide and this "open base" regarding victim selection is followed by danger of over extensive interpretation in practice. This was already noticed in Croatian case law and justifiably criticized.[60]

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55 Herceg Pakšić, *op. cit.*, note 1, p. 233

56 Munivrana Vajda, M. *Zakonska podloga za sankcioniranje govora mržnje-devedestih i danas* in: Dubljević, M.(ed): Procesuiranje ratnih zločina-jamstvo procesa suočavanja s prošlošću u Hrvatskoj, Zagreb, Documenta, 2014, pp. 359–371, pp. 360-361

57 For detailed overview and changes from 1977 see Herceg Pakšić; Lachner, *op. cit.*, note 31, pp. 312-316

58 Official Journal of the European Union, L 328/55 from 6 December 2008

59 Category of language was added within the amendments to the Penal Code from 2017. Official Gazette No. 101/17

60 Munivrana Vajda and Šurina Marton rightfully criticized the fact that the court interpreted affiliation to police officers and veterans as in compliance with this provision. Munivrana Vajda; Šurina Marton,

The second and third paragraph provide punishment if the act was committed in a group: between six months and five years for the organizer or leader, and up to one year for a participant role. There is visible terminological inconsistency between these two paragraphs mentioning two terms: "group" (par. 2) and "association" (par. 3). Pursuant to par. 2, a group means three or more persons, but there is no explanation for the term "association". Although it follows from the provision text that the meaning is the same, the terminology should be unified. Incrimination of both modalities is the result of comments Croatia got in 2012 within the fourth ECRI report.[61] The fourth paragraph provides punishments of up to three years imprisonment, for public approval, denial or significant diminishment of genocide, crime of aggression, crime against humanity or war crime appropriate to incite violence or hatred towards a group or its member based on racial, religious, national, or ethnic affiliation, origin, or skin color. These acts can be considered as severe verbal aggression, specifically genocide denial. In related academic research, this topic refers to the complex concept of *denialism*.[62] Within European systems, there is no uniform approach in criminal law reaction to denialism: it ranges from its complete absence to variants criminalizing only specific denial forms (i.e., Holocaust, Nazi, and communist crimes), to punishing any genocide denial.[63] Croatia belongs to the latter group. It is visible that the provision regarding denial of specific criminal offenses is formed in an extensive manner, but what narrows the scope is the fact that it must be made publicly, suitable for incitement to violence or hatred and directed against certain groups[64] that are more restricted than in the first paragraph provision. The categories of language, gender, sexual orientation, gender identity, disability and the possibility of any other characteristics are left out. This is to some extent understandable given the genocide incrimination in Art. 88 of the Penal Code refers to national, ethnic, racial, or religious groups, but without origin and skin color, so there is also room for alignment. Lastly, since the general

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*op. cit.,* note 15, p. 455

61 European Commission against Racism and Intolerance Report on Croatia (fourth monitoring cycle), CRI (2012) 45, adopted on 20 June 2012, published on 25 September 2012, [https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/croatia], Accessed 2 March 2022, p. 11

62 Lobba, P. *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, The European Journal of International Law, Vol. 26, No. 1, 2015. pp. 237-253, p. 238

63 Herceg Pakšić, *op. cit.*, note 5, p. 238. For an overview of relevant comparative law, see the judgment of the European Court of Human Rights in Dogu Perinçek v Switzerland, Application 27510/08 of 15 October 2015, Part IV, Comparative Law materials, para. 91 - 96 and 255 - 257 and the Report from the Commission to the European Parliament and the Council of 17 January 2014 on the implementation of Council Framework Decision 2008/913 / JHA on combating certain forms and means of expressing racism and xenophobia by criminal means, [http: // eur-lex.europa.eu / legal-content / EN /TXT /? Uri = CELEX% 3A52014DC0027] Accessed 12 February 2022

64 Herceg Pakšić, *op. cit.,* note 5, p. 239

provision on attempt is related to a sentence of five years or more, and is applicable only to paragraph 2, it was necessary to provide a special provision dealing with punishment of attempt applicable to paragraph 1 and 4. Concerning the selection of the victim by the perpetrator, Croatian criminal law accepts the discriminatory selection model, meaning selection is based on actual or presumed affiliation to a specific group. This is an objective approach, not requiring the presence of negative emotions towards the victim(s) from the side of the perpetrator. It is not needed to have the proof of "hate", i.e., hatred as a personal attribute of the perpetrator (hostility model).[65] In relation to the prevalence of hate speech in everyday life, criminal convictions are rare. Recent judgments confirm that hate verbalization has shifted from offline to online modality, specifically through social networks publishing hateful comments towards people of homosexual orientation[66], towards police officers and their children[67], towards members of religious and national groups[68] or ethnic groups.[69]

In addition, there are criminal law provisions regarding *Incitement to genocide* and *Incitement to crime of aggression* (both criminalized as public and direct) as well as Incitement to terrorism (criminalized as public).[70]

### 2.3. Other Means of Reaction: Misdemeanour Law in Focus

Polish petty offences law does not provide any direct sanctions for certain forms of speech, which could be treated as minor unlawful acts in the area of hate speech.

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65 Prosecuting Hate Crimes. A practical guide, OSCE, Office for Democratic Institutions and Human Rights (ODIHR), Poland 2014, [https://www.osce.org/odihr/prosecutorsguide] Accessed 4 January 2022, pp. 50-51. Also, Munivrana Vajda; Šurina Marton, *op. cit.*, note 15, p. 451

66 Through his profile on Facebook, the perpetrator published a comment, related to an earlier event of violence against persons of homosexual orientation with the intention of inciting intolerance: "It is unfortunate that the consequences were not greater…". Judgment of the Municipal Court in Novi Zagreb no. K-397/20-9 of 27 January 2021

67 In his comment on Facebook, the perpetrator was inciting others to hate and violence against police officers and their children, writing "…all of them should be buried like rabbits, both them and their parents, and it should be done publicly as the example to others." Judgment of the Municipal Court in Zadar no. K-43/20 of 17 September 2020

68 In his comment on Facebook, the perpetrator published a photograph with citizens of Serbian nationality leaving the territory of the Republic of Croatia during the military police operation expressing intolerance of them and additionally calling out police officers. Judgment of the Municipal Court in Zadar no. K-568/17 of 31 July 2020

69 On his Instagram profile, he posted content aimed at immigrants as a group of a different ethnicity, urging other people to bring weapons to a certain place at a certain time to deal with immigrants. Judgment of the Municipal Criminal Court in Zagreb no. K-181/20-2 of 30 January 2020

70 Art. 88 and 89 (both paragraph 3) and 99 of the Penal Code

The Code of Petty Offenses[71] contains a group of provisions regarding protection for, broadly understood, public order and peace. Among the offenses consisting of disturbing the peace or public order, the most serious and the most frequently committed offenses include excessive behavior (Art. 51 of the Code of Petty Offenses) and public incitement to commit an offense (Art. 52a of the Code of Petty Offenses). Such offenses are punishable by imprisonment (5-30 days), the penalty of restriction of liberty for 1 month or a fine (PLN 20-5000). The subject of protection is the right of citizens to undisturbed peace and public order as well as an undisturbed night's rest, meaning that any act that goes beyond the general or customary norms of social behaviour is not allowed.[72]

If the perpetrator's behaviour consists in shouting thus disrupting peace, public order, or night's rest, depending on the content, it may also be an offence under Art. 256 § 1, or Art. 257 of the Penal Code. In case of the event of a simultaneous commitment of the criminal offence and misdemeanor, Art. 10 of the Code of Petty Offences is applied, meaning it is adjudicated for a crime and a misdemeanour, however, if a penalty or a penal measure of the same type has been ordered for a crime and a misdemeanour, a more severe penalty or penalty measure is imposed.[73]It is permissible (pursuant to Article 10) to conduct two parallel or sequential proceedings in the event that separate proceedings concern a different part of the same act.

In Poland, there are also other provisions that may contain elements counteracting hate speech, e.g., in the Labour Code or the provisions implementing EU legislation in the field of equal treatment. For example, despite the broad protection of the freedom of expression, the Polish Constitution allows for restrictions of television broadcasters. Such restrictions are introduced by Art. 18.1 of the Broadcasting Act[74], according to which programs or other broadcasts must not promote activities contrary to the law, with the Polish raison d'état, as well as attitudes and views contrary to morality and social good and they must not contain incitement to hatred or discrimination on the grounds of race, disability, sex, religion, or nationality.[75]

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71 Act of 20 May 1971 – Code of Petty Offences (consolidated text, Journal of Laws 2021, item 2008)

72 Decision of the Polish Supreme Court of May 22, 2019, IV KK 219/18

73 Krajnik, S., *Wykroczenia przeciwko porządkowi publicznemu i spokojowi publicznemu*, in: Lachowski, J. (ed.), *Kodeks wykroczeń. Komentarz*, Wolters Kluwer Polska, Warszawa 2021, p. 222

74 Act of 29 December 1992 r. - Broadcasting Act (consolidated text, Journal of Laws 2020, item 805 as amended)

75 Ossowska-Salamonowicz, D., *Art. 18*, in: Niewęgłowski, A. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa 2021, [https://sip.lex.pl/#/commentary/587837648/635088/nieweglowski-adrian-red-ustawa-o-radiofonii-i-telewizji-komentarz?cm=URELATIONS], Accessed 22 April 2022

Besides the criminal law mechanism reserved for the most serious hate speech forms, the Croatian system provides misdemeanor law reaction in this area through several legal acts. The Misdemeanours against Public Order and Peace Act[76] provides sanctions for, *inter alia*, specific forms of expression. Fines and, exceptionally, imprisonment are imposed for offenses under this act, with the possibility of imposing various protective measures. This act is one of the longest-lasting legal acts in Croatia (dates back in 1977), certainly outdated in some respects. The fine (between 27 and 160 EUR) or imprisonment of up to 30 days will be imposed for performance and reproduction of songs, compositions and lyrics or wearing or displaying symbols, texts, images and drawings at a public place, thus disturbing public order and peace (Art. 3b). Another important act is the Prevention of Disorder at Sporting Events Act[77] aiming to prevent, suppress and sanction inappropriate behaviour, riots, and violence before, during and after sports competitions or sporting events. Pursuant Art. 4, para.1, along with Art. 39, attempt to insert and display a banner, flag or other items with a text, image, sign, or other feature expressing or inciting hatred or violence based on racial, national, regional, or religious affiliation are punishable with a fine (between 267 and 2000 EUR) or imprisonment up to 30 days. Pursuant Art. 4, para.1, along with Art. 39a, singing songs or expressing messages with content expressing or inciting hatred or violence based on racial, national, regional, or religious affiliation, are punishable with a fine (between 667 and 3333 EUR) or imprisonment between 30 and 60 days, and sanctioning can be more severe if the misdemeanour is repeated within a two-year period. The Anti-Discrimination Act[78] ensures the protection and promotion of equality as one of the highest values. Pursuant to Article 25, a fine (between 667 and 4000 EUR) is provided for violation of dignity with the purpose of causing fear or creating a hostile, degrading or offensive environment based on differences in race, ethnicity, skin colour, gender, language, religion, political or other beliefs, national or social background, wealth, union membership, social status, marital or family status, age, health, disability, genetic inheritance, gender identity or expression and sexual orientation). It is worth mentioning that within Croatian media law there are provisions containing anti hate speech features, as well as the Gender Equality Act[79] and the Life Partnership of the Same Sex Persons Act[80] with their provisions on discrimination prohibition.

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76 Official Gazette No. 41/1977, 47/1989, 55/1989, 83/1989, 47/1990, 55/1991, 29/1994

77 Official Gazette No. 117/2003, 71/2006, 43/2009, 34/2011

78 Official Gazette No. 85/2008, 112/2012. This Act contains provisions in accordance with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19 July 2000)

79 Official Gazette No. 82/2008, 125/2011, 20/2012, 138/2012, 69/2017

80 Official Gazette No. 92/2014, 98/2019

This dual possibility of a repressive reaction in the area of hate speech is overshadowed by the challenge of appropriate demarcation followed by inconsistency in case law. In favour of a more functional and precise solution, positions advocating restrictive criminal law application[81] should be accepted.

The most recent legislative innovation in the field of combating hate speech is the adoption of the new Electronic Media Act.[82] Debates regarding the modalities of responsibility related to illegal content and behaviour on the Internet began two years earlier, in the beginning of 2019.[83] Even though this Act regulates the rights, obligations and responsibilities of legal and natural persons engaged in the provision of audio and audiovisual media services, electronic publishing services and video sharing platforms, most of the discussion focused on the issue of accountability for content published in comments to online articles.[84] In accordance with relevant provisions, it is prohibited to incite, favor, or promote hatred or discrimination as well as ideas of totalitarian regimes in audio and / or audiovisual media services.[85] The initial idea foresaw a greater scope of responsibility for platform providers and publishers, but the end result of accountability for user comments is that users will have to be registered, so the responsibility will not fall on the publishers but on the lawbreakers. To avoid being punished, media owners are obliged to change the rules for commenting, namely requiring user registration

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81 See ECtHR, Case of Stomakhin v Russia, Application no. 52273/07, 9 May 2018, §117; United Nations Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35,4, [https://www.refworld.org/docid/53f457db4.html] Accessed 14 March 2022, point 12; Also, Munivrana Vajda, *op. cit.*, note 56, p. 368

82 Official Gazette No. 111/2021

83 Herceg Pakšić, B. *Virtualna komunikacija i izazovi kaznenog prava novog doba*. In: Velki T., Šolić K. (eds.) Izazovi digitalnog svijeta, Fakultet za odgojne i obrazovne znanosti ,Sveučilište Josipa Jurja Strossmayera, Osijek, pp. 155-173, p. 161

84 The European Court of Human Rights started creating standards in this field in 2015. The first case regarding liability for comments left by users on the Internet information portal: Case of *Delfi As v Estonia*, App. no. 64569/09, 16 June 2015. The Estonian portal Delfi was convicted of defamation published in user comments on its website, but due to the decision of the Estonian courts, it turned to the ECHR in 2009, referring to Art. 10 of the Convention. The ECHR unanimously found that Estonian news portal was justifiably held responsible for the content of anonymous and defamatory comments of its readers

85 See Art. 14, Art. 21 par. 4, Art. 24 par. 1 of the Electronic Media Act. Discrimination is based on race or ethnic origin or color, sex, language, religion, political or other belief, national or social origin, property status, membership in trade union, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity, expression or sexual orientation, and anti-Semitism and xenophobia, ideas of fascist, Nazi, communist and other totalitarian regimes

along with clear and easily noticeable guidelines for comments and violation of legislative provisions.[86]

## 3. CONCLUDING THOUGHTS ON REVEALED COMPARATIVE INSIGHTS

This comparative study revealed many similarities but also differences in the two analyzed legal systems. Consistent with the hypothesis from the outset, it can be said that, in terms of suppressing hate speech, these are indeed variations of the same general concept. Freedom of expression is a constitutionally guaranteed category in Poland and Croatia, and their constitutional courts have had the opportunity to make decisions regarding hate speech, although much less frequently than decisions on other issues in the area of freedom of expression. In both countries, hate speech is described as a constitutional category closely related to human rights and freedoms. Hate speech is present in everyday life, which is particularly evident from, for example, the ECRI reports, with national differences regarding its content and orientation towards certain groups. In both countries, legal terminology does not include the official notion of hate speech, but there are legal mechanisms to address its suppression. Both Poland and Croatia have adopted provisions intended for hate speech suppression, meeting this challenge by supporting the legal ban on hate speech imposing penal law sanctions. The main justification is the invocation of other values, the protection of which competes with freedom of speech. It is mainly about human dignity and equality.

There are specific findings regarding differences. First, within the penal law framework, both systems penalize public hate speech but the scope regarding protected groups significantly differs. Polish provisions fully protect only national, ethnic, racial, religious, or irreligious groups, which is notably narrower than in Croatia, where this list is much broader including racial, religious, national, or ethnic affiliation, language, origin, skin color, gender, sexual orientation, gender identity, disability, but can be even wider due to general clause "or other characteristics". Despite many attempts, the Polish law has not yet managed to extend the catalog that differs from European standards.

Second, the Polish doctrine does not have a developed discussion or a specific choice on the victim selection model, while Croatia accepts the discriminatory

[86] Pursuant Art. 94, par. 3. The provider of the electronic publication is responsible for all content published on the electronic publication, including content generated by users if it fails to register the user and if it does not clearly and easily warn the user of commenting rules and violations. Failure to register and warn is subject to a fine for a legal entity in the amount of HRK 10,000.00 to HRK 50,000.00 (in accordance with Art. 99, par. 1, item 8)

selection model as an objective approach. However, the end result in both systems comes down to the same. Within the court process it is not necessary to prove the presence of negative emotions on the perpetrator's side.

Third, as far as the challenges in practice are concerned, the interpretation related to the notion of incitement to hatred prevails in Poland. However, it is believed that real hatred does not have to exist for the existence of the act as well as that real motivation does not have to be revealed. In Croatia, the most significant challenges are inconsistencies in prosecution, especially in misdemeanor law and, on the other hand, the over-extensive interpretation of protected groups.

Fourth, pertinent differences are demonstrated in the role of misdemeanor law in this area. Polish misdemeanor law does not contain incriminations for sanctioning hate speech. In the Croatian system, misdemeanor law has a significant role, providing reaction through several legal acts. The advantages of misdemeanor law over criminal law are emphasized considering the stance that the latter should remain reserved only for the most serious forms.

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UDK 343.132:616.98
Review article

# TWO-WITNESS RULE DURING HOME SEARCH IN THE LIGHT OF THE COVID PANDEMIC

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***ABSTRACT***

*Authors are analysing the extent of acceptance of rule on mandatory presence of two witnesses during a home search in national criminal proceedings in EU Member States. While some police powers in Croatia are regulated using modern forms of protection of suspects' rights, some other investigative actions are regulated using rules that are uncommon in EU. Home search has a historic model of obligatory presence of two witnesses. These witnesses are often randomly selected among citizens, they are not legal professionals. A suspect has no right to reject witnesses if he considers that they could violate his privacy or health rights. Besides that, the Two-witness Rule has a peculiar impact on the evidence law. Items found during home search cannot be legally used if only one witness was present. According to such consequence, this rule actually requires a certain number of witnesses to prove a fact. Such requirements on number of witnesses have been abandoned in modern evidence law.*

*The results of the analysis of the EU Member States show that the rule on the mandatory presence of two witnesses is widespread only in some post-communist systems. When it comes to EU criminal procedure codes (CPCs), the mandatory presence of witnesses exists in Croatian, Slovenian and Bulgarian CPC. The study is showing influence of former Russian CPC in post-Soviet era as well as the influence of former Yugoslav CPC. Regarded as the relic of the past, these procedural guarantees of home inviolability in the cases of home search should be reassessed and improved.*

*In the context of COVID crisis, mandatory presence of witnesses presents challenge for the protection of suspect's and witnesses' health. Observed from the suspect's right to protect his health or the witnesses' right not to expose themselves to potentially health endangered situations, find-*

*ing witnesses presents even more complexed mission. If the suspect is in COVID quarantine and the search must be conducted, can witnesses be forced to enter such premises? In case that suspect requires fully vaccinated witnesses who can present valid COVID Certificate or negative PCR test, how could his requirement be fulfilled?*

*The possible solution for both evidence law and health reasons could be the use of modern technologies such as video recording that could replace mandatory witnesses presence. Finally, it would be more appropriate to respect the suspect's choice on protection of his rights or to use modern technical means or defence lawyer, as in other investigative actions in criminal procedure.*

***Keywords**: healt, home search, right to privacy, two witnesses, two-witness rule, two witnesses*

## 1. INTRODUCTION

Since every Member State has its own way of coping with pandemic and enacting anti-pandemic measures, those can be considered in the context of conducting evidentiary actions. The incidence of the two-witness rule in EU Member States, possible historical foundations as well as the safety and health risks for witnesses during home searches, are some issues to be considered in the light of this „new normal" pandemic situation the world has been for the last two years. In order to place results on the prevalence of two-witness rule and draw some conclusions, comparative study of EU criminal procedure codes was conducted. Survey of some other criminal procedure codes outside the EU (Russian and former Yugoslav CPC) has been conducted as well in order to determine their possible impact. Some EU states prescribe mandatory presence of citizen witnesses during the search of the suspect's home and this rule can be disputable from the aspect of protection of privacy and health rights. Essentially it may pose infringement of citizen's and suspect's fundamental rights.

Mandatory presence of citizen witnesses at home search in Croatian criminal law is prescribed in Art. 254 para. 2 of the Criminal Procedure Act,[1] and is also prescribed by Art. 34 para. 3 of the Constitution of the Republic of Croatia.[2] Police officers gather relevant information through their observations important for establishing decisive facts in criminal proceedings. There are more actions in which police observation is the main way of gathering information. Thus, in case of danger of delay, the police may perform urgent evidentiary actions before the be-

[1] "At least two citizens of age shall be present as witnesses during the search of a dwelling or other premises."; Criminal Procedure Act, Official Gazette No. 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19

[2] "A tenant or his/her authorised representative shall be entitled to be present during the search of his/her home or other premises together with the mandatory presence of two witnesses."; Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14

ginning of criminal proceedings, such as crime scene investigation (Art. 304 of the CPC). Conducting a crime scene investigation involves collecting of traces found through the observation of a police officer at the crime scene. Furthermore, police officers are authorized to conduct an inspection under police law (Art. 73-75 of the Police Duties and Powers Act) or as a part of an official criminal investigation (Art. 207 of the CPC). These actions are essentially no different from a home search because police officers also use their observations to gather information, but here the presence of two witnesses is not required. The question may be asked whether it is necessary to introduce civil supervision of other police actions that infringe the rights of the individual. Guided by this idea, the presence of citizens as witnesses could be extended to the crime scene investigation and inspection when they are carried out in the home, because during these actions the facts and traces important for establishing the truth in criminal proceedings can be found, too. *Trechsel* states that the search is an old, archaic element of criminal investigation.[3]

*Krapac* states that the rule on the mandatory presence of two witnesses is "an obstacle to possible abuses of state power",[4] and the person has the legal right to be present during the search of his home due to the realization of the guarantee of the fundamental right to inviolability of the home.[5] A person whose home is searched cannot waive the mandatory presence of witnesses if he or she wishes to protect his or her privacy. Witnesses to the search cannot be excluded from participating in certain activities during the search of the home because the legal order imposes a legal duty on them to attend the search.[6] The role of home search witnesses according to our CPC is guarantee because their presence guarantees the legality of investigation and ensures the credibility of the evidence. When choosing home search witnesses, citizens do not need to meet any special conditions as there are no rules or guidelines governing their selection. Thus, the situation arises that the selected witnesses, who do not have any legal or criminal investigation knowledge, guarantee the legality of the evidentiary action, on which the legality of all found evidence consequently depends. When it comes to the personal safety and health of search witnesses, the consistent application of this principle requires that citizens expose themselves to potentially dangerous and unsafe situations. Due to the nature of their duty, police officers are obliged to expose themselves to a

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3 Trechsel, S., *Human Rights in Criminal Proceedings*, Volume XII/3, Oxford University Press, Oxford, 2006, p. 558

4 Krapac, D., *Načela o pribavljanju okrivljenikova iskaza te pretraga stana i prostorija u krivičnom postupku prema novom ustavnopravnom uređenju u Republici Hrvatskoj*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 41, No. 1, 1991, p. 13

5 Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, VII. neizmijenjeno izdanje, Narodne novine, Zagreb, 2015, p. 328

6 *Ibid.*

greater extent to precarious situations, but such responsibility cannot be expected from citizens. The COVID-19 pandemic requires consideration of the application of this rule of mandatory presence of witnesses from the aspect of endangering their health. By requiring the mandatory presence of citizens to witness potentially health-threatening situation in order to control the legality of the police action, the legislator accepts possible endangerment of the health of his citizens. At the same time, citizens are often unaware of the seriousness of the action they are witnessing.

## 2. TWO-WITNESS RULE IN EU CRIMINAL PROCEDURE CODES

As this is one rare procedural legal guarantee in the EU legislation of the Member States, a comparative study of procedural norms related to the home search in all EU Member States was conducted. The results of the research have shown that, among EU Member States only Croatia, Slovenia and Bulgaria have this rule on the mandatory presence of two witnesses in a search of a home. Part of the comparative research included other European countries that are not members of the EU that will be considered in concluding remarks and analysis of the results.

### 2.1. Croatia

According to the provisions of Art. 240 para. 2 of the CPC, search of home and other premises is a legally regulated action conducted for the purpose of finding the perpetrator of a criminal offence, an object or traces important for criminal proceedings where it is probable that they are located in a specific place, in the immediate surroundings of or on a certain person.[7] The action presupposes entering the home and searching for objects or persons, and includes the search of movables and all persons if it is stated in the search warrant or if in relation to them exist conditions for search without a warrant (Art. 252 para. 3. CPC). If the crime scene is in a home, a home search may be conducted along with the crime scene investigation. Since the protection of the inviolability of the home is a norm of constitutional rank, the CPC contains detailed regulations on material and formal conditions for conducting a search of the home, its conducting and recording, as well as procedural consequences in case of serious violations of these provisions.[8]

Our CPC does not state the grounds for exclusion of evidence when it comes to the presence of two witnesses at a home search, and the said legal provision (Art.

[7] Krapac, 2015, *op. cit.*, note 5, p. 316

[8] *Ibid.*

254 para. 2) does not state that witnesses must be present together, but this rule was developed by case law since "simultaneous" and "joint presence" of witnesses was often crucial in assessing legality. Persons whose premises are being searched may attend a home search, but two adult citizens must be present as witnesses.[9] Witnesses must be warned before the search that they have to monitor how the search is conducted and that they have the right to make remarks before signing the search record if they think that the search was not conducted in the manner prescribed by the law or that the content of the search record is incorrect (Art. 254 para. 3).

### 2.2. Slovenia

Slovenian CPC[10] in Art. 216 para. 3 prescribes the mandatory presence of two adult witnesses in cases of search of a house or person. Only women can be witnesses when searching a woman. Prior to the search, witnesses are warned to carefully observe how the search is conducted and to have the right to object to the contents of the record before signing it if they think it is inaccurate.[11] This provision is very similar to Croatian Art. 254, para. 2 and 3. The important difference is that the Slovenian CPC still prescribes the mandatory presence of witnesses for personal search as well.[12]

### 2.3. Bulgaria

Bulgarian Penal Procedure Code[13] in Art. 137 generally defines who witnesses of procedural actions are and when their presence is mandatory. The law uses the

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9 The mandatory presence of two witnesses is also prescribed by the CPC in the case of opening retained shipments in Art. 339 para. 5

10 Zakon o kazenskem postopku, Uradni list RS, št. 32/12 – uradno prečiščeno besedilo, 47/13, 87/14, 8/16 – odl. US, 64/16 – odl. US, 65/16 – odl. US, 66/17 – ORZKP153, 154 in 22/19

11 Art. 216 para. 3. When a house search or personal search is conducted, two adult persons shall be present as witnesses. A female person may only be searched by a female person, and the witnesses of the act may also only be female. Before the search begins, the witnesses shall be instructed to observe closely how the search is conducted, and shall be informed of their right to make objections, if any, to the content of the record of the search if they believe that it is not correct, before they sign it

12 This rule existed in the Yugoslav Criminal Procedure Code, and the new Croatian CPC no longer included it as mandatory. The former Yugoslav Criminal Procedure Code of 1976 in Art. 208 para. 3 states: Two adult citizens are present as witnesses during the search of the apartment or person. The search of a female person is performed only by a female person, and only female persons will be taken as witnesses. Jemrić, M., *Zakon o krivičnom postupku*, IV. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 1977, p. 289

13 Penal Procedure Code of the Republic of Bulgaria (2006, amended 2011), Promulgated, State Gazzet No. 83/18 Oct 2005, amended State Gazzet No. 46/12 Jun 2007, 109/20 Dec 2007, 69/5 Aug 2008,

term *witnesses of procedural actions*. Thus Art. 137 stipulates that in pre-trial proceedings inspection, search, investigative experiment, identification of persons and objects shall be carried out in the presence of witnesses of procedural actions. The witnesses of the procedural actions shall be selected by the investigating authority, which shall perform the respective action of investigation among the persons who have no other procedural capacity and are not interested of the outcome of the case. After being summoned to participate in the action, they must remain as long as their presence is required, and if they do not perform their duties as witnesses of procedural action, they shall bear liability as witnesses. Witnesses of procedural actions have the following rights: to make notes and objections on the admitted incompleteness and breaches of the law, to request corrections, amendments and supplementations of the records, to sign the record under special opinion, stating in writing their reasons for this, to require cancellation of the acts, which harm their rights and legal interests and to obtain respective remuneration and coverage of the made expenses. The authority conducting a certain investigative action is obliged to inform them of these rights.

Art. 162 para. 1 stipulates that the search and seizure of objects must be carried out in the presence of *witnesses of the act* and the person using the premises or an adult member of his family. If that person or a member of his family cannot be present, the search and seizure shall be conducted in the presence of the house manager or a representative of the municipality or the town hall. In accordance with Art. 163 the opening of seized and sealed computer data media must also be carried out in the presence of witnesses to the proceedings. As far as the admissibility of evidence is concerned, the use of evidence that has not been collected or presented in accordance with the Law is not allowed (Art. 105, para. 2). The Code does not explicitly state the possibility of technical recording of the search, but Art. 241 states that other investigative actions may be audio and video recorded which includes video recording of the home search as well.

As for some other circumstances of the search, Art. 163 para. 3 of the Bulgarian CPC stipulates that the authority conducting the search shall prohibit the persons present to come into contact with other persons or among themselves and to leave the premises until the search is over. The body conducting the search must take the necessary measures so that circumstances from the private life of citizens are not made public (Art. 163, para. 5). Although *Trendafilova* describes the Bulgarian criminal procedure, apart from the legal grounds for conducting the search

109/23 Dec 2008, 12/13 Feb 2009, 27/10 Apr 2009, 32/28 Apr 2009, 33/30 Apr 2009, 15/23 Feb 2010, 32/27 Apr 2010, 101/28 Dec 2010, 13/11 Feb 2011

of premises, she does not describe in more detail the manner of conducting the action and the mandatory presence of witnesses.[14]

## 3. INFLUENCE OF RUSSIAN AND FORMER YUGOSLAV CPC

As the occurrence of this rule is particularly geographically limited and distributed, a comparative study of some other criminal procedure codes outside the EU has been conducted. Russian Criminal Procedure Code defines a special category of participants in the proceedings called an attesting witness or the witness of an investigative action (Russian *ponyatiye)* - a person who is not interested in the outcome of a case and who is invited by the investigator to confirm the fact that an investigative action has been conducted and to confirm its content, process and results (Art. 60 para. 1).[15] Attesting witnesses can not be minors, participants in criminal proceedings, their close relatives and officials of the executive authority involved in investigation activities. According to the provisions of Russian law, an attesting witness has the right to participate in an investigative action and to make statements and comments on the investigative action, which shall be entered into the record, to get acquainted with the record of the investigative action, in whose performance he has taken part, to file complaints against the actions and decisions of the investigator and the prosecutor, restricting his rights (Art. 60 para. 3). The attesting witness must respond to the summons and may not publish information from the investigation, and if he publishes it, he will be liable under the Russian Criminal Code (Art. 60 para. 4).[16] Witnesses are often unaware of their rights and duties and the legal consequences of participating in the investigation because they are only invited to be present and sign the record, and by deceiving them police officers avoid their refusal to participate in the search because the action can take hours, *Smyshlyayev* explains.[17]

*Foynitskiy* believes that this rule is a relic of an old institute of mandatory public participation in criminal proceedings to ensure the credibility of actions taken by

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14 Trendafilova, E., *The Penal Procedure Legislation of the Republic of Bulgaria*, in: Pavišić, B., Bertaccini, D., Le altre procedure penali - Transizione dei sistemi processuali penali, Vol. 1, G. Giappichelli Editore, Torino, 2002, p. 121-186

15 Criminal-Procedural Code of the Russian Federation No. 174-Fz of December 18, 2001, amended 2012

16 Bezlepkin, B. T., *Kommentariy k ugolovno protsessual'nomu kodeksu Rossiyskoy Federatsii*, Prospekt, Moskva, 2014, p. 119

17 Smyshlyayev, A. S., *The Issues of Legal Status of a Witness under the Legislation of the Republic of Kazakhstan*, Asian Social Science, Vol. 11, No. 5, Canadian Center of Science and Education (Online Published), 2015, pp. 320-321

state authorities due to lack of trust in the police.[18] *Radchenko et al.*, in a commentary of the Russian CPC pointed out that people suffering from mental illness or other physical disabilities (hearing and vision deficiency etc.) due to which they cannot effectively monitor the action, and people who cannot read and write in Russian, cannot be attesting witnesses.[19] The Federal Law from 2013 changed the provisions of the Russian CPC and one of the most significant changes was the reduction of the mandatory participation of witnesses in investigative actions.[20] The amendment to the CPC was proposed by former Russian President Medvedev, who considered the institute of attesting witnesses to be a remnant of the past that must adapt to the present.[21]According to Art. 170 of the amended Act, the participation of witnesses is now mandatory in case of search, seizure of data on electronic media, personal search and identification, while in seven other investigative actions witnesses may participate if the investigator deems necessary.[22]

The Criminal Procedure Code of the former Yugoslavia of 1976 in Art. 208 para. 3 prescribed the mandatory presence of two adult citizens as witnesses to the search of premises or person.[23] After the independence of the Republic of Croatia in 1991, the Law on the Adoption of the Criminal Procedure Code was passed,[24] which applied except for the amended provisions. The provision of the previous CPC related to the search was amended, but the mandatory presence of two witnesses during the search of a home or other premises remained.

A comparative study of the criminal procedure codes of the former USSR and the former Yugoslavia states revealed some similarities between Russia and 6 post-Soviet states (Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Ukraine, Uzbekistan) and similarities between the five states of the former Yugoslavia (Croatia, Slovenia, Serbia, Montenegro, Bosnia and Herzegovina). The Bulgarian CPC was very likely influenced by the Russian CPC because Bulgaria, due to its geopolitical position, gravitated to the influence of the former USSR. *Pavišić* pointed out that the legislative systems of the Czech Republic, Slovakia, Hungary, Slovenia, Croa-

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18 Foynitskiy, I. Y., *Kurs ugolovnogo sudoproizvodstva*, Tom 2, Alfa, Sankt-Peterburg, 1996, p. 259

19 Radchenko, V. I.; Tomin, V. T; Polyakov, M. P., *Kommentariy ugolovno protsessual'nomu kodeksu Rossiyskoy Federatsii*, 2. izdanje, Urait, Moskva, 2007, p. 236

20 Leynova, O. S., *Problemy uchastiya ponyatykh v sledstvennykh deystviyakh posle vneseniya izmeneniy v UPK RF*, Vestnik Sankt-Peterburgskogo universiteta MVD Rossii, No 3 (59), 2013, p. 82

21 Migal, S. D., *Ob otmene instituta ponyatykh v ugolovnom protsesse rossiyskoy federatsii*, Tverskoy gosudarstvennyy universitet, Vestnik TvGU, Seriya "Pravo", 2013, Vypusk 34, p. 247

22 *Ibid.*

23 The presence of two witnesses is no longer required for a personal search in Croatia, while some countries still have such a provision, such as Slovenia (Art. 216 para. 3 of Slovenian CPC)

24 Official Gazette No. 53/1991

tia, Bosnia and Herzegovina, Serbia, Montenegro, Northern Macedonia, Albania, Kosovo and Bulgaria were forcibly subjected to communist rule, and the transition of criminal proceedings in the late 20th century was the result of intensive comparative analyzes.[25] According to *Pavišić*, the reform of the criminal procedures of the former socialist countries took place in a period of fundamental social, political and economic changes, and most countries implemented the reform in two stages.[26] In the first instance, pragmatic changes were made: a simple and effective way of prosecuting crimes was defined, procedural elements of the socialist regime were removed, and the protection of individual rights was affirmed. *Pavišić* points out that the new criminal proceedings in the first period were a temporary legislative solution in young democracies, and in the second stage dogmatic changes followed (or should have followed) which represent regular criminal procedure reform as a necessity for European countries.[27]

## 4. SAFETY AND HEALTH RISKS FOR WITNESSES

The ability to testify has been considered a special honor in history and has been an indicator of a person's credibility and reputation. Venetian documents state that testifying was a difficult experience, sometimes even dangerous, and witnesses lost their precious time for which they received no compensation.[28] Police officers are obliged to expose themselves to danger in order to protect the lives of others, but citizens cannot be expected to do so. Any entry into the home of a potential perpetrator, especially in the case of violent crimes, is a potential safety risk. For this purpose, police officers are equipped with firearms, safety vests and other protective police equipment. Citizen witnesses enter the home with police officers and the precondition for starting the search is that there is no danger for police officers or witnesses, but there is no absolute safety. Caution should always be exercised when dealing with known perpetrators facing probable prosecution. With all this in mind, it is not surprising that citizens are reluctant to witness a search of home because they are consciously exposing themselves to potential danger. In human nature is the need for self-preservation and willful consent to enter the home of a perpetrator of a crime therefore defies the natural human need to be in a safe environment.

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25 Pavišić, B., *Transition of Criminal Procedure Systems*, Vol. 2, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2004, p. XXXI

26 *Ibid.*, p. LIII

27 Pavišić, 2004, *op. cit.*, note 25, p. LIII

28 Cristellon, C., *Marriage, the Church, and its Judges in Renaissance Venice, 1420–1545*, Early Modern History: Society and Culture, 2017, p. 84

In the light of „new normal" and pandemic, law enforcement officers are at a heightened risk of exposure to the COVID-19 virus due to their close contact with citizens, noted *Jennings and Perez*. In order to protect police officers, the American Center for Disease Control and Prevention (CDC) defined recommendations for law enforcement agencies to protect officers and the public.[29] One of the CDC's recommendation is social distancing which, given the nature of police work, cannot be easily carried out. On the other hand there is a tendency of limiting sharing COVID-19 data with law enforcement agencies. According to *Molldrema, Hussain and McClelland,* it is against best practice and public interest to share identifiable health data with police.[30] This is in line with the protection of personal data, especially when it comes to health data. If sharing COVID-19 health data is prohibited, the question is how witnesses can be warned of their possible health endangerment in the case of a COVID-19 positive suspect in question. Sharing COVID-19 data with police officers poses many risks and the pandemic does not allow the suspension of basic rights of control over the disclosure of health data outside the health system, concluded *Molldrema, Hussain and McClelland*.[31] If there is a strict limitation of sharing these data with law enforcement officers, then these rules apply to the citizens even more. One can conclude how the benefits of disclosing health information do not outweigh the risks of violating the right to privacy and health of either police officers or citizen witnesses. On the other hand, *Kugler et al.* conducted a survey of American local police departments in 2020 and they concluded that there was no national effort to connect pandemic surveillance against COVID-19 with police enforcement of stay-at-home and social distancing orders.[32] If there was no organized national streaming for the enforcement of these measures, it is hard to expect the implementation of some kind of measures that would regulate COVID-19 and the presence of citizen witnesses during home search.

*Rooney and McNicholas* concluded that Irish police officers are exposed to an increased level of psychological distress in time of COVID-19 pandemic which presents an occupational hazard associated with their profession.[33] The pandemic

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29 Jennings, W. G.; Perez, N. M., *The immediate impact of COVID-19 on law enforcement in the United States*, American Journal of Criminal Justice, Vol. 45, No. 4, 2020, p. 690

30 Molldrem, S.; Hussain, M. I.; McClelland, A., *Alternatives to sharing COVID-19 data with law enforcement: Recommendations for stakeholders*, Health Policy, Vol. 125, No. 2, 2021, p. 135

31 *Ibid.*, p. 139

32 Kugler, M. B.; Oliver, M.; Chu, J.; Lee, N., *American Law Enforcement Responses to COVID-19*, 112 Journal of Criminal Law and Criminology Online, Northwestern Public Law Research Paper No. 20-25, 2020, p. 30

33 Rooney, L.; McNicholas, F., *'Policing' a pandemic: Garda wellbeing and COVID-19*, Irish Journal of Psychological Medicine, Vol. 37, No. 3, 2020, p. 195

exposed officers to indeterminate levels of physical and psychological threat,[34] but that exposure to health threat cannot be imposed on citizen witnesses. *Stogner et al.* state that COVID-19 pandemic "altered norms for all members of society, but its effects on first responders have been particularly profound" and it is assumed that COVID-19 policing is a significant stressor for police officers.[35] This new circumstances have emerged as "the new normal" operational conditions, but there has been no additional support mechanism for police officers coping with them. Since there are no additional measures to combat COVID-related operational conditions for police officers, even less there are recommendations for police officers how to conduct certain actions in which they have to come to close personal contact with citizens, like home search and presence of citizen witnesses. As *Stogner et al.* concluded, COVID-19 pandemic affected the mental health of law enforcement officers and, although it is impossible to completely remove stress from police work, training on positive coping skills should help them deal with the stress they face without negative side effects.[36] Possible health endangerment of citizen witnesses presents stressor both for police officers in charge of the action and citizens who should be present during the home search. These are certainly not normal circumstances and conditions to which citizens should be exposed.

*Drew and Martin* state that police officers are more at risk of physical and psychological harm and „COVID-19 must be recognized as a critical event that is likely to induce trauma responses."[37] Another significant factor can be noticed - police officers worry about bringing home the virus to their families so police work is directly impacting the health and safety of their family members, as *Drew and Martin* and *Grover et al*. stated.[38] In this regard, a parallel can be drawn with potential endangering the lives of the families of citizen witnesses of home search. *Frenkel et al.* in 2020 conducted an online survey on 2567 police officers from five European countries in order to research the impact of the COVID-19 pandemic.[39] The results showed that police officers seemed to tolerate pandemic

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34 *Ibid*., p. 192

35 Stogner, J.; Miller, B. L.; McLean, K., *Police stress, mental health, and resiliency during the COVID-19 pandemic*, American Journal of Criminal Justice, Vol. 45, No. 4, 2020, p. 718

36 *Ibid.*, pp. 727-728

37 Drew, J. M.; Martin, S., *Mental health and well-being of police in a health pandemic: Critical issues for police leaders in a post-COVID-19 environment*, Journal of Community Safety and Well-Being, Vol. 5, No. 2, 2020, p. 31

38 *Ibid.*, p. 33; Grover, S.; Sahoo, S.; Dua, D.; Mehra, A.; Nehra, R., *Psychological impact of COVID-19 duties during lockdown on police personnel and their perception of the behavior of people: an exploratory study from India*, International Journal of Mental Health and Addiction 20, 2020, p. 839

39 Frenkel, M. O.; Giessing, L.; Egger-Lampl, S.; Hutter, V.; Oudejans, R. R.; Kleygrewe, L.; Plessner, H., *The impact of the COVID-19 pandemic on European police officers: Stress, demands, and coping resources*, Journal of Criminal justice, Vol. 72, 2021, p. 1

stress with slight decreases in strain over time and risk of infection and deficient communication emerged as main stressors.[40] They concluded that legislating and communicating unambiguous health safety policies and clear instructions for action should reduce uncertainty and stress.[41] Similar recommendations may apply to citizen witnesses and it should be borne in mind that police officers are partly responsible for the lives and health of the witnesses they call. The study of *Grover et al.* suggested as well that COVID-19 pandemic has led to significant stress and negative emotional response among police officers.[42] *Brooks and Lopez* stated that traditional police actions like search in pandemic present a substantial risk of infection for police officers, suspects and citizens which led to an unusual paradox that police practice which usually enhances public safety is now most likely to endanger public safety.[43] They concluded that law enforcement agencies should suspend enforcement of requiring close proximity or physical contact between police officers and citizens, except in cases where it would create an imminent danger of death or serious bodily injury.[44] In line with that view, the presence of citizen witnesses during home search is directly related to endangering their health. If there are clear recommendations that police officers must limit their close actions towards citizens as part of preventing the spread of pandemics, there should be clear instructions on how to minimize this risk for witnesses of procedural action.

## 5. CONCLUSION

Based on the conducted research, it can be concluded that the mandatory presence of two adult citizens as witnesses in a home search is a rarity in the legal systems of the Member States, which is very likely a relic of the past. In relation to other actions carried out by the police, this rule is a reflection of inequality, because for the credibility of the results, additional procedural formalities would be required for other police actions that may result in finding evidence, too.

The fact that no modern European criminal justice system has such a restrictive provision is certainly a significant circumstance that must be interpreted in the light of the legal sources on which it originated. Member States that do not have this rule certainly do not have a lower level of protection of suspects' rights and human rights in criminal proceedings in general. It can be assumed that in the sec-

40 *Ibid.*

41 Frenkel *et al.*, 2021, *op. cit.*, note 39, p. 13

42 Grover *et al.*, 2020, *op. cit.*, note 38, p. 840

43 Brooks, R.; Lopez, C., *Policing in a time of pandemic: Recommendations for law enforcement*, COVID-19 Rapid Response Impact Initiative, White Paper 7, Edmond J. Safra Center for Ethics, Georgetown University Law Center, 2020, pp. 2, 9

44 *Ibid.*

ond step of the transformation of the former socialist criminal justice system into a modern criminal procedure, there was no dogmatic consideration of the need for such control of the lawful conduct of action. Citizens' participation in investigation dates back to ancient historical times, as evidenced by records of a home search in the case of theft under ancient Roman private criminal law in the Code of Twelve Plates.[45] Considered in the context of that historical time and the private nature of theft, the presence of citizen witnesses as a form of supervision over the action made sense. Viewed from the aspect of modern criminal law, mandatory civil supervision of the legality of police work does indeed seem like an obsolete remnant of ancient times.

Viewed from the aspect of protection witnesses' health, in case of COVID-positive suspect witnesses must not be forced to enter the premises and take part in the search of home. If the suspect would require fully vaccinated witnesses who can present valid COVID Certificate or negative PCR test, this would be problematic from the point of sharing health data with unauthorized persons outside the health system. As we have seen, sharing health data with police officers could present violation of rights to privacy, so sharing COVID-related health data with citizens could be even more questionable. The best longterm solution would be the elimination of mandatory citizen presence during home search which would have multiple effect - on the citizens' safety and health, as well as on the safety and health of police officers and suspect in question. The existence of this provision should be reconsidered, as well as the possibility of improving control over police enforcement in other ways, such as mandatory video recording, strengthening the role of defense counsel or introducing the mandatory presence of the suspect or his representative.

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UDK 339.923(4-67EU:497)
342.56:004.7]:614.4
Review article

# NEW APPROACH TO THE EU ENLARGAMENT PROCESS – WHETHER COVID-19 AFFECTED CHAPTER 23 REQUIREMENTS?

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***ABSTRACT***

*The EU enlargement policy requires creation of the new institutional organization, alignment of legal acts, increasing capacities of administration in the candidate countries. In relation to the Western Balkans the conditionality has an increased focus on good governance criteria, particularly maintenance of the rule of law, an independent judiciary, and an efficient public administration.*

*To address raised concerns of the EU accession process in the Western Balkans as a box-ticking exercise, the European Commission in February 2018, adopted the Credible Enlargement Perspective for an Enhanced EU Engagement with the Western Balkans' strategy, which introduced some renewed policy objective on the future enlargement of the EU including fundamental democratic, rule of law and economic reforms. In March 2020 the Council of the EU officially endorsed Commission proposal for a new enlargement methodology that is based on grouping the negotiation chapters in clusters, based on their interconnection, which requires tangible progress in all chapters merged to a cluster.*

*The above-mentioned introduction of a new methodology and the decisions of the Western Balkans candidate countries to apply it, correspond in time with the ongoing Europe and worldwide struggle to overcome challenges imposed by COVID-19 outbreak. The response to the pandemic influenced on the functioning of judiciary across the world and the rule of law in general. To respond to pandemic EU members states accepted new standards in relation to*

*judiciary which tend to be threat or suspension for fundamental rights protection and right to fair trial. Outbreak of COVID-19 revealed new trends in rule of law like limited access to the lawyer in criminal cases, use of IT tools for trials, and cancelation or limitation of public hearings. The scope and modalities of such rule of law exemptions differ across the EU member states.*

*Introduced measures and responses shed a completely new light on the issues of relevant standards in the accession process and modality to be addressed and implemented in the candidate countries. Finally, this also triggers the issue of evaluation and assessment of the reform achievements in candidate countries by EC when measuring the progress. In the analysis of the abovementioned issues the authors assessed whether derogation of the well-established rule of law principles influenced on EU accession requirements towards candidate countries and whether they temporary changed understanding and implementation of the fundamental rights or made permanent transformations in understanding of rule of law requirements.*

***Keywords**: COVID-19 pandemic, EU enlargement, fundamental rights, judiciary, rule of law, Western Balkans*

## 1. INTRODUCTION

The enlargement of the European Union (EU) is the main political process for the EU and for international relations in Europe.[1] EU enlargement has impact both on the political structure of the EU and on the EU's institutional set-up.[2] In light of candidate countries it has impact on institutional organization, changes of legislative framework, and increased capacities of public administration.

For the enlargement the EU needs effective conditionality to ensure that new candidate countries reach needed level of preparation to enable smooth functioning of the EU internal market and decision-making process.[3] In relation to the Western Balkans the conditionality has an increased focus on good governance criteria, particularly upholding of the rule of law, an independent judiciary, and an efficient public administration.

To address raised concerns of the EU accession process in the Western Balkans as a box-ticking exercise, in March 2020 the Council[4] of the EU officially en-

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1 Schimmelfennig, F.; Sedelmeier, U., *Theorizing EU enlargement: research focus, hypotheses, and the state of research*, Journal of European Public Policy, Vol. 9, No. 4, 2002, pp. 500-528, [DOI: 10.1080/13501760210152411]

2 Schimmelfennig, F.; Sedelmeier, U., (eds.), *The Politics of European Union Enlargement – Theoretical approaches,* Routladge, 2011, p. 4

3 Steunenberg, B.; Dimitrova, A., *Compliance in the EU enlargement process: The Limits of conditionality,* European Integration online Papers, Vol 11, No. 5, 2007, pp. 1-18

4 General Secretariat of the Council, Enlargement and stabilization and association process, Council conclusions, 7002/20, Brussels, 25 March 2020

dorsed Commission proposal[5] for a new enlargement methodology that is based on grouping the negotiation chapters in clusters, based on their interconnection, which requires tangible progress in all chapters merged to a cluster. The methodology introduces stronger political governance to the enlargement process. However, political conditionality is now explicit and institutionalised, which will lead to the shifting of the process from a bureaucratic approach. In addition, the performance-based approach in relation to the Instrument for Pre-accession Assistance (IPA), together with the reversibility clause[6] represent powerful incentives.

The introduction of a new methodology and the decisions of the Western Balkans candidate countries to apply it, relate in time with the ongoing struggle to overcome challenges imposed by COVID-19 outbreak. The pandemic has seriously impacted functioning of courts across Europe and Western Balkans. Due to the introduction of social distancing and closure of courts, there has been an increased use of remote justice tools such as video and audio conferencing. Outbreak of COVID-19 revealed new trends in rule of law like limited access to the lawyer in criminal cases, use of IT tools for trials, cancelation or limitation of public hearings, etc. The scope and modalities of such rule of law exemptions differ across the EU member states. The response to pandemic tends to be threat or suspension for fundamental rights protection and right to fair trial, especially defendants' rights.

The subject of the paper is analysis of influence of these new trends on relevant standards in the accession process and modality to be addressed and implemented in the candidate countries. First part of the paper presents review of the EU enlargement process in the Western Balkans, challenges in application of conditionality and measuring progress in the reform of justice sector. After twenty years of the accession process the overall assessment of the judicial reforms impact in Western Balkan countries is moderate. Slow pace of reforms were additionally jeopardize by the pandemic and measures taken by authorities. Considering criticism of measure, in the second part authors analysed impact of COVID-19 on fundamental rights and specifically procedural rights of defendant, both in the EU countries and Western Balkans. While the third part of the paper relates to the assessment whether derogation of the well-established rule of law principles influenced on EU accession requirements towards candidate countries and whether they temporary changed understanding and implementation of the fundamental rights or made permanent transformations in understanding of rule of law requirements.

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5 European Commission, Enhancing the accession process – A credible EU perspective for the Western Balkans, 5 February 2020

6 The possibility to adopt measures sanctioning any serious or prolonged stagnation or backsliding in the reform process

## 2. EU ENLARGEMENT PROCESS IN WESTERN BALKANS

The accession of the Western Balkans is governed by the rules defined at the Copenhagen European Council in 1993.[7] In the Conclusion of the Presidency the heads of state or government set a series of membership requirement that the candidate countries which to join the EU should fulfil to become a member. The criteria included stability of the institutions guaranteeing democracy, the rule of law human rights and respect for and protection of minorities as political criteria. [8] Economic criteria included functioning market economy and capacity to cope with competitive pressure and market forces within the Union. Copenhagen criteria were gradually developed and extended. Consequently, 1995 European Council held in Madrid adopted conclusions in which is highlighted that candidate countries in addition to the political commitment to adopt EU acquis have to increase administrative capacities to guarantee efficient applications of the EU acquis.[9]

For the Western Balkans the two other European Councils are important for clarification of enlargement criteria. The Thessaloniki European Council held in June 2003[10] reiterated its determination to fully and effectively support the European perspective of the Western Balkans countries and for the first time recognised that Western Balkan countries would become an integral part of the EU, once they meet the established criteria. At the 2003 Thessaloniki European Council, the Western Balkan countries were offered to sign Stabilisation and Association Agreements (SAAs) as a framework within which they would conduct reforms and fulfil conditions required for the EU membership.[11] The SAAs included provisions on adoption of the EU acquis, but also requirements for regional cooperation and economic development.[12]

The second relevant document for the Western Balkan countries is Presidency conclusions from the European Council held in Brussels on 14-15 December 2006, which integral part present Enlargement strategy. The European Council

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7 European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93/ REV 1

8 Hillion, C., *EU Enlargement*, in: Craig, P., De Burca, G., (eds.), *The Evolution of EU Law,* Oxford, 2011, pp. 187–217

9 Matić Bosković, M., *Obaveza usklađivanja sa pravnim tekovinama Evropske unije*, in: Škulic, M; Ilić, G.; Matić Bošković, M., (eds.), Unapređenje Zakonika o krivičnom postupku: *de lege ferenda* predlozi, Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca, 2015, pp. 149-158

10 European Council in Copenhagen, 19-20 June 2003, Presidency Conclusions, 11638/03

11 Bieber, F., (ed.), *EU Conditionality in the Western Balkans,* Abingdon: Routledge, 2017

12 Miščević, T.; Mrak, M., *The EU Accession Process: Western Balkans vs. EU-10*, *Politička misao*, Vol. 54, No. 4, 2017, pp. 185-204

agreed that basis for a renewed consensus on future enlargement strategy is based on consolidation, conditionality and communication. The European Council endorsed stricter conditionality at all stages of negotiations, as a lesson learned from previous enlargement processes, especially with Romania and Bulgaria.[13] Conditionality is methodology that is applied during accession process to ensure that new member states can absorb requirements incorporated in the EU acquis and implement obligations from the membership.[14]

The Enlargement strategy highlighted that difficult issues such as administrative and judicial reforms and the fight against corruption will be addressed early in the accession process to ensure success. Judicial reforms include ensuring the independence and impartiality of judiciary, guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners, while laws are clear, publicised, stabile, fair and protect human rights.[15]

Although the Strategy refers to the whole region, unlike previous post-Cold war enlargements, the EU stressed that compliance with the accession criteria for Western Balkan countries will be assessed for each country separately.[16] It is important to stressed that the EU refrained from setting any target dates for the accession until the negotiations are close to completion.

Due to external and internal factors, such as financial crisis in 2008, followed by migrants' crises in 2015, the enlargement was not in the focus of the EU institutions and member states. In addition, the Western Balkan countries slowly implemented reforms, while some even backsliding in reforms. When Croatia started negotiations, the EU had already learned from experience with Bulgaria and Romania in which significant shortcomings remain after accession to the EU. Therefore, the European Commission revised approach and upgraded the acquis to include areas that deemed problematic, justice and fundamental rights. Learning

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13 European Commission Progress reports emphasized shortcomings of the progress in the area of judiciary and internal affairs, including lack of institutional capacities. The European Commission even questioned if countries would become members in 2007 as it was planned. See: European Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, Brussels, 26 September 2006

14 Smith, K. E., *Evolution and Application of the EU Membership Conditionality*, in: Cremona, M. (ed.), The Enlargement of the European Union, Oxford University Press, Oxford 2003, pp.105–140

15 Matic Boskovic, M., *Role of Court of Justice of the European Union in Establishment of EU Standards on Independence of Judiciary*, in: EU 2020 – Lessons from the Past and Solutions for the Future, Vol. 4, 2020, pp. 329-351

16 Bechev, D., *Constructing South East Europe: The Politics of Balkan Regional Cooperation,* Hampshire: Palgrave Macmillan, 2011

from Croatian experience, Chapters 23 and 24[17] are open the first and close at the end of the negotiation process to allow sufficient time for completing of reforms in area of judiciary, fundamental rights, anti-corruption and organised crime, freedom and security. That approach was applied with Montenegro that opened accession negotiation in 2012 and Serbia that opened in 2014. Nevertheless, even that approach did not produce expected results with the Western Balkan states. Over the two decades Western Balkan countries introduced significant legislative and institutional changes to strengthen independence of judiciary and improve efficiency and quality of the justice system as EU accession requirements. However, citizens across Western Balkans, except Kosovo, are not convinced that the previous reforms resulted in meaningful improvements in the judiciary.[18] Majority of reforms included amendments to the constitutional and legislative framework to ensure alignment with EU standards in rule of law area, and establishment of the new institutional set-up (i.e. judicial council, judicial training centre, corruption prevention institution). The biggest challenge presented lack of the implementation of law in practice. Furthermore, establishment of judicial councils and training academies without adequate internal reform has led to the creation of new channels of undue influences,[19] not only external but also internal. The finding is confirmed through the 2021 World Bank Regional Justice Survey that identified integrity and independence as the major problems of the judicial system.

To address challenges in EU enlargement process, the European Commission announced in February 2018 the adoption of a new enlargement strategy through a Communication "A credible enlargement perspective for an enhanced EU engagement with the Western Balkans".[20] The Communication recognized that Western Balkan countries are part of Europe and sharing the same history, cultural heritage

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17 Chapter 23 relates to judiciary and fundamental rights. European standards in the Chapter 23 include strengthening independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights. Chapter 24 relates to justice, freedom and security. European standards include 11 areas thematic areas: external borders and Schengen system of migration, asylum, visa, police cooperation, fight against organize crime, fight against human trafficking, fight against terrorism, fight against drug, judicial cooperation in civil and criminal matters and custom cooperation.

18 2021 Regional Justice Survey Albania Country Report, Bosnia and Herzegovina Country Report, Kosovo, Country Report, Montenegro Country Report, North Macedonia Country Report, Serbia Country Report, World Bank

19 A. Fagan, *Judicial reform in Serbia and Bosnia-Herzegovina: Is EU support and assistance augmenting independence?*, Working Paper No. 24, "Maximizing the integration capacity of the European Union: Lessons of and prospects for enlargement and beyond" (MAXCAP), 2016, p. 3

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, COM (2018) 65 final

and challenges and that EU support is needed for the region to overcome vulnerabilities and instability.[21]

Following Commission Communication and based on the French proposal, the European Commission in February 2020, adopted the new methodology for the accession negotiations[22] with the aim to improve the effectiveness of the accession process and its implementation. The Commission proposal is aimed to build more trust among all stakeholders, EU institutions, member states and candidate countries. Therefore, the new methodology is based on principles of credibility, predictability, dynamics and stronger political steer. The European Commission intends to shift from bureaucratic and technical process to more political and dynamic approach. It seems that political impetus is important for the Western Balkans, both for decision makers who expected exact accession dates and public administration and judiciary that have to implement reforms.

The new methodology introduced grouping of negotiation chapter into six thematic clusters: fundamentals; internal market; competitiveness and inclusive growth; green agenda and sustainable connectivity; resources, agriculture, and cohesion; and external relations. Approach of clustering chapters should enable stronger focus on core sector and the most important and urgent reforms that are part of the cluster fundamentals. Furthermore, process was changed to allow opening of whole cluster instead chapter by chapter. However, the content of Chapter 23 remained the same. The candidate countries have to ensure independence, impartiality and professionalism in judiciary, enforcement of measures of prevention and fight against corruption and maintenance of high standards of protection of human and minority rights.

The EU policy documents reflected the slowdown of enlargement towards the Western Balkans, but the new methodology raised expectations.[23] After gaining momentum in the last couple of years, the new risk for postponement is pandemic crisis and the war in Ukraine. Pandemic crises and state responses opened discussion on rule of law violation, decreasing of human rights and disturbing the balance of the separa-

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21 Tilovksa-Kechegi, E.; Kolaković-Bojović, M.; Turanjanin, V., *EU New Strategic Policies Towards the Western Balkans: Hope for the Future of Endless Postponement,* In: Conference Proceedings, Towards a Better Future: The Rule of Law, Democracy and Polycentric Development, St. Kliment Ohridski University, Bitola, 2018

22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans, COM (2020) 57 final

23 Anghel, S. L. (2019), "Western Balkans: State of play in the European Council", European Parliamentary Research Services, October 2019, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)631770], Accessed 10 April 2022

tion of powers. State measures, but also reaction of judiciary, especially the highest instances, stated reediness to protect achieved rule of law standards.

## 3. COVID-19 PANDEMIC AND FUNDAMENTAL RIGHTS ISSUES

The COVID-19 pandemic and the measures introduced as a response to the outbreak raised challenge to the fundamental rights across the world. The deadly impact of the virus and the obligation of governments to act to protect the rights of people to life and health require their urgent action. Following advice and guidance of the health authorities, the governments took wide range of measures that affected the freedom of movement and assembly, ranged from imposing curfews, travel restrictions and social distancing measures, which resulted in closing schools and home-based work.[24]

Restrictive measurers affected the work of courts across the world and in the EU member states, which had an impact on access to justice and right to a fair trial. Courts were often closed, only urgent cases were proceeded, and hearings were postponed. Limitation in work of courts influenced on creation and increase of pending cases and case backlogs, and extension of case duration. In some cases concerns were also raised about people missing judicial deadlines.[25] The European Commission and Council of Europe conducted comprehensive assessment of measures taken by courts in EU Members States.[26]

The European countries witnessing the expansion of use of digital and videoconference tools as measures that enable judicial systems to overcome impact of social distancing measures and restrictions. However, the judicial systems faced with challenges to work remotely using electronic devices, due to different level of ICT equipment across the EU jurisdictions, e-literacy among members of judiciary and different options within the judicial case management system (i.e. possibility to access files though databases, adequacy of video-conferencing equipment).

The pandemic accelerated the digitalization of justice. Nevertheless, in digitalization of justice it is crucial to ensure the respect of minimum standards developed under articles 47 and 48 of the EU Charter on fundamental rights and article 6

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24 Alemanno, A., *The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination*?, European Journal of Risk Regulation, Vol. 11, No. 2, pp. 307-316

25 Croatian Ombudsbody, *To enable efficient functioning of the judiciary even in extraordinary circumstances,* 29 April 2020

26 European Commission, *Impact of COVID-19 on the Justice field*, e-Justice portal, 2020; CoE European Commission for the Efficiency of Justice, *National Judiciaries COVID-19 emergency measures of COE Member States,* 2020

of the European Convention on Human Rights, regarding effective participation in proceedings, particularly criminal cases, including right to be present and the principle of publicity.[27]

## 4. IMPACT OF COVID-19 ON THE PROCEDURAL RIGHTS OF DEFENDANT

The procedural rights of defendant are incorporated into requirements of Chapter 23 that accession countries need to guarantee by national legislation. To understand the scope of procedural rights of suspect and accused it is important to get insight into the interpretation provided by the European Court of Human Rights and Court of Justice of the EU.[28]

Procedural rights of suspects and accused under the article 6 of the European convention of human rights guarantees the right to participate effectively in a criminal trial.[29] The right includes not only the right to be present, but also to be heard and follow proceedings.[30] Access to a lawyer, access to an interpreter and access to the case files are aspects of the right to a fair trial protected under the European Convention of Human Rights, EU Charter of Fundamental Rights and relevant EU acquis on rights of suspects and accused. Limitation or violation of these rights during criminal procedure present violation of listed legal documents.[31]

The rights of the defence requires that any measures restricting the defendant's participation in the proceedings or imposing limitations on the defendant's relation with lawyers should be proportionate to the risks in a specific case.[32] Barriers to confidential conversation between the defendant and lawyer may present violation of right to a fair trial. Specifically, the European Court of Human Rights considers that violations of article 6 present the applicant's inability to have con-

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27 European Union Agency for Fundamental Rights, *The Coronavirus pandemic and fundamental rights: A year in Review,* p. 21

28 Matić Bošković, M., *Krivično procesno pravo EU*, Institut za kriminološka i sociološka istraživanja, Beograd, 2022

29 European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to fair trial (criminal limb),* 31 December 2021

30 For example, in accordance with the jurisprudence of the European Court of Human Rights, case *Stanford v the United Kingdom* (application nos. 16757/90, judgement 23 February 1994), poor acoustics in the courtroom and hearing difficulties could give rise to an issue under art. 6

31 Jimeno-Bulnes, M., *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?*, CEPS, 2010, p. 171

32 Case *Yaroslav Belousov v Russia,* judgement of 4 October 2016, application nos. 2653/13 and 60980/14, par. 147

fidential exchange with legal counsel during the trial due to defendant placement in a glass cabin.[33]

Considering impact of COVID-19 on digitalization of justice and reduction of direct communication between lawyer and defendant, it is important to have in mind jurisprudence of the European court of human rights on use of video link in proceedings. The Court has held that use of video link as a form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, the use of video link should fulfil several preconditions. It is important that all partis can be follow and hear proceedings without any technical impediments. If the defendant participates in the proceeding by video-conferencing the European Court of Human Rights specifically highlighted that Court is obliged to ensure that recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirement of respect for due process from article 6 of the Convention.[34] Specifically, the European Court of Human Rights emphasized that during video-conferencing the confidential communication between defendant and defence lawyer has to be secured.[35]

In relation to the institution, the procedural rights include right to a fair hearing within the reasonable time by an independent and impartial tribunal, established by law. Judgements must be presented publicly, but public could be excluded from part or whole hearing in the interest of public order, moral or national security, to protect interest of minors or protection of private life.

Use of video-conference in judiciary is not a new technology and prior to COVID-19 it was used in specific procedures, especially in the cross-border cases or for hearing of vulnerable victims.[36] Prior to COVID-19 outbreak many countries regulated possibility to use remote hearings in courts, but pandemic accelerate the use. In Austria and Germany video-hearings were introduced in early 2000s.[37] In Germany, video-hearings were introduced in 1998[38] for the protection of wit-

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33 Case *Yaroslav Belousov v Russia,* paras. 151-154

34 Case *Marcello Viola v Italy,* judgement of 5 October 2006, application nos. 45106/04, par. 67

35 Case *Asciutto v Italy,* judgement of 27 November 2007, application nos. 35795/02, par. 71

36 Gori, P., Pahladsingh, A. *Fundamental rights under Covid-19: an European perspective on videoconferencing in court*, ERA Forum, Vol. 21, 2021, p. 575

37 Sanders, A., *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic,* International Journal for Court Administration, Vol. 12, No. 2, 2021, pp. 4-21

38 In June 2021 the German Criminal Procedure Code (StPO) was amended to extend the use of video conferencing in criminal proceedings. According to the new provision of article 463e of German Criminal Procedure Code, oral hearings by use of video or audio conference are now possible for all court hearings when the defendant is in an office or in the business premises of a defence counsel or lawyer during the oral hearing

nesses in criminal procedures, while in Austria was established in 2005[39] for hearing of accused and witnesses in criminal procedures, defence counsel or lawyer during the oral hearing. In Belgium, the 2002 Criminal Procedure Law introduced the use of video conference technology for conducting of hearings of witnesses and experts.[40] In Finland, since beginning of 2019 parties in criminal cases can participate in the main hearing through video-conference. That provision was introduced to enable the hearing of witnesses who could not travel or to prevent the transportation of defendants who are in custody.[41] The fight against mafia in Italy influenced establishment of video-conferencing in courts. Since 1992 the Italian Criminal Procedure Code[42] introduced that people under the risk of pressure or danger for their safety can testify via video-conference technology.[43] Italian law does not require consent of the witness, but judge decides on use of video-conferencing. In France, video-conferencing was introduced in the criminal procedure to prevent risk or danger to safety, but also risk of the escape for those in detention. The Criminal Procedure Code article 706-71 requires consent of the accused to use video-hearing. In Serbia, prior to pandemic, Criminal Procedure Code envisages the use of video-conferencing for hearing of witnesses who got the status of specially vulnerable witness.[44] Hearing by video-conferencing is also possible when witness or expert cannot participate at the main hearing due to illness or some other justified reason.[45] Additional possibility to use video-conferencing for hearing in criminal procedure is for the protection of witness, if there is a risk that by giving a statement witness or his family would be in danger.[46]

COVID-19 pandemic influenced on authorities to introduce or expend use of remote hearings. In Italy, the Government adopted organisational measure allowing for remote hearings and acceleration of digitalisation in criminal trials.[47] The Law 27/2020 introduced the rule that criminal hearings that do not require the hearing of witnesses other than judicial police officers can be held remotely. The provision on remote hearing can be apply only with the consent of the accused person

39 Art.165 of the Criminal Procedure Code (StPO)

40 Arts. 112, 158 bis and 298 of the Criminal Procedure Law

41 Sanders, A., *op.cit.,* note 37, p. 5

42 Art. 147 bis implementing provisions

43 Van der Vlis, E.-J., *Videoconferencing in criminal proceedings*, in: Braun, S.; Taylor, J. L., (eds.), Videoconference and remote interpreting in criminal proceedings, Guildford, University of Surrey, 2011, pp. 11-25

44 Art. 103 of the Criminal Procedure Code, Official Gazette, No. 72/2011, 101/2011. 121/2012, 32/2013, 55/2014, 35/2019, 27/2021, 62/2021

45 Arts. 357 and 404 of the Criminal Procedure Code

46 Art. 105 of the Criminal Procedure Code

47 Art. 83 of the Decree-law of 17 March 2020, n.18

when it relates to the final hearing and those during which witnesses, parties, consultants and experts must be examined. The Prosecution service was granted the possibility to hear witnesses and examine suspects through video-conference and appoint experts.[48] In Belgium, the Parliament adopted law to introduce wider use of written procedures and video-conferences in court proceedings. The Belgium authorities took two-track approach and adopted temporary provisions applicable during COVID-19 pandemic and permanent changes to the court procedures.[49] The new legislation has been criticised for the potential impact on the right to fair trial and urgency with which the proposals were introduced.[50] To address challenges of COVID-19 outbreak, Serbian Ministry of Justice on March 17, 2020 adopted Recommendations on work of courts and public prosecutors offices during state of emergency,[51] additional recommendation the Ministry adopted on March 26, 2020 to inform courts to conduct hearing of defendants in detention by use of Skype application.[52] To provide legal basis for the recommendation, on April 1, 2020, the Government issued a Decree on the manner of participation of the accused in the main trail in a state of emergency.[53] The Decree stipulates that duration of the state of emergency, presence of defendant on the main trial in the criminal proceedings could be organized through video and audio conference if judge finds that presence in the courtroom is difficult due to the danger of spreading a contagious disease. The Bar Association of Serbia considered that holding the main hearings by video-conferencing prevents the defendant from communication with the defence counsel, does not provide guarantees for respecting the prohibition of torture and cannot ensure the request for public hearings.

Although positive experience have been reported from different countries, especially Austria, Germany, Italy, Sweden,[54] the judges reported that there is a slight

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48 Rule of Law Report, Country chapter on the rule of law situation in Italy, 2020, SWD (2020) 311 final

49 Law introducing Urgent Provisions in the Field of Justice in the Context of the Coronavirus Pandemic.

50 Advisory Opinion 67.516/1-2 of the Council of State of 22 June 2020; President of the High Council for Justice (2020), Letter to the President of the House of Representatives on the law containing various provisions on justice in the context of the fight against the spread of the coronavirus.

51 Preporuke za rad sudova i javnih tužilaštva za vreme vanrednog stanja proglašenog 15. marta 2020. [*https://www.mpravde.gov.rs/obavestenje/29154/preporuke-za-rad-sudova-i-javnih-tuzilastava-za-vreme-vanrednog-stanja.php],* Accessed 10 April 2022

52 Saslušanje za lica koja su prekršila meru samoizolacije putem videolinka, 26. mart 2020. [*https://www.mpravde.gov.rs/vest/29671/saslusanja-za-lica-koja-su-prekrsila-meru-samoizolacije-putem-video-linka.php]*, Accessed 10 April 2022

53 Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog 15. marta 2020, Official Gazette, No. 49/2020

54 Remote Courts Worldwide, Available at: [https://remotecourts.org/country/sweden.htm], Accessed 10 April 2022

bias to treat live statements in a more favourable manner compared to video-statements.[55]

The analysis on experience and perception of judges on use of video-conferencing was implemented in Serbia in 2021.[56] Main conclusion is that judges are not interested to analyse and apply procedural rules on use of video-conferencing. Specifically, opinion of judges is divided in relation to the usefulness of remote hearing and use of video-conferencing linked only with pandemic. In relation to the protection of right to a fair trial, experience from the practice confirms that there are reasons for concerns. Judges held remote hearings during the state of emergency without special explanation of the legal basis and reasons for questioning defendants without their physical presence. Judges only in limited number of cases asked the defendant for their opinion on the Skype hearing, most often only informing them. Concerning the communication between the defendant and lawyer, judges did not engage in examining respect for the right of defendant to have confidential conversation with the defence counsel.[57] The lack of judges' reaction could present also shortage of judicial independence, since judges did not postpone hearings due to danger of virus spreading.

To make the best possible use of video and audio hearings in the future, a number of challenges must be addressed. The most important one is strengthening of legal framework to ensure implementation of standards of the fair trial and provide adequate access of public. In addition, technical solutions should be improved to enable good connections, confidential communication with lawyer and protection of sensitive data.[58]

## 5. COVID-19 INFLUENCE ON EU ENLARGEMENT REQUIREMENTS IN RELATION TO CHAPTER 23 PROCEDURAL RIGHTS

lready prior to the outbreak of the COVID-19 pandemic, the Western Balkan's progress in the EU accession process was challenging. Despite having started 20

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55 Wilkman, J., *Finish District Judges' Assessments of Live Versus Video-Mediated Party Statements in Courts*, Master thesis, 2022, Available at: [https://www.doria.fi/bitstream/handle/10024/183670/wilkman_jonas.pdf?sequence=2&isAllowed=y], Accessed 10 April 2022

56 Kostić, I.; Tešović, O.; Milovanović, I.; Dakić, D., *Suđenje na daljinu, pravni okvir i praksa*, Forum sudija, Beograd, 2021

57 *Ibid.,* pp. 65

58 McCann, A., *Virtual Criminal Justice and Good Governance during COVID-19,* European Journal of Comparative Law and Governance, Vol. 7, No. 3, 2020, pp. 225-229

years ago, this process has still not yielded to irreversible reforms in rule of law and political and economic transformation.

The COVID-19 crisis affected region and the EU enlargement process. However, the question arises also on the technical level. Whether the temporary and permanent legislative changes that EU countries introduced will influence on the EU requirements in relation to right to a fair trial and need to align national legislation and practice with EU acquis in relation to protection of procedural rights of defendant in the criminal procedure.

Obviously, there are numerous benefits of using the means of modern technology in the criminal justice system. Remote hearings are reducing costs for transfer of detainees or witnesses. Furthermore, the technology becomes more affordable which reduce initial investment of introduction of IT equipment in courts and public prosecutor offices. As a result, remote hearing costs less than traditional trial, however that could not jeopardize procedural rights of defendant.[59] Use of audio and video-conferencing in criminal cases is helping witnesses, especially vulnerable witnesses.[60] As it is already mentioned many EU countries, prior to the COVID-19 outbreak, had legislative framework that enabled use of video links for witnesses to protect them, by providing better protective measures for vulnerable witnesses. Furthermore, use of technology allows witnesses to give testimony and not to travel long distance. Moreover, if witnesses are not able to attend the trial in person due to their disability or illness use of video-conferencing enable them to provide it. The use of means of modern technology in the trial could help decreasing defendants' movement.

However, there are many challenges in use of modern technologies in the criminal justice system. One of the challenges relates to the experience and time needed to make judges and lawyers comfortable familiar in using such technology in the trial. The biggest challenge relates to the technical failure, that could affect quality of sound and understanding of party that is using video-conferencing. Using technology requires technical support staff to assist regarding any problems needed, which creates additional costs for the judicial budget. In relation to the criminal procedure, the direct communication would better to show the witness's body language.

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59 Grio, A., *The Defendant's Rights in the Hearing by Videoconference*, In: Ruggeri, S. (ed.). Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing, 2014, pp. 119-127

60 Stevanović, I., Kolaković-Bojović, M., *Informacione tehnologije u službi zaštite deteta u krivičnom postupku,* in: Bejatović, S., Videolink i druga tehnička sredstva kao način preduzimanja procesnih radnji u kaznenom postupku – norma, praksa i poželjni slučajevi širenja mogućnosti primene, Misija OEBS u Srbiji, 2021

Reluctance of the judicial system and judges to use video-conferencing beyond strict rules of national legislation or European standards and jurisprudence of the European Court of Human Rights is confirmed by two decisions of the Supreme Court of Finland from December 2021. The Supreme Court of Finland found in two criminal appeal court cases[61] that participation of the judges via video link constituted a procedural error and remanded one of the cases, as well as lack of consent of the defendant. Although the Act on Criminal Procedure in Finland provides that parties may participate in proceedings electronically if the defendant agrees and the courts finds it appropriate, the Act does not specifically mention judges and public prosecutors.[62] In addition to parties, the Act provides that only party representatives such as the defense attorney or a plaintiff's attorney may participate via video link under the same conditions as parties. The Code of Judicial Procedure provides that in appellate courts the presence of three judges constitutes a quorum.[63]

In the Turku Appeals Court case, all three appellate court judges had been physically present for the initial hearing and issued an interim judgement before one of the judges had to go to quarantine due to COVID-19 exposure. During quarantine the hearing was scheduled, and judge participated via video link. The Supreme Court found that the judge participating virtually should consider as incorrect participation, since this possibility is not envisaged in the Code of Judicial Procedure or Act on Criminal Procedure. However, the Supreme Court held that the procedural error was not so serious that the interim judgement and judgment of the Court of Appeal should be vacated, and the case remanded to the Court of Appeal to be heard anew.

In the Vaasa Appeals Court case, the use of electronic video link was the result of a convenience request from the prosecutor, as the main hearing had to be conducted without delay in between other hearings owing to the imminent retirement of the prosecutor. The prosecutor, the parties and one judge had participated from the district court building while the two other judges had been present in person at the Vaasa Appeals Court. The Supreme Court noted that the procedural error committed by the Court of Appeal had nor arisen from covid-related or other health reasons or any other comparable persuasive and acceptable reasons, so the procedural error relating to the manner in which a judge participated in the pro-

61 Case ECLI:FI:KKO:2021:92, dairy no: R2021/389 (participation of a judge and the defendant in a main hearing by video link), issued on 22 December 2021, and case ECLI:FI:KKO:2021:91, diary no. R2021/162 (participation of a judge in a hearing by video link) issued on 22 December 2021

62 FSS 1997/689, Art. 13

63 FSS 1734/4, Art. 8

ceedings was in itself so serious that the case was to be remanded to the Court of Appeal to be heard anew.

Additional procedural error in the Vaasa Appeals Court case presents lack of consent of the defendant. The right of defendant in criminal proceedings to be present in person in an oral hearing is one of the guarantees of a fair trial enshrined in section 21 of the Constitution of Finland. The Court of Appeal, before ordering the main hearing, had sent an email to the defendant's public defender and inquired about the suitability of the proposed hearing date. The Court of Appeal had not asked for consent to remote participation nor indicated that consent should be voluntary or what the consequence of the consent are. Even though the Court of Appeal had summoned the defendant to participate in the main hearing by video link and the defendant's public defender had not before or even during the hearing indicated to the Court of Appeal that the defendant did not consent, the Supreme Court held that under the circumstance the mare absence of protest did not meet the criteria valid for consent. Accordingly, it was held that the defendant had not self-consented to participation by video link nor given such consent for the public defender's participation by video link.

In assessing consent of the defendant for remote hearing the Supreme Court referred to the case law of the European Court of Human Rights, specifically to the judgement of the Grand Chamber in case *Hermi v Italy.*[64] According the interpretation of the European Court of Human Rights the defendant may waive the guarantees of a fair trial expressly or implicitly. Either way, the waiver must be definite, it must be voluntary, and it must involve minimum guarantees that are proportionate to the significance of the waiver.[65] The waiver cannot be contrary to any important public interest.[66] In the assessment of the conduct of the defendant so as to determine whether it constitutes an implicit waiver, it must be shown that the defendant can reasonably have foreseen the consequence of the conduct.[67]

Following the two decisions by the Supreme Court, it became recognized that under the Finnish law the judges cannot participate in the hearing through video link. The legislative changes are necessary to allow for such participation of judge or public prosecutor. Furthermore, the participation of defendant through the video link needs to be in line with the standards of the European Court of Human Rights and its jurisprudence, including that court need to ensure consent of the defendant, and waiving of rights to oral hearing and participation should be vol-

64 Application nos. 18114/02, Grand Chamber, judgement of 18 October 2006, paras. 73-76

65 Case *Poitrimol v France*, application nos. 14032/88, judgement of 23 November 1993, par. 35

66 Case *Sejdovic v Italy*, application nos. 56581/00, judgement of 1 March 2006, par. 33

67 Case *Jones v the United Kingdom,* application nos. 30900/02, decision of 9 September 2003

untary, in line with public interest, and the defendant foreseen the consequence of waiving.

Decision of the Supreme Court of Finland, approach of Germany in amendments to the Criminal Procedure Code to allow limited use of video conferencing by defendant, as well as changes introduced during COVID-19 outbreak across EU countries confirmed that pandemic did not change requirements related to the application of European standards of fair trial and procedural rights of defendant. This approach and position of the judiciary to protect established fundamental rights confirms that content of the Chapter 23 will remain the same for Western Balkan countries. Western Balkan countries need to align national criminal procedure legislation with EU and Council of Europe standards in relation to the procedural rights of defendant. Furthermore, the courts need to follow jurisprudence of the European Court of Human Rights and Court of Justice of EU and judges should be independent in the work to protect established standards of fair trial.

## 6. CONCLUSIONS

Although all EU countries used online hearings and video-conferencing during COVID-19 to overcome health protection requirements, it seems that it will take time to significantly impact criminal procedure system. After initial increased of use of remote hearings, the requirements to protect established human rights standards influenced on the practice and temporary measures that were introduced. In majority of countries, temporary measures and lack of infrastructure and IT equipment limited right to a fair trial, however, permanent amendments and court judgements took into consideration need to ensure all elements of right to affair trial, including access to lawyer, confidential counselling, right to be heard and oral hearing, etc.

The priority to protect right to a fair trial and procedural rights of defendant is confirmed in the approach took by German legislator and Finnish Supreme Court. Amendments of the German Criminal Procedure Code from 2021 were adopted to allow remote hearing for defendant when person is in the own office or in the business premises of the defence counsel. This solution ensures access to lawyer and confidential counselling between defendant and lawyer. Similarly, the Supreme Court of Finland in two cases from December 2021 assessed violation of procedural rights of defendant against standards established by European Court of Human Rights.

Having in mind abovementioned it seems that Chapter 23 requirements towards EU accession countries will remain the same. The Western Balkan countries will

need to ensure protection of fundamental rights, specifically procedural rights of defendants in situation of in person hearings, but also for remote hearings. The policy makers in Western Balkan countries should identify legislative interventions in line with EU countries and their policies, but also full implementation of the laws in practice. Furthermore, the judiciary in Western Balkan countries should have in mind jurisprudence of the European Court of Human Rights to avoid applications against national judiciaries for violation of fundamental rights.

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Topic 3

# EU and new realities

UDK 614:34(4-67EU)
Review article

# FACING REALITY: A NEED TO CHANGE THE LEGAL FRAMEWORK OF THE EU PUBLIC HEALTH POLICY AND THE INFLUENCE OF THE PANDEMIC OF COVID-19 ON THE PERCEPTION OF IDENTITY AND THE ROLE OF THE EU

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***ABSTRACT***

*The main aim of this article is to highlight two interconnected issues raised in the context of the COVID-19 pandemic. The first one concerns a need to change the EU Health Policy legal framework, particularly the founding treaties (TEU and TFEU), while the second one relates to the issue of the very perception of the identity of the European Union.*

*The possible adequate solution for the situation created by the unprecedented nature of the COVID-19 pandemic and unprecedented measures that followed, was to proclaim state of emergency, which was largely avoided. It seems that it should be considered whether there is a need for amendments of the European Union founding treaties and/or the Charter on Fundamental Rights by providing the possibility of the state of emergency proclamation in the case of "the threats of the life" of the EU.*

*The European Union is not entrusted with the competencies, powers, and responsibilities in health matters such as a pandemic, however founding treaties, functioning institutions as well as procedures seem sufficient for an effective response to health crises such as the one caused by the COVID-19 pandemic. However, having in mind experience with the COVID-19 pandemic it seems that there is a need to strengthen the EU legal framework concerning the issues of pandemic and similar threats, not by altering the nature of the EU competence regarding health issues, but by identifying the threats such as pandemic in the founding treaties that should contain basic regulations concerning European Centre for Disease Prevention and Control. In that manner the efficient response would be in a form of an institutionalized mechanism at the core of the European Union instead of being fully dependent on the variable political will. At the same time there is an urgent need to identify those Health Policy issues that should be an adequate subject of judicial scrutiny.*

*The COVID-19 pandemic also proved that Member States and the European Union should be more realistic regarding the perception of the role and identity of the European Union. The author argues that the identity of the European Union is blurred with a variety of considerations and that its content and features should be more determined, not only in academic literature but also in political practice, especially when it comes to the issue of self-determination of the European Union. The world is not the same as it was before the pandemic, and it seems that the European Union, in order to be prepared to face new challenges, must build its identity in realistic parameters and act in one voice "if it wants to make itself heard and play its proper rôle in the world", as it was declared in the 1973 Declaration on the European Identity.*

***Keywords**: COVID-19, EU identity, European Union, Pandemic, Shared Competencies*

## 1. INTRODUCTION

The COVID-19 pandemic caught the whole world by surprise and the European Union was not an exception. The common experience is that the European Union failed with the pandemic, particularly in its "early stages". However, from the pandemic, still ongoing in the spring of 2022, the bitter experience emerged and was supplemented with the new phase of the Ukrainian crisis with still inconceivable consequences. Every country in the world and every international organization (including the United Nations and the World Health Organization) encountered serious problems facing the pandemic of coronavirus.[1] Now, when the pandemic is hopefully near to its end,[2] the long two years created the reservoir of experience upon which the European Union might base its awareness necessary to deal with the future crisis.

The main aim of this article is to highlight two interconnected issues raised in the context of the COVID-19 pandemic. The first one concerns a need to change the European Union Health Policy legal framework, particularly founding treaties

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1 Haass, R., "*The UN Unhappy Birthday*", Project Syndicate, 10 September 2020, available at: [https://www.cfr.org/article/uns-unhappy-birthday] Accessed 24 March 2020. Haass observed that "[t]he result is that the major powers get the UN they want, not the one the world needs" See: Gajić, A., *Remarks on Challenges of International Law in the Contemporary International Society Faced with the Pandemic of COVID-19*, in Izazovi međunarodnog prava, International Criminal Law Association, Tara 2021, pp. 85-93

2 Ghebreyesus T. A. (Director-General of the World Health Organization), "*2021 has been tumultuous but we know how to end the pandemic and promote health for all in 2022"*, World Health Organization, 30. December 2021 [https://www.who.int/news-room/commentaries/detail/2021-has-been-tumultuous-but-we-know-how-to-end-the-pandemic-and-promote-health-for-all-in-2022.], Accessed 10 April 2022. Director-General urged particularly on the "need to build a stronger global framework for global health security". See also Yadav R.; Dr Moon S., Opinion: Is the pandemic ending soon?, 11 March 2022, available at: [https://www.who.int/philippines/news/detail/11-03-2022-opinion-is-the-pandemic-ending-soon], Accessed 10 April 2022

(TEU and TFEU), while the second one relates to the issue of the very perception of the identity of the European Union.

Firstly, we will focus on the unprecedented nature of the COVID-19 pandemic, particularly to the fact that situation created by the pandemic does not have clear solutions in the existing international treaties including the EU law. The solution that seems to be adequate having in mind the nature of the COVID-19 pandemic, to proclaim state of emergency, was largely avoided. It seems that it should be considered whether there is a need for amendments of the EU founding treaties and/or the Charter on Fundamental Rights of the European Union by providing possibility of the state of emergency proclamation in the case of "the threats of the life" of the European Union.

We will argue that there is a need to strengthen the EU legal framework concerning pandemic and similar threats, not by altering the nature of the EU competence in health issues, but by identifying the threats and providing a clear and efficient mechanism for cooperation in response to challenges surrounding pandemic. In particular, we will point out to the need for strengthening the early warning system by amending the founding treaties. At the same time, there is a need for the identification of issues that should be the subject of juridical scrutiny of the Court of Justice of the European Union.

The issue of the identity of the European Union is a long standing one, and it seems that experience from the pandemic clearly shows that Member States and the European Union should be more realistic when it comes to the perception of the role and identity of the European Union. We equally argue that the identity of the European Union is blurred with a variety of considerations and that its content and features should be more determined focused, not only in academic literature but also in political practice, especially when it comes to the issue of self-determination of the European Union. It seems that the proper basis for the determination of the identity of the European Union was established a long time ago in the Document on the European Identity published by the Nine Foreign Ministers on the 14th of December 1973, in Copenhagen. The world is not the same as it was before the pandemic, and it seems that the European Union, in order to be prepared to face new challenges, must build its identity in realistic parameters and act in one voice "if it wants to make itself heard and play its proper rôle in the world", as it was declared in the 1973 Declaration on the European Identity.

## 2. UNPRECEDENTED NATURE OF THE COVID-19 PANDEMIC AND THE „STATE OF EMERGENCY“

The nature of the COVID-19 pandemic and the state of affairs that followed is unprecedented and was not predicted in any international treaty, nor in the founding treaties of the EU also are not an exception. Even the core human rights treaties (International Covenant on Civil and Political Rights and European Convention on Human Rights and Fundamental Freedoms) and corresponding authoritative commentaries[3] cannot be used to provide full legal 'support' when it comes to the measures imposed in order to fight against the COVID-19 pandemic. The same goes for other very important international treaties whose rules form part of international customary law[4] as they do not contain clear solutions for situations such as a pandemic, and measures imposed in order to contain the spread of COVID-19 created difficulties in the early phases of the pandemic. The EU legal framework is not an exception, and in this article, we are particularly concerned with the EU legal framework, however, some general remarks need to be pointed out at the outset.

The law does not provide answers to every challenge. The term "challenge" has a variety of meanings; however, it seems that a common meaning is that of finding a solution to a problem. In this case, the law is not under challenge, but political actors who are entrusted with the authority to deal with the crisis,[5] and in the final instance to influence "the development" of the law.

No international treaty or well-established customary international law provides solutions to numerous problems caused by the COVID-19 pandemic nor does it contain measures taken to fight against it. The aforementioned mechanism of declarations under core human rights treaties (International Covenant on Civil and Political Rights, European Convention on the Human Rights and Fundamental Freedoms) regarding the state of emergency in a situation threatening "the life of

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3 See in particular Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency, 31 December 2019, [https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf], Accessed 10 April 2022

4 Such as the Vienna Convention on Diplomatic Relations and Vienna Convention on the Law of Treaties. Vienna Convention on Diplomatic Relations does not contain solutions for situations such as pandemic and in the early stages of the pandemic of COVID-19, it was problematic whether certain measures (obligatory PCR tests, quarantine, restriction of freedom of movement etc.) are in line with this convention

5 It shall be remembered that the situation around the very proclamation of the pandemic was faced with the main political difficulties

the nation"[6] was largely avoided. Even though all European States applied almost the same measures in the context of the pandemic, only a minor number of States from the Council of Europe and just two EU Member States (Estonia and Romania) declared a state of emergency because of the COVID-19 pandemic.[7] The States which made those declarations withdrew them during 2020 while almost the same measures as the ones imposed during the "state of emergency" remained in force.[8] The question that remained without an answer is whether measures taken during the pandemic derogated certain human rights, and was there a need to declare a state of emergency in the context of human rights treaties.

Does that mean that unprecedented measures were of such a nature that they are inherent limitations of human rights recognized in Europe? However, at least since the proclamation of the pandemic, which affected the whole Europe, it was not a "state of emergency" that solely touched upon the human rights recognized in Europe, but almost all of the policies (and legal fields) were heavily affected by the measures imposed to prevent the spread or to combat against COVID-19.

The Charter on Fundamental Rights of the European Union[9] does not contain references to "extraordinary situation" and "state of emergency." However, it "reaffirms…the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms…"[10] Article 52 (3) stipulates that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning, and scope of those rights shall be the same as those laid down by the said Convention…" It is the matter of interpretation whether the Charter on Fundamental Rights of the European Union recognizes the "the state of emergency" based on the "threat of the life of the nation." The Charter does not expressively recognize "the threats of the life of the European Union."

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6 See *Guide on Article 15 of the European Convention on Human Rights*, Derogation in time of emergency, 31 December 2021, [https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf] Accessed 15 April 2022

7 *Factsheet – Derogation in time of emergency,* Press Unit of the European Court on Human Rights, February 2022. [https://www.echr.coe.int/documents/fs_derogation_eng.pdf], Accessed 15 April 2022

8 Facing the measures to stop spreading the COVID-19, only Albania, Armenia, Estonia, Georgia, Latvia, Moldova, Romania, San Marino and Serbia made notifications under Article 15 of the Convention in the context of the COVID-19 pandemic and during the 2020 while most of the measures were still in force, the declarations were withdrawn

9 Charter on Fundamental Rights of the European Union [2012] OJ C326/391

10 *Ibid.*, Preamble

It is our opinion the Charter and founding treaties should be amended in order to recognize situations (such as those similar to the pandemic of COVID-19) that might be the cause for the proclamation of a state of emergency. In that case, the legality of certain measures such as, for example, restriction of movement, quarantine, obligatory PCR testing, derogations from the Schengen *acquis,* and requests for vaccine certificates for variety of purposes, would not be questioned.

## 3. IS THERE A NEED TO CHANGE THE LEGAL FRAMEWORK OF THE EUROPEAN UNION IN ORDER TO BETTER DEAL WITH PANDEMIC?

The legal framework of the "EU health policy" seems well developed having in mind that public health is not an exclusive competence of the European Union, and that the main responsibility is on the Member States.[11] The European Union is not entrusted with the competencies, powers, and responsibilities in health matters such as a pandemic, however founding treaties and established institutions and procedures seem sufficient to provide an effective response to health crises such as the one caused by the COVID-19 pandemic. The legal framework is not only limited to founding treaties, but it encompasses secondary legislation. However, the EU has limited competence to adopt directives and regulations in health matters.[12]

The European Union has certain responsibilities in health matters but there are not responsibilities in the strict legal sense. Its responsibility is more political, depending on both the efficiency of institutions created under the European Union umbrella (*via* secondary legislation) and the political will and ability of Member States to cooperate in accordance with the well-established principle of solidarity. In other words, the European Union's responsibility in pandemic health matters is of particular political importance and is heavily dependent on the strength and ability of the European Union bodies and political attitudes of the Member States.

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11 Geer, S. L.; Fahy, N.; Elliott, H. A., Wismar, M.; Jarman H.; Palm, W., *Everything you always wanted to know about European Union health policies but were afraid to ask*, European Observatory on Health Systems and Policies, World Health Organization, Copenhagen 2014
See also Hervey, T.; Vonhercke, B., *Health care and the EU: the law and policy patchwork*, in Health Systems Governance in Europe: The Role of European Union Law and Policy, Cambridge University Press, 2010, pp. 84-133. The argument is that "While national health care policy tends to be the domain of national (political or administrative) 'health' experts, in the EU context most legal measures and policies that have implications for health care are adopted within institutional structures and procedures that were developed for quite different policy domains. Furthermore, EU-level health care law and policy occupies a highly contested space in the EU's current constitutional settlement." *Ibid,* p. 86

12 *Ibid*., p. 88

The pandemic is a global matter of particular concern to the World Health Organization empowered by the International Health Regulations (2005)[13] to proclaim a Public Health Emergency of International Concern and also a pandemic.[14] All Member States of the EU are also members of the World Health Organization and the European Union has well-established relations with the World Health Organization.[15] The legal framework of the European Union cannot be analyzed 'in clinical isolation' from the global legal framework that provides significant powers to the World Health Organization and envisages certain obligations to the States. However, as Bergner and others noted, "before the COVID-19 pandemic, the European Union was neither a strong promoter of global health nor a strong supporter of the World Health Organization. The Global Health Council Conclusions from 2010 [Council conclusions on the EU role in Global Health][16] were never comprehensively implemented and quickly forgotten".[17] The initial phase of the pandemic (and particularly the period that preceded the proclamation of the pandemic by the World Health Organization) provides support for the conclusion that there was unreadiness of the EU (and also other States) to cope with the pandemic.

Experience with the COVID-19 pandemic inevitably requires discussions concerning the legal framework of the EU Health Policy and it will probably be on the agenda as one of the main issues, particularly when the time comes for the revision of the Lisbon Treaty. As noted by Brooks and Geyer: "early calls for treaty revision, to increase the EU's formal health powers, were quickly rejected as both

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13 World Health Organization, *The International Health Regulations* adopted by the 58th World Health Assembly on May 2005 by resolution WHA56.29. [ https://www.paho.org/en/international-health-regulations-ihr]. Accessed 16 April 2022

14 Von Bogdandy, A.; Pedro A. V., *International Law on Pandemic Response: A First Stocking in Light of the Coronavirus Crisi*s, MPIL Research Paper Series, No. 7, 2020.; Pedro A. V., *Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies*, Göttingen Journal of International Law, Vol. 7, No. 1, 2016, pp. 97-129

15 Technical cooperation has taken place since 1970s. Contemporary relations between the WHO and the EU are based on an exchange of letters dated 14 December 2001. For the comprehensive overview of the EU and the World Health Organization see: EU and WHO: partners for global health, World Health Organization Regional Office for Europe, [https://www.euro.who.int/en/about-us/partners/the-european-union-and-its-institutions]. However, opinion expressed on the official website of the World Health Organization seems not to be well accepted

16 Council conclusions on the EU role in Global Health, 3011th Foreign Affairs Council meeting, Brussels, 10 May 2010, Council of the EU, [https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/114352.pdf], Accessed 10 April 2022

17 Bergner, S.; Van de Pas, R.; Van Schik, L.; Voss, M., *Upholding the World Health Organization: Next Steps for the EU*, SWP Comment No. 47, October 2020, German Institute for International and Security Affairs, p. 1

infeasible and unnecessary" adding that "[c]onsensus among academic layers is that, though patchy, the EU's legal basis for the health already permits considerable action *where this is supported by political will.*"[18]

Fully supporting previously- quoted opinion, and taking into account other problems that the EU was facing even before the pandemic[19], it seems that there is a need to strengthen the EU legal framework concerning the issues of pandemic and similar threats, not by altering the nature of the EU competence in health issues, but by identifying the threats such as pandemic and providing a clear and efficient mechanism of cooperation in response to challenges that surround the pandemic.

Health Policy ("common safety concerns in public health matters for the aspects defined" in the Treaty on European Union) is an area of the shared competencies between the EU and the Member States.[20] In accordance with Article 6 of the Treaty on European Union "The Union shall have the competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at the European level, be (a) protection and improvement of human health…"[21]

"Health in all policies" has its basis in Article 9 of the Treaty on European Union stating that "[i]n defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of," inter alia, "protection of human health."[22] Title XIV of the Treaty on the Functioning of the European Union (Public Health) containing single Article 168 in paragraph 1 stipulates that "A high level of human health protection shall be ensured in the definition and implementation of all of the Union's policies and activities." The

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18 Brooks, E.; Geyer, R., *The development of the EU health policy and the Covid-19 pandemic: trend and implications*, Journal of European Integration, Vol. 42, No. 8, 2020, p. 1060 (emphasis in original)

19 See L. Greer, S. L.; Laible, L (eds), *The European Union after Brexit*, Manchester University Press, 2020; Anagnostopoulou, D; Papadopolous, I.; Papadopoulos, L., *The EU at a Crossroads: Challenges and Perspectives*, Cambridge Scholars Publishing, 2017

20 In accordance with the Art. 4 of the Treaty on European Union, "2. Shared competence between the Union and the Member States applies in the following principal areas: …(k) common safety concerns in public health matters for the aspects defined in this treaty"

21 See also Art. 9 of the Consolidated version of the Treaty on the Functioning of the European Union

22 The particular area that might come on the agenda concerns approximation of laws (Article 114 of the TEU), and powers and responsibilities of the European Parliament and the Council to adopt the measures "for the approximation of the provisions laid down by the law, regulation or administrative action in the Member States which have as their object establishment and functioning of the internal market". Particularly, "When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonization measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council."

same wording is contained in Article 35 of the Charter of Fundamental Rights of the European Union."[23]

At the time of the creation of the Lisbon Treaty and the Charter of Fundamental Rights of the European Union, it seems that situations and challenges such as the one caused by the COVID-19 pandemic was not even perceived. If perceived, it might have been regulated in a separate article dealing with the pandemic (as a specific threat to health much different and perhaps more far-reaching than those particularly mentioned – tobacco and abuse of alcohol).

A pandemic, such as the COVID-19 pandemic seems to be one of the most "serious cross-border threats to health." However, even though the contemporary legal framework through interpretation and various actions taken at the level of the EU seems to be sufficient to face the pandemic, there is a need to create a clearer legal framework to raise the level of awareness, emphasize the urgency and to achieve efficiency of possible responses to a pandemic.

Article 169 of the Treaty on the Functioning of the European Union (together with the institutions created by secondary legislation)[24] seems to be also sufficient in terms of the power of the European Union and responsibilities of the Member States, but insufficiently clear when it comes to determining the very need of the European Union to act in a timely manner in relation to a pandemic.

While the pandemic is not the word expressly used in Article 168, it is encompassed by the determination of the "major cross-border health scourge" and reveals the great potential of the European Union for a prompt reaction in health matters. Some of those potentials are already expressed in the Decision of 22 October 2013 on serious cross-border threats to health,[25] with the aim "to support cooperation and coordination between the Member States to improve the prevention and control of the spread of severe human diseases across the borders of the Member States, and to combat other serious cross-border threats to health in order to contribute to a high level of public health protection in the Union."[26] However, it is estimated that the structure and mechanisms established by this Decision "showed limitations in allowing a timely common EU-level response, co-ordinate

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23 Charter of Fundamental Rights of the European Union [2012] OJ C326/391

24 Such as the European Centre for Disease Prevention and Control, the European Medical Agency, the European Food Safety Authority, the European Environmental Agency, the European Monitoring Centre for Drugs and Drug Addiction, the European Agency for Safety and Health at Work all have at least some cooperation with the World Health Organization

25 Decision No. 1082/2013 of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health replacing Decision No. 2119/98/EC [2013] OJ L293/1 (Decision)

26 Art. 1 of the Decision, see note 34

the crucial aspects of risk communication, or ensure solidarity among the Member States" and there is a current proposal "to provide a strengthened framework for health crisis preparedness and response at EU level by addressing the weakness exposed by the pandemic."[27]

Lessons learnt during the COVID-19 pandemic motivated an initiative for the creation of "the European Health Union" in order "to better protect the health of the European Union citizens, equip the European Union and its Member States to better prevent and address future pandemics and to improve the resilience of Europe's health systems."[28] However, the question remains how to "ensure solidarity among Member States" and their willingness and ability to work together facing future pandemics?

Health Policy in situations such as pandemics cannot be efficient without an early warning system that is already established through the creation of the mechanisms under the umbrella of the World Health Organization and the European Center for Diseases Prevention and Control established in 2005.[29] Further studies need to identify a catalog of tools to implement the "Health in All Policies" principle, particularly in an extraordinary situation such as the pandemic.[30] The COVID-19 pandemic is a "perfect" situation for such an action because it provides a great experience when it comes to the nature of possible consequences caused by delayed or inadequate response to the pandemic. It seems that it should be emphasized that all policy decisions are decisions of political nature, even based on scientific data or opinions, but also that the early warning and prevention must be based on mechanisms that would be, as far as possible, objective considerations divorced from politics.

The TEU and the TFEU provide only a basis for the creation of a comprehensive legal framework to fight against infectious diseases and their pandemic. Even the main responsibility in health matters is on the Member States, agencies such as European Centre for Disease Prevention and Control need to act with full accountability, but all Member States and the bodies and institutions of the Eu-

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27 Proposal for a Regulation on serious cross-border threats to health, European Commission COM (2020) 727

28 *European Health Union, Protecting the health of Europeans and collectively responding to cross-border health crisis,* European Commission [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en], Accessed 10 April 2022

29 European Centre for Disease Prevention and Control is an agency of the European Union

30 Bartlett, O.; Naumann, A., *Reinterpreting the health in all policies obligation in Article 168 TFEU: the first step towards making enforcement a realistic prospect*, Health Economics, Policy and Law, 2020, p. 1

ropean Union could rely on its early warnings, scientific analysis, opinions, and recommendations.

The EU already has institutions created as a response or based on the experience from preceding pandemics. However, those institutions must be better equipped, particularly with the early warning capabilities, in order to avoid what had occurred in January 2020 when the European Centre for Disease Prevention and Control announced that "[e]ven if there are still many things unknown about 2019-nCoV, European countries have the necessary capacities to prevent and control an outbreak as soon as cases are detected."[31] Only five days after this statement, on 30 January 2020, the World Health Organization declared the Public Health Emergency of International Concern[32]. On 11 March 2020, the World Health Organization declared a pandemic of COVID-19. However, when the WHO declared a pandemic, all of the Europe found itself in trouble,[33] and most of the EU countries were already faced with insufficient capacities to prevent and control the COVID-19. Therefore, the assessment of the ECDC was not reliable.[34] It seems that the pandemic of COVID-19 is a clear example that serious cross-border threats should not be underestimated or neglected. The issue is not about the lack of adequate legal framework, but the awareness of the threat.

The Regulation establishing the European Center for Diseases Prevention and Control defines its mission and tasks in a precise and comprehensive manner. [35] It is obvious that at the very beginning of the pandemic something went wrong not because of the legal framework insufficiencies. Even before the COVID-19 pandemic, "despite the EU's political and legal commitment to [Health in all Policies] as a policymaking strategy... the use of [Health in all Policies] tools and

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31 *Novel coronavirus: three cases reported in France*, European Centre for Disease Prevention and Control, [https://www.ecdc.europa.eu/en/news-events/novel-coronavirus-three-cases-reported-france], Accessed 10 April 2022

32 *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV),* 30 January 2020, [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)], Accessed 10 April 2022

33 See van Eijken, H., Rijpma, J. J., *Stopping a Virus from Moving Freely Border Controls and Travel Restrictions in the Times of Corona*, Utrecht Law Review, Vol. 17, No. 3, 2021 p. 34

34 See, for example Griffin, G., *Covid-19 pandemic - why was the ECDC so ineffective?,* 2021, [https://euobserver.com/opinion/152036], Accessed 10 April 2022

35 See Art. 3 of the Regulation (EC) No 851/2004 of the European Parliament and of the Council establishing a European Centre for disease prevention and control [2004] OJ L142/1

implementation of its principles has been intermittent, and not always effective" as it was noted by Brant and Naumann.[36]

It seems that further reforms of the TEU and the TFEU need to take more account of the health policy, in particular when it comes to the estimation of what threats and the mechanism to cope with them should be raised on the level of founding treaties. For example, if the regulation concerning European Center for Disease Prevention and Control finds its place in the founding treaties of the European Union, its activities and probably the efficiency would not depend on the variable political will but would be an institutionalized EU mechanism at the core of the European Union.

## 4. THE QUESTION OF JUSTICIABILITY

The European Union Health Policy was never intended to be the subject of such a legal obligation that would be subjected to judicial control.[37] While it is still doubted whether it is the policy end or policy tool (as argued by Bartlett and Naumann) not all of the areas of EU activities should be the subject of judicial review.

The drafters of the founding treaties of the European Union (now TEU and TFEU) seem to be aware of the nature of health risks and the great uncertainty of this area depending on both scientific knowledge and political will.[38] At the time when the decision needs to be made and action to be taken, scientific facts might be insufficient, contradictory, or its reliability might be under the shadow of the doubt.

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[36] Bartlett; Naumann, *op. cit.*, note 30, p. 2. In this context, it seems that it should be emphasized that there was no lack of legal framework, but of its effectiveness. The legal framework already established provided that "An independent external evaluation should be undertaken to assess the impact of the Centre on the prevention and control of human disease and the possible need to extend the scope of the Centre's mission to other relevant Community-level activities in public health, in particular to health monitoring." The Centre (ECDC) is empowered to issue scientific opinions necessary for taking actions in the fight against the pandemic. Scientific opinion is not a matter of judicial scrutiny, however the method of obtaining information and respect for other operative procedures are or should be a matter of judicial activity

[37] Compare with Bartlett and Naumann, which stated that "HiAP itself was never intended to be the subject of legal obligations." However, included in the TEU and the TFEU (as quoted above) Health policy is a part of the legal framework of the EU involving certain legal obligations. Cooperation, harmonization, supplemental action etc. are all legal obligations of the EU institutions. However, the question of justiciability is another one

[38] While in Art. 114 of the TFEU dealing with the approximation of law new developments and scientific facts are criteria that should be taken into account, health policy, particularly in the area of pandemic, depends on the scientific knowledge that is not always achievable at the time when the decision needs to be taken

Not all of the actions and inactions of the European Union institutions are eligible to be the subject of the jurisdiction of the Court of Justice of the European Union. The legal framework in the Health Policy of the European Union might provide a certain basis for the judicial action (upon satisfaction of the admissibility thresholds requirements). Prolonged "brainstorming" when it comes to the issues stemming from this area is of little practical effect when there is a need for a prompt reaction such as the one created with the spread of COVID-19. However, this cannot be understood as a position against justiciability. On the contrary. There is an urgent need for the development of the EU legal framework in the area of Health Policy and the identification of those issues that should be the subject of judicial scrutiny. In this development, it should be noted that judicial tools cannot be a substitute for policy tools and judges cannot be perceived as actors that can replace political decision-makers.

## 5. THE IDENTITY OF THE EUROPEAN UNION AND THE PANDEMIC OF COVID-19

It seems that the pandemic of COVID-19 makes it clearer that all States and actors in the European arena should be more realistic in their perception of the role and the very identity of the European Union (not only in health matters). The pandemic revealed that the role of the State in the time of crisis is unavoidable and that the membership in the European Union cannot serve as an excuse when it comes to matters concerning pandemics. On the other hand, the European Union cannot free itself of the responsibility in providing appropriate answer to the threats such as pandemic. Events surrounding the COVID-19 pandemic revealed the role of States in the time of crisis while on the other hand, it also revealed the need for a stronger European Union. The question of the European identity during the COVID-19 is at stake.

The European Union is confronted with the question of its own perception. While it is undoubtful that it is an international organization (however unusual), from the standpoint of the Member States it is not a classical international organization and for some it is not even an international organization.[39] There is a need to highlight greater unity between the Member States, as well as, unlike most international organizations, that the EU is a supranational entity with its own and

[39] Von Bogdandy, A., *Neither an International Organization Nor a Nation State: The EU as a Supranational Federation*, The Oxford Handbook on the European Union, 2012, [https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199546282.001.0001/oxfordhb-9780199546282-e-53], Accessed 10 April 2022

well-developed legal and political system based on values such as democracy, rule of law and human rights.

While the issue of the identity of the European Union is blurred with a variety of considerations, particularly in the field of democracy[40], the rule of law, and the protection of human rights, it seems that the focus should be (not only in academic literature but also in political practice) on the issue of self-determination of the European Union and its perception from the outside. While there are many discussions about national self-determination within the European Union,[41] (as far as we are aware of) there are no analysis regarding the self-determination of the European Union and neither regarding the perception that the European Union has a clear right to self-determination.

The Europeans or citizens of the European Union, the people of the European Union, have the right to self-determination. It seems that self-determination is a key to the identity of the EU. By virtue of self-determination, the EU can "freely determine /its/ political status and freely pursue /its/ economic, social and cultural development."[42]

In this context, the EU is composed of Member States, but also of their citizens, whose citizenship of the European Union has already been legally established. However, self-determination is not a static notion. Quite the contrary, it is a process, and in the case of the EU, it is determined in Article 1 of the TEU: "[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."

The proper basis for the determination of the European Union was established a long time ago in the Document on The European Identity published by the Nine

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40 "The fact that the European institutions and the academic community are unable to identify the nature of the EU does not mean that the Union should not exist. There is no point indenting reality in the name of theory! It is neither feasible to organise an ambitious and time demanding conference on the future of the EU, if there is no theoretical foundation for the functioning of the Union. To put it simply: the European Union cannot solve its existential problems by ignoring them." Hoeksma, J., *The Identity of the EU*, The Federal Trust 2020, [https://fedtrust.co.uk/the-identity-of-the-eu/], Accessed 14 April 2020

41 See for example Levrat, N., *The Right to National Self-determination within the EU: a Legal Investigation*, Euborders Working Paper 08, 2017; Ushakovska, M., *European Union Integration and National Self-Determination*, New England, Journal of Public Policy, Vol. 31, No. 2, 2019, pp. 1-21

42 See Art. 1 of the International Covenant on Civil and Political Rights [1966] United Nations Treaty Series, Vol. 999

Foreign Ministers on 14 December 1973, in Copenhagen.[43] Today, it seems that the very substance of the document determines also the identity of the contemporary European Union. Basic elements of the identity of then European Economic Communities and today's European Union are set in an adequate manner, even less enthusiastic.

In the part of the Document, which deserves to be quoted *in extenso,* it is clearly stated:

"The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society that measures up to the needs of the individual, they are determined to defend the principles of representative democracy, the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity. The Nine believe that this enterprise corresponds to the deepest aspirations of their people who should participate in its realization, particularly through their elected representatives.

The Nine have the political will to succeed in the construction of a united Europe. Based on the Treaties of Paris and Rome setting up the European Communities and subsequent decisions, they have created a common market, based on a customs union, and have established institutions, common policies, and machinery for cooperation. All these are an essential part of the European Identity."

The nowadays European Union needs a similar document on its identity. Basic elements are set almost 50 years ago and need to be reaffirmed today when the membership grew/fell to 27 States. Only an update to the existing legal text is needed in order to reflect developments from the founding treaties to the European Union's well-established policies.

More than 50 years ago, the Document was clear that "[a]lthough in the past the European countries were individually able to play a major role on the international scene, present international problems are difficult for any of the Nine to solve alone. International developments and the growing concentration of power and responsibility in the hands of a very small number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself

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[43] Declaration on European Identity, Bulletin of the European Communities [1973], Office for official publications of the European Communities, pp. 118-122, [https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf ], Accessed 16 April 2022

heard and play its proper rôle in the world."[44] Today, when faced with the COVID-19 pandemic, this statement has a great value and emphasizes the urging need to promote cooperation of Member States based on the principle of solidarity.

The identity of the European Union inevitably concerns the issue of "the European Identity in Relation to the World" and the following formulation from the Document on the European Identity needs to be reaffirmed and implemented: "European unification is not directed against anyone, nor is it inspired by a desire for power. On the contrary, the Nine are convinced that their union will benefit the whole international community since it will constitute an element of equilibrium and a basis for co-operation with all countries, whatever their size, culture or social system."[45]

Inevitably, due to the COVID-19 pandemic, activities but also inactions of the European Union found a prominent place in the very perception of the identity of the European Union. The identity of the European Union cannot be based only on its exclusive competencies. Even in the case of highly centralized unitary states (not to mention federations) not all of the competencies are on the central government, and that fact does not undermine its unity and its identity.

It seems that in the area of health, the European Union does not have a particular international identity. It has to be built, and the first steps are taken through the creation of the initiative of the European Commission on the European Health Union[46]. In our perception, this is not a creation of the novel Union, that is an attempt to strengthen cooperation and achieve solidarity in the already existing legal environment. In this context, certain improvements of the founding treaties seem to be necessary.[47]

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44 *Ibid.*, par. 6

45 Since 1973, many things have changed, and the EU has now established a Common Foreign and Security Policy through which the European Union can act on behalf of all Member States. Now, the foreign policy of the European Union is one of its key elements in the perception of the European identity. In order to strengthens the European Union, the main political course of the European Union should be clearly formulated and also implemented in practice

46 See: European Health Union, Protecting the health of Europeans and collectively responding to cross-border health crises, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en], Accessed 14 April 2022

47 What the EU makes a single entity is not only its supranational powers to issue binding decisions, but also the coordinating and directing mechanism that makes the European Union and its Member States capable to respond to challenges and to speak in one voice. In this context Regulation 2021/522 of 24 March 2021 establishing the Programme for Union's action in the field of health ('EU4Health Programme) for the period 2021-2027 [2021] OJ L107, and repealing Regulation (EU) No. 282/2014 [2014] L 86/2 OJ makes significant improvements in the field of the EU health policy. However, even this document makes some improvements of the EU legal framework of the EU health policy

## 6. *IN LIEU* OF A CONCLUSION

What has to be done in order to strengthen the ability of the EU to respond to the new challenges? The reality is that the world is not the same as before the COVID-19 pandemic. While the challenges are more demanding, and not all of them are covered with this article, it seems that one of those challenges concerns the readiness of the European Union and its Member States to face the future threats of pandemics or similar causes. The development of the legal framework (already on the European Union agenda under the name of the European Health Union) shall not be struck only in declarations and secondary legislation. Issues such as pandemics are unexpected and prompt. Experience with the COVID-19 pandemic, which is unprecedented in recent history, taught us a lesson that the European Union needs to establish a reliable mechanism for the prompt identification of the threat and to provide timely (or more precisely - prompt) reaction.

Besides significant improvements of the European Union legal framework with secondary legislation during the COVID-19 pandemic, it seems that it should be reconsidered whether there is a need to amend founding treaties by adding provisions concerning the state of emergency in situations such as pandemic when the threat to the life of the European Union is identified, identification of the pandemic as the "major cross-border health scourge" as well as provisions that will define competencies and responsibility of the European Centre for Disease Prevention and Control. In that manner, its activities and probably the efficiency would not depend on the variable political will but would be an institutionalized mechanism at the core of the European Union.

The COVID-19 pandemic saliently raised the issue of the European Union's identity since that was (or still is) a crisis of unprecedented magnitude testing the ability of the European Union to confront it and its role in the crisis on the one hand, and the solidarity of its Member States, on the other. The experience that resulted from the COVID-19 pandemic, even the failures of the EU to react in the early phases of the pandemic, provides plenty of "opportunities in crisis" to build a stronger identity of the European Union. The world is not the same, and it seems that the European Union, in order to face new challenges, must build its identity in realistic parameters and act in one voice, as it was declared in the Declaration of 1973.

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with the significant budget (See Article 5 of this Regulation). It is just a step, as stated in regulation, "The Program therefore should support the development, implementation and enforcement of Union health legislation and, in conjunction with relevant bodies such as EMA and ECDC, should provide high-quality, comparable and reliable data, including real-world healthcare data, to support policy-making and monitoring, set targets and develop tools to measure progress."; See, the Preamble, par. 32

At the very beginning of the pandemic, Henry Kissinger, one of the most prominent geopolitical analysts and the ex-US Secretary of State and National Security Advisor, wrote: "When the Covid-19 pandemic is over, many countries' institutions will be perceived as having failed. Whether this judgment is objectively fair is irrelevant. The reality is the world will never be the same after the coronavirus. To argue now about the past only makes it harder to do what has to be done."[48] Richard Haas, actual president of the US Council on Foreign Relations, at the beginning of the pandemic pointed out that "the pandemic will accelerate history rather than reshape it" arguing that "not every crisis is a turning point."[49] Those two prognoses are not in contradiction and both of them were realized. In this "new world" the European Union needs to find its place and to build its own identity exercising its own right to self-determination. The culmination of the Ukrainian crisis,[50] that is contemporaneous with the pandemic, has a great potential to blur the perception of the consequences of the coronavirus pandemic. Bitter experience of the COVID-19 pandemic should not be forgotten and need to find its proper place in the founding treaties of the European Union.

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48 Kissinger, H., *The Coronavirus Pandemic Will Forever Alter the World Order,* 2020, [https://www.wsj.com/articles/the-coronavirus-pandemic-will-forever-alter-the-world-order-11585953005], Accessed 16 April 2022. However, Richard Haass (the actual president of the Council on Foreign Relations) put the thesis that the pandemic will accelerate history rather than reshape it- not every crisis is a turning point (Haass, R., *The Pandemic Will Accelerate History Rather Than Reshape It Not Every Crisis Is a Turning Point*, Foreign Affairs 2020). Wang, C., *To Cope with a New Coronavirus Pandemic: How Life May be Changed*, Chinese Journal of International Law*,* 2020, pp. 221-228. „One of the most important ways in which the coronavirus pandemic is changing the world is through its impact on every aspect of the life of every individual in society, including the way we work, live and learn, from the macro economy to household income, and from social security to individual human rights.…", *Ibid.,* p. 222

49 Haass, *op. cit., note* 1

50 It seems that at least in the footnote it should be observed that in order to face challenges, an objective analysis and facing the problems are more than necessary. However, as noted by Pascu and Nunweiller-Balanescu, it is also important not to neglect the possibility that the authorities in one country or another, faced with an inability to manage the pandemic domestically, will knowingly cause an international crisis in order to divert attention from the mismanagement of the pandemic towards an "external threat". Furthermore, in the absence of an outside enemy, in some countries the narrative has aimed to reconstruct a state-based threat by linking the origin of the virus to a foreign country (Tardy 2020, 14), which can have serious consequences for the stability of the international order. Pascu, I.; Nunweiller-Balanescu A, *Implications of the COVID-19 Pandemic*, Europolity, Vol. 14, No. 2, 2020, p. 43

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UDK 331.361.3:34.08(497.5)
378:34]:339.1
Preliminary communication

# CAREER DEVELOPMENT AND MENTORING FOR YOUNG LAWYERS IN CROATIA - RECENT FINDINGS AND PANDEMIC IMPLICATIONS

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***ABSTRACT***

*Unlike their Western European and American counterparts, most young Croatian lawyers feel they lack the necessary career support during their studies and later at their workplace. Based on the recent primary data, this study investigates the career development services and experiences, perceived legal education-labour market (mis)match and mentoring insights among final year law students and recent graduates in Croatia. Preliminary findings indicate plenty of room for improvement both in transferring Western good practices and organically creating career support initiatives at the workplace and during legal studies. In addition, this study emphasises the (increased) importance of quality mentoring relations in the circumstances of exogenous shocks such as the global COVID-19 pandemic.*

***Keywords****: Career development, COVID-19, Mentoring, Lawyers, Law school, Legal practice*

## 1. INTRODUCTION

A recent Bloomberg Law article[1] on lawyers' mentoring experience states:

"Graduating from law school, passing the bar exam, and joining a firm are key milestones for new attorneys. *But mastering elements not taught in law school such as developing business and navigating firm culture can be daunting. That's where mentors can make a difference*. …They said professional guidance from a more experienced attorney—a senior associate or partner—who worked in their same practice area, or who shared similar life experiences, was of great help, even if only as a sounding

[1] Bloomberg Law, *Big Law Attorneys Share Why Mentoring Matters,* [https://news.bloomberglaw.com/bankruptcy-law/big-law-attorneys-share-why-mentoring-mattersG] Accessed 7 April 2022

board. Sometimes a mentor introduced the attorney to important clients, employers, or other individuals who proved to be key to their futures. Most said they were inspired to pass on that help to others." (part of the quote italicised by the author of the article)

Unlike their Western European and American counterparts, most young Croatian lawyers feel they lack the necessary career support both during their studies and later at their workplace. Preliminary studies suggest that there is plenty of room for improvement, particularly when comparing the situation in Croatia to the developed systems of career support and mentoring like the ones in the United States and Western Europe. This paper is based on the recent research conducted within the project inspired both by the afore-mentioned differences and the needs recognised by young legal professionals.

The paper is structured as follows. Section 2 presents the methodology. Section 3 provides the literature review on the importance and implementation of mentoring (system) as a part of career development. Section 4 presents and discusses the findings of the recent project on career development and mentoring among (young) Croatian lawyers. Section 5 concludes the paper.

This paper contributes to the understanding of the underresearched and underrepresented topic of career development (support services) and mentoring (systems) in the legal profession, with an emphasis on final year law students and recent graduates in Croatia. The findings of the study are expected to be useful to various actors in the field ranging from students, higher education administration and management to the employers.

## 2. METHODOLOGY

This study draws on primary research conducted for the purposes of the project 'Promoting Entrepreneurial Life Cycle Principles among Law Practitioners - Lessons Learned from the US Practice' funded by US Embassy to Croatia - US Alumni grants, conducted by CEPOR[2] and led by Ružica Šimić Banović. The initial survey was conducted in the period September – November 2020. It included interviews and/or focus groups with 52 final year law students and recent graduates, mostly from the University of Zagreb. The affiliation of the employed interview-

[2] CEPOR – SMEs and Entrepreneurship Policy Center, available at [https://www.cepor.hr/en/], Accessed 17 March 2022
Project information, Available at: [https://www.cepor.hr/online-radionice-ide-abbott-razvoj-karijere-u-odvjetnistvu-i-mentorstvo/], Webinars available at [https://www.youtube.com/watch?v=PWdrojw3f-0&t=115s], Accessed 17 March 2022 (Strategic Career Planning) and [https://www.youtube.com/watch?v=ob3JFcENDSk&t=875s] (Mentoring Matters), Accessed 17 March 2022

ees was as follows: majority of the respondents were employed in the law offices, followed by the European Commission, Croatian public administration, NGOs and corporate sector. Additional data were obtained from the post-webinar survey completed by 49 participants with similar backgrounds mostly from Croatia, and a minority of them from Slovenia, Bosnia-Herzegovina, Serbia and Macedonia. The Mentoring webinar was held in April 2021 and the post-webinar survey was completed within seven days after the webinar. The third, supplemental source of primary data for this paper comes from the conversations with Ida Abbott[3], one of the leading US experts for career development and mentoring in the legal profession.

## 3. LITERATURE REVIEW

It is well known that mentoring is linked with numerous benefits ranging from behavioural and health-related to relational, motivational, and career aspects. More significant effects are usually found in the academic and workplace mentoring (when compared to youth mentoring).[4] Positive outcomes are commonly associated with the mentees. Yet, studies reveal that the mentors (managers in this case) are considered better performers by their supervisors[5] and that their perceived training effectiveness was positively linked with their willingness to engage in activities leading to the wellbeing of younger generations.[6] Overall, mentoring is markedly instrumental to mentees, to organisations and to mentors.[7]

Numerous universities have recognised the role of mentoring and alumni relations – the two can also provide synergy effects. Leading law schools nurture the alumni relationships at many levels, ranging from regular newsletters and blogs on their activities and School's updates to networking events, career days, thematic panels and career counselling (both for the students and younger graduates).[8] The

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3 About Ida, available at: [https://idaabbott.com/about-ida/], Accessed 21 March 2022

4 Eby, T. L., *et.al*, Does mentoring matter? *A multidisciplinary meta-analysis comparing mentored and non-mentored individuals*, Journal of Vocational Behavior, Vol. 72, No.2, 2008, pp. 254-267

5 Gentry, A. W.; Weber, J. T.; Sadri, G., *Examining career-related mentoring and managerial performance across cultures: A multilevel analysis*, Journal of Vocational Behavior, Vol. 72, No. 2, 2008, pp. 241-253

6 Parise, R. M., Forret, L. M., *Formal mentoring programs: The relationship of program design and support to mentors' perceptions of benefits and costs,* Journal of Vocational Behavior, Vol. 72, No. 2, 2008, pp. 225-240

7 Ivey, G. W.; Dupré, K. E., *Workplace mentorship: A critical review*, Journal of Career Development, 2020, Advance Online Publication [https://doi.org/10.1177/0894845320957737], Accessed 10 April 2022

8 Selected examples from the London School of Economics and Political Science (LSE) are following: Career centre and its services [https://info.lse.ac.uk/Current-Students/Careers], Alumni events [https://info.lse.ac.uk/current-students/careers/events/Employer-and-alumni-insights], Alumni

importance of a strong and visible alumni community is considered to be an asset. Alumni and their schools may contribute to the society in many measurable ways.[9]

Considering the (recent) pandemic conditions, it is valuable to analyse the recommendations for the online mentoring programmes developed based on an extensive review of e-mentoring programmes in medical clinics in the period between 2000-2017[10]. The novice mentoring and mentoring between senior and junior clinicians was scrutinised. Because of the deficit of mentors, online mentoring was suggested to be the more appropriate form. The framework that appears to be applicable in many other professions is presented in Figure 1. Furthermore, aimed at efficient matchmaking, three recommendations appear to be crucial: first, matching the mentor and mentee based on deep-level similarities; second, addressing the mentee's developmental needs during matching, and third, seek mentors' and mentees' feedback before reaching the final stage of matchmaking.[11] In line with that, Abbott explains the background and the need for mentoring training and guidelines being incorporated in the work environments:

"Effective mentors make mentoring a natural part of their daily work. They enjoy helping others succeed and consider the time spent as a mentor to be valuable and productive. They understand the important role mentoring plays in developing their organization's future leaders. For many people, being a mentor is easy and natural. Other people want to be mentors but are not sure what they should do. They fear that mentoring is too complicated and time-consuming, so they overlook opportunities to assist others who could benefit greatly from their wisdom and attention."[12]

promotion [https://www.lse.ac.uk/alumni-friends-and-partners/alumni-profiles] and Alumni blogs [https://blogs.lse.ac.uk/careers/2019/02/05/insider-tips-digital-consultancies/]; In addition, LSE Law organises various events: Life outside the magic circle coffee morning, Law careers panel, Criminal justice networking, Life as a Barrister, etc.

9 This campaign is one of the examples: [https://shapingtheworld.lse.ac.uk/], Accessed 10 April 2022

10 Chong, J.Y., *et al. Enhancing mentoring experiences through e-mentoring: a systematic scoping review of e-mentoring programs between 2000 and 2017*, Advances in Health Sciences Education 25, 2020, pp. 195–226 [https://doi.org/10.1007/s10459-019-09883-8]

11 Deng, C.; Gulseren, D. B.; Turner, N., *"How to match mentors and protégés for successful mentorship programs: a review of the evidence and recommendations for practitioners*", Leadership & Organization Development Journal, Vol. 43 No. 3, 2022, pp. 386-403, [https://doi.org/10.1108/LODJ-01-2021-0032]

12 Abbott, I., *Being an Effective Mentor: 101 Practical Strategies for Success*, NALP, 2018, [https://www.nalp.org/productdetail/?productID=264]

**Figure 1.** The e-mentoring framework[13]

**The e-mentoring framework**

1. Clear understanding of goals and focus of mentoring program

The scope and focus of the mentoring programme should be clearly decided upon by the host organization and reflected in the programme design.

Mentors must have a clear idea of their roles, goals, duties and the e-mentoring approach being employed.

2. Mentor recruitment

Mentors who choose to e-mentor, must have support from their department heads and have good mentoring track records should be invited to participate in e-mentoring programmes.

3. Mentors training

Mentor training comprises of a) navigation of the electronic platform b) training on communication, mentoring and core-competencies and skills including assessment of mentees and providing effective feedback c) training on netiquette (internet etiquette) and d) on the mentor's role and codes of conduct

4. Mentee training

Mentees need to be given guidance on how to navigate the online space, netiquette and the roles, timelines, standards of practice and codes of conduct and clear articulation of what is expected of them

5. Choosing a mentoring approach

The mentoring approach adopted must reflect the setting, goals and timelines of the project, the needs, abilities and support of mentees, mentors and their relationship and what can realistically be provided and supported by the host organization.

These considerations determine, the type of platform that will be adopted, the frequency of meetings and the nature and tone of the program

6. Space for reflection

Reflection features strongly in e-mentoring and asynchronous communication affords mentor and mentee time to consolidate their thoughts and reflect.

Having 'protected time' within the curriculum for mentors and mentees will facilitate reflection.

7. Oversight by host organisation

Host organisations must provide longitudinal and holistic oversight of the program including maintaining privacy and confidentiality, policing conduct and compliance to timelines and responsibilities.

The host organization must guide and support the program and must do so through regular evaluation of the program as whole.

[13] Deng, C.; Gulseren, D. B.; Turner, N., *op. cit.*, note 11

In light of the legal profession, it is interesting that provision of online legal services had notably increased even before the COVID-19 pandemic. For instance, Chinese online legal service platforms have shown to be successful before 2020. The reasons for success were usually rather pragmatic. These include flexibility (i. e. scheduling autonomy) both for the clients and the lawyers and compensation for less offline work for lawyers despite lower professional status.[14] Thus, the development of online mentoring platforms may be well in line with the digital legal market. Some studies suggest that e-mentoring may not be as efficient as face-to face mentoring and that the reason for that could be connected with the gender of the mentor. This was, for instance, the case in the observed online peer mentoring that resulted in less psychosocial support, career support, and post-mentoring mentee's results. That happened only for those with male mentors and it was mainly attributed to male mentors compressing their conversations in the chat when compared to live interactions.[15]

## 4. KEY FINDINGS AND DISCUSSION

### 4.1. Setting the scene: Career aspirations of the final year law student and young legal professionals

In order to obtain the big picture on the career intentions of the respondents, several questions were asked in the survey. These were meant to cover the topics of their career goals, plans, resources to achieve them, possible obstacles and prerequisites for the job market. Table 1 shows the key topics that emerged when asked about the overall career goals of the respondents.

[14] Yao, Y., *Uberizing the Legal Profession? Lawyer Autonomy and Status in the Digital Legal Market*, British Journal of Industrial Relations, Vol. 58, No. 3, 2019, pp. 483–506, [doi: 10.1111/bjir.12485]

[15] Kimberly A. Smith-Jentsch, *et al.*, *A comparison of face-to-face and electronic peer-mentoring: Interactions with mentor gender*, Journal of Vocational Behavior, Vol. 72, No. 2, 2008, pp. 193-206

**Table 1.** Career goals (intentions, motivation, ideal practice)

| Key topics | Illustrative examples of the answers provided |
|---|---|
| Law offices | "After graduating from college, become a trainee lawyer in a law firm, continuously develop my knowledge and skills and continue to study, pass the bar exam and become a top lawyer."<br><br>"My ultimate goal is to open an independent law firm. For now, I have more affinity for civil, commercial and financial law, but I would like to try my hand at criminal law as well, at least during my internship at the law firm. I am also interested in the field of legal and financial consulting."<br><br>"Develop a boutique office for up to 7 employees / Develop a highly professional specialised (boutique) law firm." |
| EU /international organisations and master studies | "LLM and/or work in international organisations / EU organisations (human rights, international development, migration, diplomacy)."<br><br>"I would love to complete an MBA at some stage in my career. I am very interested in entrepreneurial ventures, but I expect that time will show if there is room for that, and if so, in which direction."<br><br>"After taking the bar exam in my home (Croatian) jurisdiction, my main ambition is to gain international experience in several countries in the field of international (public) law. Ideally - an internship in an international public organisation and in an established "larger" office where I would encounter issues of international law." |
| Work-life balance | "Balance of personal satisfaction, material security, family life and contribution to the community."<br><br>"Have a stable job without excessive stress, even at the cost of a lower salary."<br><br>"Lead a team / department, be a recognized expert in their field, know how to balance private and business life."<br><br>"Gain as much knowledge and experience as possible. Being successful and committed to what I will do, constantly improving. The ideal practice would be to work with someone who can pass on their knowledge, experience and advice to me. I strive to be great in my profession." |

Table 1. shows rather clear ambitions of the interviewees with many of them emphasising importance of the work-life balance already at the early career stage. As a long term advice, Ida Abbott[16] strongly advocates preparing a career development plan and checking it and, if needed, revising it on a regular basis. In the next step,

[16] Šimić Banović, R.; Alpeza, M., *Razvoj karijere i mentorstvo u pravnoj struci*. CEPOR, 2021 [http://www.cepor.hr/wp-content/uploads/2015/04/CEPOR-Razvoj-karijere-i-mentorstvo-web.pdf]

the interviewees were asked in more depth about their resources, tactics, plans and expected barriers on their career path.

The most representative answers include:

- "Lots of experience, knowledge, work and learning."
- "I have a strategy for achieving these goals, and I need to graduate, get involved in as many projects in the target area as possible, which are not related to my studies, and improve my financial literacy."
- "Find an environment that allows for progress, mentoring, collaborating with many clients, making a good impression based on the work done, expanding contacts, further education and leaving the comfort zone for training in other areas,"
- "I believe that strong internal motivation to work, adaptability to change and a proactive attitude are key factors for achieving goals. These traits will often be tested throughout our professional lives and we will often encounter conditions that are not ideal, but with focus and commitment to work tasks we will find it easier to get through such periods."
- "First of all, to graduate from law school, to invest in further education, especially in the field of financial literacy (e.g. further specialisation in the field of economics, taking courses in accounting / bookkeeping). In addition to further education and financial resources, investments should be made in acquiring knowledge and skills in overcoming obstacles in terms of terminology and improving foreign languages, English in particular."
- "As the most important item, I would set aside a lot of effort and work, and then the financial resources needed to make a person independent in their work. Also, I would like to single out the need for managerial and economic skills and interpersonal relationships in running a business, office, etc."
- "I have a strategy: a mentoring relationship, consciously monitoring my working methods and evaluating skills, identifying the necessary training, consciously exposing myself to certain projects to improve my skills, etc."
- "To achieve the above goal, it is necessary to continue education in one of the internationally recognized LLM studies - specialisation in international public law, international arbitration, etc. Obstacles I will encounter are financial in nature (since many LLM programs are expensive programs) and such that the competition for the small number of places they offer is extremely high. I have been working on the strategy of achieving this goal since the second year of law studies at the Faculty of Law in Zagreb, when I became involved in numerous projects where I gained valuable experience that I hope will be enough for me to enroll in LLM. After LLM, I hope to practice / work abroad with

the aim of gaining diverse experience and finding a narrower sphere of interest in the field of international law."

- "I guess choosing a law firm is a very important moment to develop the direction of my career and my skills until I pass the bar exam. Certainly, one of the biggest obstacles is the coronavirus epidemic, due to which the economic situation and the labour market could suffer to a greater extent than now in a year, but I believe that I will overcome that obstacle."
- "To achieve success in law, I believe that one of the most important factors is character. I have a great desire to develop my skills, learn and believe in my abilities, and I am aware of my weaknesses and negative traits."
- "I need my own clients!"

…but also…

- "I have a very vague strategy."
- "Achieving these goals will require a lot of work and dedication, graduate college, and lifelong learning. I don't have a detailed strategy at the moment."
- "I have a framework plan for education, but I do not have a specific strategy."
- "I do not know. I have no strategy."

The answers to these questions provide a heterogeneous mosaic that is most likely to reflect the attitudes of the full population of that age and professional background. Many of them seem to be rather focused on their career goals, well aware of the reality and milestones needed to be reached, emerging and existing obstacles. They predominantly emphasise lifelong learning, the urge to be flexible and to upgrade one's skills and competences throughout the whole career. Still, some of them possess only an ambiguous plan and lack ideas about their career.

### 4.2. Legal education, job market needs and career progress

Most respondents feel ready and rather competent while at the same time noticing room for improvement. Some complain about the lack of practical skills and make a distinction in case they need to look for a job abroad such as this one:

- "I feel insufficiently ready to enter the foreign labour market, while after almost a year spent as a trainee lawyer I feel relatively ready to advance in the domestic labour market in the form of employment in another office or other institution."

  Regarding their legal education, the respondents usually consider the lack of various soft skills, practical experience and critical thinking. They argue that Croatian legal education predominantly relies on the reproduction of the

readings and consequently fails to incorporate sufficient training on the vital soft skills. The respondents emphasised the need of improving their negotiation, presentation, sales and similar skills as well as having more work experience. Findings presented in this study are mostly in line with the findings of a similar study conducted ten years ago.[17] It could be argued that not much has changed in the meantime. Other important issues are included in the following statements:

- "Mostly practical knowledge, case study approach, taking exams focused on the application of information, not their mere reproduction. … I am sorry that most of the studies of law in Croatia are focused on the method of mere memorization and reproduction of facts. In my opinion, such an approach to students and the subject is completely outdated."
- "Obtaining information during legal education about various career options, especially non-traditional ones that do not include law, judiciary or legal service, and linking theory with practice, precisely to gain a picture of the daily routine of individual jobs - writing lawsuits, complaints, objections, discussions proceedings before judicial or administrative bodies, etc."
- "I find that I lack knowledge of foreign languages since at work I often find myself in a situation where I have to communicate with foreigners, who prefer their language being spoken. Furthermore, practical experience in various branches of law, contact with contracts and litigation, etc. is something we almost do not encounter at law school, which makes the period after direct employment more difficult and arduous - a lot of time is spent learning some things "from scratch"."
- "We lack everything! OMG, since I have emigrated, every day I identify the knowledge and skills I should have obtained during my studies. And I was among the best students. What would the mediocre ones say?"

In the next stages of their career, the interviewees would like to acquire and/or improve some of the essential skills for the (junior) lawyers who are either self-employed or employed in a law office, a company or possibly in an international organisation: self-presentation/promoting skills, networking, sales of legal services (ethical, of course), finding and keeping new clients (especially when founding their own law offices), other complementary skills. But also, some young professionals (towards mid-career stage) claim they need to know how to identify market trends, and once they recognise the niche(s) they want to know how to spe-

[17] Vedriš, M.; Dujšin, U.; Šimić Banović, R., *Uloga kolegija Ekonomska politika u obrazovanju pravnika: Iskustva Bolonjskog sustava obrazovanja na Pravnom fakultetu Sveučilišta u Zagrebu*, Pravnik Vol. 51, No. 102, 2017, pp. 127-138, [https://hrcak.srce.hr/192607]

cialise in that niche in a small market like Croatian. Boutique law office remains an increasingly attractive and needed topic for some young lawyers.

Recent graduates mostly state:

- "I would like to learn how to attract as many clients as possible as a lawyer and maintain a quality business relationship with them, how to combine additional education and work, and how to start learning about an area of law that I have not dealt with so far (or avoid it)."
- "First of all, I would love to see what a real world law firm looks like. I would love to hear tips to help me with my further education and work."
- "Since I do not want to build a career in the direction of advocacy, I think that a general introduction to the labor market in the legal profession, or what all the possibilities the legal profession opens up to us, would be interesting and useful."

Young professionals have further developed their ideas:

- How to get along with different groups and profiles of people, how to be less emotional at work and not take everything personally, and how to know where to set and draw the limit.
- Elements of the entrepreneurial spirit needed for lawyers.
- Exchange of experience in law
- Use of new technological tools.
- How to find new clients and how to open my own office.
- Techniques and skills of communicating with clients, taking into account difficult personalities, personal involvement and "exposure" than is the case in large law firms when working with legal entities.
- Basics of business communication, negotiation, lobbying, peaceful settlement of disputes.
- Information on opportunities outside the Republic of Croatia.
- Psychological skills - setting boundaries in an office environment.
- Experiences of American lawyers in terms of relations with judges, relations with clients....

### 4.3. Career services provided

In terms of their 'real life' experience in legal practice, the respondents' answers vary from an obligatory student practice that was not useful as expected to very useful experiences in Croatia (law offices, ombudsman, corporate sector, Law

Clinic at the Faculty of Law, student assistants' work) and abroad (EU institutions, law offices). Related to job search and employment opportunities in general, they mostly have an idea on the technical procedure, but they do lack skills for proactive job search.

- "I think I know. In addition to applying to office vacancies, many are hired by submitting an open application or by personal recommendation."
- "As for the Croatian market - I know a little bit, based on the experience of friends and acquaintances. As for the Brussels market (lawyers, EU institutions), I know a lot because I have been here for over five years."
- "I learned most about the employment opportunities on the labour market in the legal profession from my Zagreb Law School colleagues as well as from my LSE colleagues, personal research and through acquaintances in the profession, i.e. after graduation and through encounters with different people. I am aware of the possibility of finding a job through various channels as well as tools that can be useful, such as LinkedIn platforms, certain websites, networking benefits, employment processes in institutions and the like."
- "I am familiar with employment opportunities in the domestic market and I believe I know how to start looking for a job and eventually get it somewhere. I would like to gain insight into employment opportunities in the foreign market and in the branches of law that are not as represented in Croatia as abroad."

(Former) students having Western education experience are well aware of the importance of the career counselling during undergraduate and graduate studies. They consider it precious for their overall professional development, attitude and skills like preparing motivation statement and CV. Yet, formal career service (like the ones in Western Europe and USA) does not exist at the Croatian Law Faculties. Most students did not experience any sort of continuous and formal career counselling during their studies. Yet, some of them attended lectures on career development organised by student associations and some professors. Furthermore, there is no structured and continuous platform that would help students find a job. From time to time the Faculty serves as co-organiser of Career Days. Students and former students find the help and recommendations of certain professors very useful. These are usually from the Departments where those students acted as student assistants, so the professors had worked with them closely. Some respondents recognise the individual advice they got from those professors or senior colleagues as very valuable. To underline the comparison between the provision of career support services in Western countries and in Croatia, here is the excerpt from the interview with an alumna being education both in Zagreb and in the Western Europe and now working for an EU institution:

"...I realised that at my current job and during my LLM I got used to a "buffet" of opportunities to upgrade myself, to network and to reflect proactively on my professional path with expert support provided for all of that. Quite contrary to that "buffet", in Croatian educational institutions I was mostly offered some crumbs which at that time I considered great, but, in order for our graduates to be competitive in an international environment, much more should be offered."

## 4.4. THE ROLE AND IMPORTANCE OF MENTORING

When asked about the features of an ideal law practice, the interviewees often emphasise the role of a competent and engaged mentor and/or supervisor:

- "Working with a mentor who can be relied on and in front of whom I am not afraid to make mistakes."
- "Specialised law office. Because today the law is so broad and the market requires specialisation. But, the problem is that the size of Croatian market rarely allows specialisation."
- "An office where I have responsibility and various jobs so that I can learn as much as possible and finally decide in which direction I want to specialise."
- "Ideal practice would contain the following elements: dynamism, constant learning, quality relationships with co-workers in the workplace."
- "Paid internship that involves working with a mentor on various projects, where the intern's work can be immediately evaluated and therefore learned immediately."
- "Getting started in the legal department in a corporation and merit-based advancement."
- "A practice in which detailed feedback is obtained often and the possibility of learning with healthy interpersonal relationships."
- "First of all, work with a quality mentor, from whom I will gain the necessary knowledge and experience, in the areas that interest me, so that I can gradually develop myself."
- "Exposure to a number of frequent problems and situations of the relevant field of law, with taking responsibility for the preparation and execution of the task, but also clear mentoring and monitoring of the final product of the work. I believe that both of these aspects are needed in order to gain independence, develop creativity and the necessary skills, but with mentoring as ensuring the effectiveness of learning and the much-needed provision of security support in the beginning."

- "An ideal legal practice is one in which a good and engaged mentor is present. Practice with a lot of responsibility, trust of the boss / principal, support and resources, with the possibility of additional education."
- Also, when asked about their expectations on acquiring and upgrading practical, everyday aspects of practising law (such as conflicts of interest, client trust, monitoring the work of trainees), the respondents provided the answers similar to this one:
- "I think that in Croatia this knowledge is acquired through practice and years of work, and it is up to us how quickly we will adopt it. Also, many life situations that an individual has gone through, regardless of the job, are an important factor ... It would certainly be useful if there were workshops or seminars where you could learn more about it."
- "Since I work in a small office that can be described as a family business, from the very beginning of my employment, I deal with everyday aspects of this job - caring for clients, not just performing tasks, monitoring and encouraging my own work and learning, attracting new clients, etc."

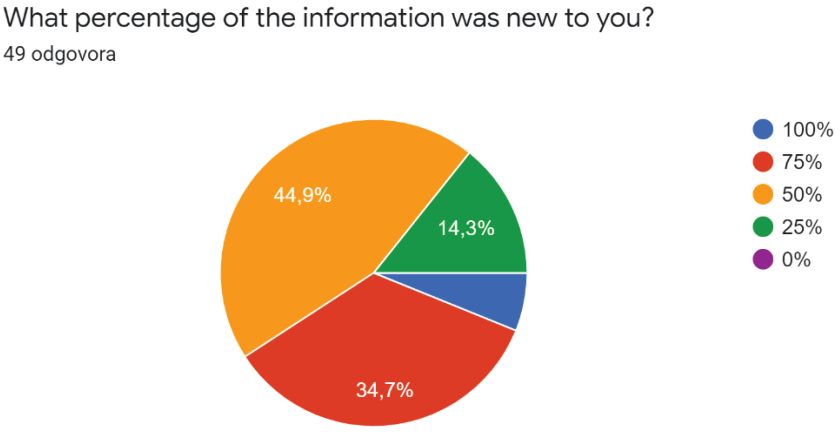
In addition, the respondents argue that these topics would be vital for their further professional development: making the best use of the mentoring relationship, choosing a profession, niche and/or office according to personal preferences, importance of the entrepreneurial spirit for establishing and developing law offices: acquiring new clients and managing the relations with them, promotion and self-promotion, financial literacy, etc. Overall, mentoring is considered highly important in many aspects during the studies and at the labour market. Yet, the interviewees perceive a gap between its considerable importance on one hand and its insufficient availability at all study and employment stages on the other. Based on their experience, they also note another gap between the Western countries and Croatia, it is related to the mentoring development and overall career support. This refers both to their LLM studies and their work experience. As a way forward, the interviewees feel a pressing need for continuous quality mentoring. Based on their experience so far, they would like it to be more systematic, more coherent rather than informal, from time to time, in cases of urgency. The COVID-19 pandemic was one of the important tests of the mentoring relationships. According to Ida Abbott[18], quality mentoring relationships served as a vital professional and personal support mechanism in those difficult circumstances. Numerous mentors and mentees witnessed the benefits of upgrading themselves through that kind of (mutual) support. Some of the benefits perceived include enhanced

[18] Ida Abbott: Mentoring webinar (held online on April 13, 2021) and semi-structured conversations in preparation of the weinar

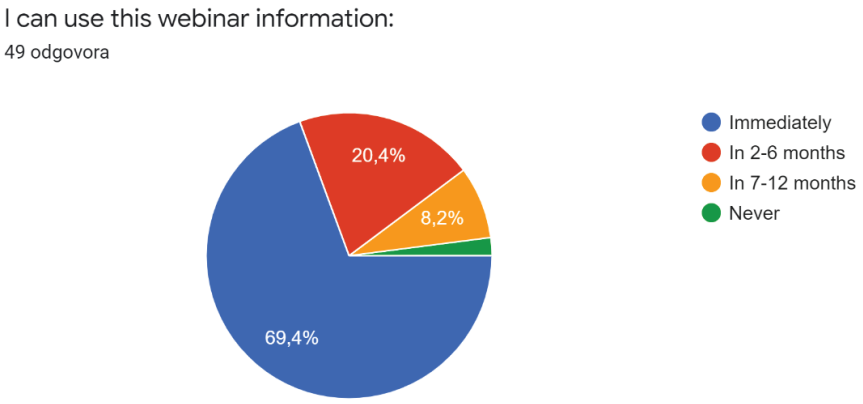
resilience, more innovative ideas, higher levels of flexibility and empathy. In addition, workplace mentoring adds to the continuity in client relationships that consequently leads to increased credibility and reliability. Ida Abbott mentioned the case of retirement, but even more of an illness or similar circumstances that required an immediate takeover. Moreover, the 'reverse mentoring', defined as juniors mentoring seniors, is perceived to be on the rise in the United States. It increases reliance and trust in the mentoring relationship, encourages young professionals to contribute to their workplace and is usually aimed at enhancing the IT skills of their senior colleagues (social media are among the most requested topics for the 'reverse mentoring').

In order to further assess the mentoring status, development and perspectives among law professionals in Croatia, the findings from the post-webinar satisfaction survey present valuable inputs. Webinar 'Mentoring Matters – The Impact, Mechanics and Benefits of Being a Mentor' was held in April 2022. As shown in Graph 1, for most of the respondents, the majority of seminar information was new. Furthermore, as presented in Graph 2, almost 70 % of the participants can use the webinar information immediately. Also, a vast majority (93,9%) of the participants would like to learn more about mentoring.

**Graph 1.** What do the respondents already know about mentoring?



**Graph 2.** Immediate use of the mentoring webinar information




The respondents assess that the most useful webinar sections were the following:

- Mentoring Functions, Old vs. New Concepts, Mentoring vs. Sponsorship vs. Coaching;
- Elements of Successful Mentoring Relationship, A Mentoring Plan, Communication Techniques;
- Good Mentoring Habits, Feedback and Feed-forward, Overcoming Obstacles, Pandemic Mentoring.

The afore-presented list could be useful for the future organisers of the mentoring training. Namely, a vast majority (93,9 %) of the participants would like this training to be organised by their Bar Association, Corporate Lawyers' Association or Law School. In general, the respondents consider that the following organisations and professionals should be taking a lead in providing life-long learning and professional development education for lawyers: senior mentors, colleague, experienced lawyers; established business coaches who are also lawyers; law professors from various law schools; the Bar Association, Corporate Lawyers' Association; Chamber of Commerce, but also, as per advice from webinar, not one, but multiple mentors/coaches are the optimal way.

## 5. CONCLUDING REMARKS

The benefits of mentoring are identified primarily for mentees, but increasingly for the organisations and mentors as well. Same as mentoring schemes, career support services are common and are deemed to be well developed and highly valuable in

the Western Europe and in the United States. These countries are mentioned because, in addition to their leading positions in legal education and practice, a part of the respondents, when assessing the situation in Croatia, relied on their first-hand experience of studying and/or working in the West. In addition, the insights of a well-known consultant, lawyer and awarded author from the USA are used. The study is rather timely as it stresses the (increased) importance of mentoring relations in the circumstances of exogenous shocks such as the global pandemic.

The findings suggest a substantial room for improvement both at the university level and among the employers in legal practice in Croatia. At the university level, this would include establishing a professional career centre(s) in the law schools in addition to the already existing legal career fairs that are usually organised several times a year. Among the employers, two compatible directions of actions are recognised. One is raising the awareness on the importance and advantages of mentoring at the workplace and the other one is mentoring training provided by bar association, law schools, corporate lawyers' and other associations. Finally, linking the employers and law schools could be a win-win if mentoring schemes would, for instance, be organised by the alumni associations with a long-term perspective.

Note: The author would like to thank survey respondents and focus group participants for their valuable inputs. A special thanks goes to Ana Martinić for her research help and comments.

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UDK 614:004.9](4.67EU:497.7)
Review Article

# THE LEGAL ASPECTS OF TELEHEALTH*

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***ABSTRACT***

*Telehealth seems to be the new normal in this fast-changing environment. According to the European Commission eHealth was among the highest priorities before the COVID -19 pandemic. Transformation of health and care in the digital single market is among the EU`s six political priorities of the Commission 2019-2024 (2018 Communication on Digital Health and Care). The pandemic caused by COVID-19 just accelerates the necessity of the inclusion of digital health into the traditional healthcare systems. Telehealth services are among the biggest eHealth trends in EU. Therefore, one of the challenges is the national, regional and regulatory priorities regarding telehealth. There is lack of telehealth special legislative and governmental policies that needs to stimulate the developing and innovative solutions in medicine through technology and to envisage the upcoming innovation technology. Therefore, the government support and adequate policy making is important to support the development of the telehealth services. One of the main challenges is the electronic transactions of patient data among the telehealth providers and services and the cross-border patient data share. Another issue is the exchange of information among the national health institutions and providers and their interoperability.*

*The Macedonian legislation does not have special legislation (policies, or laws) about telehealth. Telehealth is regulated as a term in the Law on health protection. Additionally, there is a lack of national acts, literature, and research in this subject matter. Thus, this paper will*

* This article is part of a research that is conducted within Jean Monnet Project titled as EU E-Health and North Macedonia: From Current Practice to Implementation (EUEHL). This project is supported by the Erasmus+ Jean Monnet Action of the European Union and the Goce Delcev University in Shtip, Republic of North Macedonia, Project Reference: 621268-EPP-1-2020-1-MK-EPPJMO-PROJECT. The official website of the project is: [https://euehl.ugd.edu.mk/]

*explore the telehealth from two main perspectives: scientific theories and legal practice and the users' practice.*

*Hence, this paper will analyze the legislation about the telehealth on the EU level and the EU Member States and the Macedonian legislation and the impact on the e-health that was made during COVID-19 pandemic. Furthermore, it will make comparative analyses among different countries into the EU zone compared with the EU aspirant country- the Republic of North Macedonia. A survey conducted among doctors in private and public healthcare institutions in the primary, secondary, and tertiary healthcare levels in the city of Stip and in the city of Skopje will provide data about the challenges, risks, and trends in telehealth before and during COVID -19.*

***Keywords**: Data Protection, e-Health, EU Digital Strategy, Macedonian healthcare legislation, Telehealth*

## 1. INTRODUCTION

The telehealth became the main cornerstone during COVID-19 among the healthcare providers, the beneficiaries, the healthcare system, and the doctors and patients. This complex system of involved stakeholders and procedures requires high level of caution and knowledge that goes beyond the traditional accessibility and use of the healthcare services in the traditional healthcare system.

Comparatively, on EU level, since early 2020, the EU countries have rushed to introduce remote health consultations and other telemedicine services at an unprecedented deployment rate. Thus, the global telehealth is expected to grow to US$218.5 billion by 2025 (European Parliamentary Research Service, April 2021). It seems that all countries were challenged to create appropriate regulatory frameworks that will safeguard the rights of the individuals and the society, on one hand, and to stimulate the use of technology and innovations in healthcare, on the other hand. The pandemic has rapidly accelerated the use of ICT in the health care system in the EU countries. Since the pandemic began, 58 % of countries have been using telemedicine to replace face-to-face consultations, as family doctors' surgeries and hospitals restrict face-to-face contact to essential visits.[1] In December 2021, the Macedonian government enacted the Health Strategy 2021–2030, in which one of the key questions to be considered is to: enhance the health systems and the role of eHealth; assess health technology; and improve the healthcare information system.[2]

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1 Negrero, M., *The rise of digital health technologies during the pandemic*, European Parliamentary Research Service, 2021, p. 2

2 For more, see: The Announcement of the Government in its 125th session: [https://vlada.mk/node/27191], Accessed 5 May 2022

Therefore, this paper aims to explore the relevance and importance of telehealth as part of the eHealth developments in the country; the adequacy of the policy making in the process of the development of the telehealth services, the need to empower eHealth literacy among professionals; the access to quality eHealthcare service delivery, and overview the legal basis for interoperability in the national healthcare system.

For the purpose of this research paper we have use comparative legal methods, mainly based on the national healthcare Strategies and positive law, the WHO reports and resolutions, the EU policies, Directives, and Regulations and other potential sources such as releases from a state's executive offices (national and international) and online research articles from which the findings in this introduction are taken. In addition to this research paper, at the beginning of 2022, an online survey with close-ended questions was conducted among doctors in private and public healthcare institutions in the primary, secondary, and tertiary healthcare levels in the city of Stip and in the city of Skopje. There were some restraints that referred to the low interest of the doctors in contributing to the online survey through Google Forms, 69 responses were collected. In terms of the complexity of the work these respondents were doctors in medicine (27.5%), specialists (59,5%) and subspecialist (13%) employed in the public and private healthcare organizations in the city of Shtip and the city of Skopje. Given the focus of this research on secondary healthcare level, specialists are the dominant respondents. In order to clarify and deepen this research, we have made direct contact with 11 doctors and conduct an open interviews and conversations. Also, considering the lack of clarity around the terms like mHealth, eHealth, telehealth, and telemedicine in the country among the health professionals, efforts were made to adjust terminology where was needed.

## 2. SOME GLOBAL AND EU LEVEL ASPECTS OF TELEHEALTH

eHealth trends have been on the rise in recent years. There are many examples of successful eHealth developments including health information networks, electronic health records, telemedicine services, wearable and portable monitoring systems, and health portals.[3]

Most of the research papers in this area emphasise the advantages of the use of telehealth "Four systematic review papers suggest that telehealth is "promising",

[3] e-Health - making healthcare better for European citizens: An action plan for a European e-Health Area, COM (2004) 356 final, Brussels, p. 4, [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0356:FIN:EN:PDF], Accessed 4 April 2022

or has a potential benefit, although the evidence included in their reviews is not powerful enough for the effects to be labeled as causal."[4]

The European Commission, in one of the first working documents on this subject, stated that "eHealth means information and communication technologies, ICTs tools and services for health that can improve prevention, diagnosis, treatment, monitoring and management and can benefit the entire community by improving access to care and quality of care and by making the health sector more efficient"[5]. Additionaly, the World Health Organization defines eHealth as "broad group of activities that use electronic means – information and communication technologies to deliver health-related information, resources and services as treatment of patients, conducting researches, education of the healthcare workers, disease monitoring and monitoring of the public health".[6] Most researchers follow the WHO guideline: recommendations on digital interventions for health system strengthenght[7] to define the temedicin as: "The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities"[8]. According to A Global Guide telehealth "refers to the delivery of healthcare services where patients and providers are separated by distance, using information and communications technology for the exchange of information for the diagnosis or treatment of diseases and injuries."[9]

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4 Abbott, P. A.; Liu, Y., *A Scoping review of Telehealth***,** IMIA Yearbook of Medical Informatics, 2013, p. 6

5 Commission staff working document eHealth Action Plan 2012-2020 – innovative healthcare for the 21st century Accompanying the document eHealth Action Plan 2012-2020 – innovative healthcare for the 21st century, Available at: [COMMISSION STAFF WORKING DOCUMENT eHealth Action Plan 2012-2020 – innovative healthcare for the 21st century Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS eHealth Action Plan 2012-2020 – innovative healthcare for the 21st century - Publications Office of the EU (europa.eu)], Accessed 23.March 2021

6 World Health Organization, Regional Office for Europe, *From Innovation to Implementation-eHealth in the WHO European Region,* Official Report, Copenhagen: WHO, 2016, [https://www.euro.who.int/en/health-topics/Health-systems/digital-health/publications/2016/from-innovation-to-implementation-ehealth-in-the-who-european-region-2016], p.7

7 WHO guideline: *Recommendations on Digital Interventions for Health System Strengthening*, Geneva, World Health Organization, 2019 [https://apps.who.int/iris/bitstream/handle/10665/311941/9789241550505-eng.pdf], Accessed 5 May 2022

8 ISSA, *Telemedicine: Good practices from Latin America,* Analysis, 11 May 2021 [https://ww1.issa.int/analysis/telemedicina-buenas-practicas-en-america-latina], Accessed 5 May 2022

9 Telehealth around the world: A global guide, DLA PIPER, 2020, [Telehealth around the world: A global guide | Insights | DLA Piper Global Law Firm], Accessed 15 May 2022

The telehealth is part of the eHealth. Although similar, the terms "ehealth", "telehealth" and "telemedicine" should not be used interchangeably. Telehealth refers to "the use of telecommunications and information technology (IT) to provide access to health assessment, diagnosis, intervention, consultation, supervision and information across distance".[10] Therefore, telehealth can be considered as "a more broad concept of telemedicine that includes technology used to collect and transmit patient data such as telephones, email and remote patient monitoring (RPM) devices for the purposes of providing health education or ancillary healthcare services".[11] Telemedicine is viewed as "a cost-effective alternative to the more traditional face-to-face way of providing medical care (e.g., face-to-face consultations or examinations between provider and patient) that states can choose to cover under Medicaid".[12]

Some eHealth stakeholders implies that the telemedicine there are two types of telemedicine services. Firstly, those considered as a medical act, this means that it is an extension of the existing practice of medicine, performed by healthcare professionals – the 'teleologies' such as teleradiology, teleneurology, telecardiology and so on. By default these are services provided by medical doctors or other healthcare professionals. Secondly are telemonitoring services, these services are remote monitoring technologies that provide health professionals or call centre personnel with biological parameters of the patient/ citizen. The analysis of the data can even be done by computers.[13]

Having in mind the comparative resources and definitions widely used in some point of the paper there will be overlapping of these terms.[14]

In 2019, the telemedicine was marked as the second biggest e-Health trend with expectation to hold this position in the next years almost everywhere. Compared to last year's results, "the only significant exception is the rising importance of telemedicine services, which are often related to video-conferencing solutions".[15]

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10 Kichloo, A, *et al.*, *Telemedicine, the current COVID-19 pandemic and the future: a narrative review and perspectives moving forward in the USA*, in: Li, L. (ed.) Family Medicine and Community Health, BMJ Journals, Vol.8, No.3, 2020, p.1-9

11 *Ibid.,* p. 1

12 This definition is modeled on Medicare's definition of telehealth services, [https://www.medicaid.gov/medicaid/benefits/telemedicine/index.html], Accesed 20 April 2022

13 Schillebeeckx, J., *Legal Aspects of Telemedicine*, Health Menagament, Vol. 13, No. 3, 2013, [https://healthmanagement.org/c/imaging/issuearticle/legal-aspects-of-telemedicine], Accessed 1 May 2022

14 Ampovska, M.; Miseva, K., *Legal aspects of eHealth development in North Macedonia*, Vestnik St. Petersbourg University, Vol. 12, No. 3, pp.660-661

15 HIMSS Analytics, eHealth Trendbarometer, Annual European eHealth Survey 2019, 2019, p.11, [PowerPoint-Präsentation (mckinsey.de)], Accessed 15 May 2022

The widespread deployment of eHealth technologies in Europe was one of the key actions to be achieved by 2020. This can improve the quality of care, reduce medical costs and foster independent living of individuals and the society. New telemedicine services such as online medical consultations, improved emergency care and portable devices allowing monitoring the health condition of people suffering from chronic disease and disabili ties have the potential to offer a freedom of movement that patients have never previously enjoyed.[16]

This is part of the Digital Agenda for Europe[17]. The Digital Agenda for Europe is one of the seven flagship initiatives of the Europe 2020 Strategy, set out to define the key enabling role that the use of Information and Communication Technologies (ICT) will have to play if Europe wants to succeed in its ambitions for 2020.[18]

The eHealth Action Plan (2012-2020) was adopted by the European Commission on 7 December 2012. It updates the first Action Plan from 2004 and proposes a set of 16 actions[19] to boost the deployment of eHealth with a focus on four areas: Achieve wider interoperability in eHealth services; Support research and innovation and competitiveness in eHealth; Facilitate deployment and adoption of eHealth (through CEF, cohesion policy, digital literacy, measuring eHealth added value); Promote international cooperation on eHealth at global level.[20]

However, despite these rules and policy attention, the existing legal framework is not yet complete. The current European rules often remain too vague. The issues confronting health care players have to be addressed at the European level, as some important legal issues, as well as technological developments, need a clear legal answer. Regarding the legal issue, specific attention should be given to the need to enact European criteria on the reimbursement of e-health activities and on the (no-fault) liability issue.[21]

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16 Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, COM (2010)245 Final, Brussels, 19.5.2010, pp.29 [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF], Accessed 1 March 2022. For more see: The eHealth Lead Market Initiative, Cf.COM (2007) and SEC (2009)1198

17 A Digital Agenda for Europe COM (2010)245 final, Brussels, 19 May 2010

18 Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, COM (2010)245 Final, Brussels, 19.5.2010, pp.3 [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF], Accessed 1 March 2022

19 For more see: Ehealth Action Plan, European Trade Association, Brussel, [https://www.cocir.org/regulations/digital-health/ehealth-action-plan.html], Accessed 01 March 2022

20 *Ibid*.

21 Callens, S., *The EU legal framework on eHealth*, Health Literay Center Europe, 2015, p.561-588, [9780521761383pre_pi-xxii.indd (healthliteracycentre.eu)], Accessed 5 May 2022

Today, with the advancement of mobile and electronic technologies, telemedicine is more accessible than ever before. According to a 2019 report by the Pew Research Center, 90% of Americans use the internet.[22]

## 2.1. The legal foundation and (possible) developments of telehealth in North Macedonia

North Macedonia is a candidate country for membership in the European Union. Therefore, it follows the EU recommendations and EU eHealth policies and strategies, as well as the reports, recommendations, resolutions, and strategies of the WHO European Region for strengthening the health care systems, eHealth standardisation and interoperability and Data Protection Regulation. The National Health Strategy 2021-2030 follows the European framework for health policies that supports actions in all sectors of government and society (Health 2020).

Based on previous legal research and analisis regarding the legislation in North Macedonia that regulates the eHealth activities, we can note that the main characteristic is that it is not comprehensive, as there is no specific law that refers to eHealth activities but instead, we note several patterns of eHealth regulation:

- Reliance on general provisions for certain questions. General health record legislation is used to regulate the electronic records and general data protection rules are applicable with regard data used in the eHealth system/activities.
- No specific legislation but existence/adoption of specific legal provisions or several provisions in the general healthcare legislation. This is the case with the Electronic health card regulation which legal framework has been set in the Law on Health Insurance, and the Integrated Health Information System which legal framework is set in the Law on Health Care[23]

Having this noted it is expectable that the country does not have special acts or legislation for telehealth and telemedcine. In addition, we may say that there is a lack of clarity in the *lex scripta* and in the use of the terms telehealth and telemedicine on a national level. The Law of Health Care[24] does not operate with the term "telehealth,". According to Article 15 paragraph 1 item 33, "telemedicine" is the exchange of medical information with the help of information and communica-

22 Kichloo, A., *et al. op.cit.,* note 10, p. 2

23 Ampovska, M.; Miseva, K., *Legal aspects of eHealth development in North Macedonia*, in: Stoyko, N. (ed.), Vestnik St. Petersbourg University, Vol.12, No. 3, pp.660-661

24 The Law of Health Care, Official Gazette of the Republic of Macedonia No.43/12, 145/12, 87/13,164/13, 39/14,43/14, 188/14, 10/15, 61/15, 61/15, 154/15, 192/15, 17/16, 37/16, 20/19, 101/19, 153/19,180/19, 275/19; Decree with the force of Law, Official Gazette of the Republic of N. Macedonia 76/20

tion technology in order to improve the health treatment of the patient in the field of diagnosis, treatment and monitoring of the patient, as well as in the field of professional exchange of opinions.

The use of ICTs in medicine (the Health care services) and the use of Health is inseparably connected with the internet availability of the users. Therefore, we should emphase that the eHealth is unenforceable in practice without internet access. In 2004, at least four out of five European doctors have an internet connection, and a quarter of Europeans use the Internet for health information.[25] Using internet has become an integral part of daily life for many European. Yet, 150 million Europeans – some 30% - have never used the internet. Often they say they have no need or that it is too expensive.[26]

Our country follows the EU recommendations and stays in line with the core objectives of the Europe 2020 Strategy, [27] the Digital Agenda for Europe[28] and the eHealth Action Plan[29] and eHealth Action Plan 2012-2020 - Innovative healthcare for the 21st century[30]. In 2019 the Ministry for Information Society and administration has prepared National operative broadband plan[31]. By this Plan (2020-2029) starting from 2023 until 2029 it is expected that all public institutions (e.g. public health institutions) will have symmetrical internet access at a speed of at least 1Gbps[32] this will easier access to e-health services[33] and will provide more effective use of telecommunication technology in health and improve the public health care of the citizens. In the first quarter of 2020, 79.9% of households had access to the Internet at home. The participation of households with broadband connections in the total number of households as 87.8% in 2020. In the first quarter of 2020, 81.4% of the total population aged 15–74 used the Internet, and

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25 e-Health - making healthcare better for European citizens, *op. cit.,* note 3, p. 4

26 A Digital Agenda for Europe, COM (2010)245 final, European Commission, Brussels, 19.05.2010, p. 25

27 Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010)2020, European Commission, Brussels, 03 March 2010

28 Digital Agenda for Europe, COM(2010)245 final, European Commission, Brussels, 19.05.2010

29 eHealth Action Plan, COM (2004) 356 final, European Commission, Brussels, 30.04.2004

30 eHealth Action Plan 2012-2020 - Innovative healthcare for the 21st century, COM(2012) 736 final, European Commission, Brussels, 06 December 2012

31 National Operative Broadband Plan, MIOA, North Macedonia, 2019, [https://mioa.gov.mk/sites/default/files/pbl_files/documents/reports/nacionalen_operativen_brodbend_plan_finalna_verzija_02.04.2019.pdf], Accessed 5 May 2022

32 National operative Broadband Plan, Ministry of Informatic Society and Administration (MIOA), North Macedonia, 2019, p. 4

33 *Ibid.,* p. 40

70.9% used the internet every day or almost every day.[34] According to the state statistical office, 40.7% of the population sought health-related information (e.g., injuries, diseases, nutrition, improving health, etc.) during this time period, while only 4.7% made an online (via web or application) appointment with a doctor (e.g., of a hospital or health care center).[35]

The pandemic caused by COVID-19 has accelerate the use of communication technology in the healthcare, this was the only sustainable "distance measure" in the health crises. And this remained as a post-pandemic solution that became a standard that must be followed. But at the same time the research didn't show that legal or ethical principles were established or maintained when using new forms of communication and technology in healthcare.

## 2.2. Survey results

In February 2022, an online survey was conducted among the doctors from the primary, secondary, and tertiary health care levels ( private and public health care sector) among doctors, doctors-specialists, and doctors-subspecialists in the city of Shtip and the city of Skopje. In the survey, we collected 69 responses, 26 from men (37.7%) and 43 from women (62.3%). In terms of the complexity of the work these respondents were doctors in medicine (27.5%), specialists (59,5%) and subspecialist (13%) employed in the public (53,6%) and private (46,4) healthcare organizations in the city of Shtip and the city of Skopje. Some additional issues were discussed face-to-face or on the phone with eleven doctors by random choice. For the purpose of this research, we will present only the results that are relevant to this topic.

Most of the respondents (63 or 81.3%) were totally or partially familiar with the essence of term digital health (eHealth).

"In effect, telemedicine allows remote group collaboration between various healthcare professionals from different locations, sometimes even from different countries. Practitioners can communicate with distant colleagues, thus improving the quality of the services provided. The continuous flow of communication between healthcare professionals is motivated by the growing complexity of medicine,

[34] MAKSTAT database, State Statistical Office of Repubic of North Macedonia [https://www.stat.gov.mk/pdf/2020/8.1.20.31_mk.pdf], Accessed 1 December 2021

[35] Misheva, K. *Authorized lectures EU eHealth Law*, ICT and Bioethics (2020-2022) within the Jean Monnet Project EUEHL, Official data used from MAKSTAT, State Statistical Office of the Republic of North Macedonia, year LVIII, No. 8.1.20.31 from 16 November 2020

which forces doctors to consult with more experienced colleagues or experts in a particular field or just to request a second opinion."[36]

The Macedonian doctors recognize the potential of the use of Internet of things in medicine. They all agree that the IoTM (Internet of Things in Medicine) enable the process of daily working. See **Table 1.**

**Table 1**

| **Question:** The use of ICT (information and communication technology) in medicine facilitates the work of health professionals | Totally agree | Partially Agree | Partially disagree | Totally disagree |
|---|---|---|---|---|
| Number of Respondent/s | 38 | 27 | 1 | 3 |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

It seems that providing health services consumes more time (**see Table 3**) that entering data from the *tete-a tete (*physical) examination (see **Table 2**). From the survey and the comments made by the doctors that are made through the telecommunication, it is estimated that they spent almost 10% of their daily working hours. This extends their working hours.

**Table 2**

| **Question:** For entering the data for the performed health examination of the patient I dedicate (I need) | Less than 15 minutes | Less than 30 minutes | More than 30 minutes | Not aware |
|---|---|---|---|---|
| Number of Respondent/s | 46 | 19 | 2 | 2 |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

**Table 3**

| **Question:** Providing health services over the phone (telemedicine) takes me | Less than 15 minutes | Less than 30 minutes | More than 30 minutes | More that 1 hour |
|---|---|---|---|---|
| Number of Respondent/s | 37 | 13 | 12 | 7 |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

[36] Rapuso, V., *Telemedicine: The legal framework (or the lack of it) in Europe*, GMS Health Technology Assessment, 2016, [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4987488/], Accessed 22 April 2022

It seems that using the digital tools (apps) for social communications (Viber/ WhatsApp, Messenger, E-mail, Instagram, Facebook) are very popular between the doctors and the patients (see **Table 4**). More that 80 % of the doctors are using Viber for consultations, sending results, photos, asking for online diagnoses, even making appointments. Moreover, this type of personal communication with the doctor, in a way, is a frequently used tool for the patients to schedule an examination or intervention directly with the doctor-specialist by "skipping the line" through the regular national e-platform "My Term". This negative tendency has reached its peak during the health crisis caused by the COVID -19 virus. For example, the number of canceled and unrealized medical appointments within the system My Term, from the start of the pandemic (end of March) till the middle of June 2020, has reached to 128.000.[37] It is not clear why this has happened, but during the pandemic, most of the cases that were threatened were emergency cases.

**Table 4**

| **Question:** Although I provide health services and advices over the phone, I also use other ways of online communication with the patients | Viber / WhatsApp | Messenger | e-mail | All mentioned above | I do not use this kind of communication |
|---|---|---|---|---|---|
| Responses in % | 74.5% | 10.6% | 6.4% | 6.3% | 2.2 % |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

Despite the potential of telemedicine and the benefits that provides the telemedicine, there are several restrains that should be consider. Most respondents have agreed that the health services provided through telemedicine consume more time than the regular physical **(see Table 5**).

**Table 5**

| **Question**: Providing health services with the help of telemedicine consumes more working hours (increases your workload) than the usual work (with physical presence) with patients | Totally agree | Partially agree | Partially disagree | Totally disagree |
|---|---|---|---|---|
| Number of Respondent/s | 40 | 22 | 6 | 2 |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

[37] For more see: Misheva, K; Ampovska, M., *Legal aspects of eHealth development in North Macedonia***, in:** Stoyko, N. (eds.), Vestnik of Saint Petersburg University Law, Vol. 12 No. 12, 2021, p.10, [https://lawjournal.spbu.ru/article/view/10610], Accessed 1 March 2022

Almost 85% of the respondents have agreed that they need continuous training, transfer of knowledge, and to keep up-to-date activities to improve their competence in the area of the technological advancements in the global e-health market. (**See Table 6**). "In recognizing that digital competence is a fundamental skill for individuals in a knowledge-based society"[38], the European Commision`s Digital Agenda for Europe encourages EU Member States to enhance the digital literacy e-skills and inclusion of the digital services.[39] From 69 only 37 respondents (53,6 %) have state that their additional professional trainings and are enable by their employer. This question was subject of discussions with the interviewers, most of them answered that their additional professional trainings are paid from the healthcare services providers.

**Table 6**

| **Question:** New e-platforms and e-health records, e-referrals, e-prescriptions, etc. require additional training | Totally agree | Partially Agree | Partially disagree | Totally disagree |
|---|---|---|---|---|
| Number of Respondent/s | 28 | 30 | 6 | 5 |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

The national Law on Personal Data Protection[40] is harmonized with the provisions consisted in the EU Regulation for personal data protection (GDPR) that was adopted in EU and became enforceable beginning 25 May 2018. In February 2020, the Macedonian Law on Personal Data Protection was adopted. The Law prescribed a time period of 18 months (until August 24, 2021) in which the controllers and processors are obliged to comply with the new law.

The doctors agree that they are familiar with the provisions from the Law on Personal Data Protection (see **Table 7**). From the interviews that were conducted, it seems that the doctors are partially aware, from a legal perspective, that healthcare/sensitive personal data can only be processed/transferred with patient consent, and to what extent can be shared among the heatlthcare workers and the professionals.

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38 World Health Organization, Regional Office for Europe, *From Innovation to Implementation-eHealth in the WHO European Region*, Official Report, Copenhagen: WHO, 2016, p. 53, [https://www.euro.who.int/en/health-topics/Health-systems/digital-health/publications/2016/from-innovation-to-implementation-ehealth-in-the-who-european-region-2016], Accessed 15 March 2022

39 For more see: A Digital Agenda for Europe, European Commision, Brussels, COM (2010)245 final, p.24-27, [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF], Accessed 5 March 2022

40 Law on Personal Data Protection , Official Gazette of Republic of North Macedonia, No.40/20; 294/21

**Table 7**

| **Question:** I am familiar with the provisions of the Law on Personal Data Protection | Totally agree | Partially Agree | Partially disagree | Totally disagree |
|---|---|---|---|---|
| Number of Respondent/s | 38 | 19 | 8 | 4 |

*Source:* online survey for the purposes of this research and the JM Project EUEHL

Although the doctors are aware of the advantages of telehealth and the eHealth Records of the patients, they are still obliged to keep parallel records both in hard copy (physical) and electronic format, according to the responces 66.1% of the doctors are providing parallel data records. According to Article 3 the Law on Health Records[41] applies for the electronic records and processing of health and medical data and records in paper form and manual processing of health and medical data.

## 3. CONCLUDING REMARKS

In the European Union, telemedicine has become increasingly important in the advancement of medicine and healthcare delivery. As a result, European eHealth legal instruments and legal initiatives to stimulate the development of the EU telemedicine market have become a priority. The Member States also develop their own national legislation, particularly for the legal framework governing telemedicine.

Although many reforms have recently been made in North Macedonia, there is still a significant difference in the national regulations that will enable healthcare providers to deploy telehealth solutions. From this research, it is evident that there is a lack of a dedicated and systematic legal basis for the development of eHealth services, especially telehealth. The country needs to develop a national systematic approach to telehealth. As mentioned above, telehealth is only defined and mentioned in several laws that derive from the eHealth service. The country needs to develop a comprehensive and sustainable national eHealth strategy with a view to telehealth or to develop a separate programme, policy, or strategy for telehealth.

The delivery of the healthcare services should be developed and integrated with the European telemedicine solutions and standards to became a part of the Digital Single Market.

[41] Law on Health Records, Official Gazette of the Republic of Macedonia No. 20/09; 53 / 11; 164/13, and 150/15

The rules and procedures restrain the effective time of the doctors, but more importantly, they slow down the condition of the whole healthcare system. The doctors are often contacted by their patients after their working hours and during their non-working days. Therefore, it is expected that these telehealth services should be charged. The current situation spontaneously and with the COVID-19 rapidly burdens the daily work of the doctors, which prevents quality delivery of the eHealth services.

The skills required for effective use of ICT in medicine are still complex and they remain challenging for doctors and health professionals. The government should encourage all involved stakeholders in the national eHealth infrastructure to support the system and to increase the digital and health literacy. The investment in health knowledge is a high priority for any society, so it should be viewed as a "value for money" and long-term return investment rather than a burden on the healthcare system and budget. The core values for a sustainable healthcare system ask for continuous engagement in the educational process and professional career development. Additionally, the healthcare institutions should continue to enable adequate and quality education and trainings to their employees following the international standards and best practices. The education plays pivotal role in the process of practice medical acts at distance (e.g. teleinterventions, teleconsultations, telemonitoring etc.).

The country must enact eHealth policies, strategies and to define the regulation of the telehealth into adequate laws and procedures that will be incorporate in practice. The legislation must ensure collaboration between the doctors and patents as well between the different stakeholders in the healthcare system (the government, the health care institutions, the health services providers and the end users). The cybersecurity of the health data also incorporates significant changes and additional skill and knowledge for safeguarding and protection of the health record data and health information about the health conditional of the patient. The doctors are aware of the provisions under the Law on personal data protection, but still they use social platforms for exchanging health information with the patients.

The employers (especially the public health institutions) should follow the trends in the ICTs in medicine and should continuously invest in the digital technologies in health systems and to support e-innovations.

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UDK 342.7-054.7(497.1):616.98
Review article

# MIGRANTS AND SAFETY IN SERBIA DURING AND AFTER CORONAVIRUS PANDEMIC

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***ABSTRACT***

*The removal of internal borders and the establishment of freedom of movement are important aspects of the EU's history, but they are not accompanied by a uniform legal system. The migrant dilemma isn't going away, and the pattern and character of these movements have evolved dramatically over the previous six decades. The author of this article addresses the issue of migrants' position in Serbia's rural areas during the coronavirus pandemic. During the period of emergency, Serbia enacted policies that imprisoned migrants in detention centres, effectively depriving them of their liberty. According to the government's reasoning, it was done to protect migrants' health. Given the rising violence between migrants and the local people, the question is whether the state intended to safeguard migrants' health or citizens from migrants in this manner. The author conducted a survey in these areas, explains the findings in depth, and draws a conclusion based on his findings. The paper is comprised of several units. In the first place, the author briefly explains the state of emergency in Serbia and gives an overview of migration centers in Serbia. The central part of this paper deals with the research between citizens in relation to migrants, both in their general attitude and in terms of the relationship between migrants and crime. Residents of migrants' areas were surveyed, as the author believed thought that due to the location of migration centres, they would be most affected by waves of migrants and possibly, crimes committed by migrants. The author set two initial hypotheses and both were confirmed, and according to the research, the population has a negative attitude towards migrants. At the same time, most respondents show distrust of the state's claim that migrants are imprisoned for their health. The author believes that this move by the state at that time was a hasty reaction in order to prevent the uncontrolled movement of migrants and the potential spread of the infectious coronavirus disease. In the same time, the author tries to answer to the question about the migrants' position today and in the near future.*

***Keywords****: deprivation of liberty, human rights, migrants, migrant's crime, safety*

## 1. INTRODUCTION

The removal of internal borders and the establishment of freedom of movement are important aspects of the EU's history, but they are not accompanied by an uniform legal system.[1] Following the WWII, the roots of the contemporary system of migrant protection were created.[2] However, the previous decade has seen two distinct responses to the migrant issue: on the one hand, greater militarization and border control, including the construction of fences, and on the other, the enhancement of migrants' human rights and freedoms.[3] Economic crisis and political changes in certain African and Asian nations necessarily provide issues for Europe[4], particularly in terms of migration. Politicians, attorneys, and citizens are advertised based on current events via social media, announcements, and newspapers. International organizations are studying how human rights can defend the rights of migrants all over the world[5], and the argument over the relationship between human rights and migrants' rights is crucial. This is a major issue and topic of political debate, and the most heated debate concerning migrant control is over the constitutionality of repressive measures (*push-backs*).[6] "Extraterritoriality" methods describe today's immigration control systems.[7]

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1 Mitsilegas, V., *Solidarity and Trust in the Common European Asylum System*, Comparative Migration Studies, Vol. 2, No. 2, 2014, p. 182

2 Betts, A., *Survival Migration: Failed Governance and the Crisis of Displacement,* Cornell University Press, Ithaca-London, 2013, p. 10

3 Aas, K. F.; Gundhus, H. O., *Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life,* The British Journal of Criminology, Vol. 55, 2015, p. 1

4 Černič, J. L., *The European Court of Human Rights, Rule of Law and Socio-Economic Rights in Times of Crises*, Hague J Rule Law, Vol. 8, 2016, p. 237

5 Cantor, D. J., *Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence*, Refugee Survey Quarterly, Vol 34 , 2014, p. 79; Harvey, C., *Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law,* Refugee Survey Quarterly, Vol. 34, 2014, p. 44; McConnachie, K., *Refugee Protection and the Art of the Deal,* Journal of Human Rights Practice, Vol. 9, 2017, p. 191

6 Markard, N., *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, The European Journal of International Law, Vol. 27, No. 3, 2016, pp. 591–592

7 Ryan, B., *Extraterritorial Immigration Control: What Role for Legal Guarantees?*, in: Ryan, B.; Mitsilegas, V. (eds.), Extraterritorial Immigration Control: Legal Challenges, Martinus Nijhoff Publishers, Leiden-Boston, 2010, p. 3; see more in: Klug, A.; Howe, T., *The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures,* in: Ryan, B.; Mitsilegas, V. (eds.), Extraterritorial Immigration Control: Legal Challenges, Leiden-Boston: Martinus Nijhoff Publishers, 2010, pp. 69-70; Costello, C., *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, Human Rights Law Review, Vol. 12, No. 2, 2012, p. 290; Brouwer, E., *Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States,* in: Ryan, B.; Mitsilegas, V. (eds.), Extraterritorial Immigration Control: Legal Challenges, Leiden-Boston: Martinus Nijhoff Publishers, 2010, p. 213

Migrants in all nations face challenges.[8] Migration pressure, on the other hand, cannot absolve nations of their human rights commitments.[9] During the coronavirus pandemic, the Republic of Serbia adopted certain measures regarding the status of migrants, and the focus of this work is on empirical research on citizens' attitudes towards migrants, as well as the state's reaction to migrants during the pandemic. This article is divided into several parts. After introductory considerations, we will first briefly draw attention to the principle of non-refoulement and state of emergency in Serbia. Then, we will show the migration centres that exist in Serbia, after which we will clarify the results of the research.

## 2. BRIEFLY ON THE PRINCIPLE OF NON-REFOULEMENT

The Geneva Refugee Convention of 1951 specifies the circumstances in which a state must provide refugee status to persons requesting it. This convention defines refugee as a someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[10] Furthermore, Article 33 provides that no Contracting State shall expel or return (*refouler*[11]) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. Protection of territorial waters carries particular problems.[12] State sovereignty and international law as well as law and politics have traditionally clashed over the relation-

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8 Ogg, K., *Protection from 'Refuge': On What Legal Grounds Will a Refugee Be Saved from Camp Life?*, International Journal of Refugee Law, Vol. 28, No. 3, 2016, p. 385 Sharpe, M., *Mixed Up: International Law and the Meaning(s) of "Mixed Migration"*, Refugee Survey Quarterly, Vol. 37, 2018

9 Moreno-Lax, V., *Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?*, Human Rights Law Review, Vol. 12, No. 3, 2012, p. 598

10 By the end of 2017, there were 25.4 million refugee men, women and children registered across the world. See The UN Refugee Agency [https://www.unhcr.org/what-is-a-refugee.html], Accessed 6 April 2022

11 This principle dates back to 1933. See Bhuiuon, J. H., *Protection of Refugees throgh the Principle of Non-Refoulement,* in: Islam, R.; Bhuiyan, J. H. (eds.), An Introduction to International Refugee Law, Leiden-Boston: Martinus Nijhoff Publishers, 2013, p. 101

12 Guilfoyle, D., *Shipping Interdiction and the Law of the Sea,* Cambridge University Press, Cambridge, 2009, p. 222

ship between migrants and migration control.[13] The fact that rights are guaranteed by international treaties and national legislation does not guarantee that they will not be violated.[14]

Without reservation, the principle of non-refoulement is a key principle of protection embodied in the Convention.[15] This principle is, in some ways, a natural continuation of the right to seek asylum, which was recognized in the Universal Declaration of Human Rights and became a rule of customary international law obligatory on all nations. Non-refoulement is also a basic component of the absolute prohibition of torture and cruel, inhuman, or degrading treatment or punishment under international humanitarian law. The duty not to return (refouler) is also recognized as applicable to refugees regardless of the formal recognition of their status, so it obviously includes asylum seekers whose status has not yet been decided. It means all measures that can be attributed to the state, which could have the effect of returning asylum seekers or refugees to the borders of territories where their life or freedom would be endangered, or where they would be at risk of persecution. The Resolution 1812 of the Council of Europe from 2011 on the interception and rescue of asylum seekers, refugees, and irregular migrants at sea is especially crucial, as well as Dublin regulations. Although some states conclude mutual agreements which in some way try to circumvent the rules of international law, they cannot be repealed in that way. For example, Italy concluded some contracts on these issues with Libya and Tunisia.[16] Finally, the Directive 2005/85 stipulates that authorities shall refrain from ordering a juvenile's imprisonment.

## 3. STATE OF EMERGENCY IN SERBIA

Coronavirus (COVID-19) is the world's newest and most dangerous contagious disease, which appeared at the end of 2019 and the start of 2020[17] and it is certain-

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13 Gammeltoft-Hansen, T., *Access to Asilum: International Refugee Law and the Globalization of Migration Control,* Cambridge University Press, Cambridge, 2011, p. 11

14 About it Storey, H., *The Meaning of "Protection" within the Refugee Definition*, Refugee Survey Quarterly, Vol. 35, 2016, p. 20

15 On the legal nature of this principle, see Greenman, K., *A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law*, International Journal of Refugee Law, Vol. 27, No. 2, 2015, pp. 264–296, UNHCR points this out in its Note on International Refugee Protection dated September 13, 2001

16 Gallaghe, A. T.; David, F., *The international law of migrant smuggling,* Cambridge University Press, Cambridge, 2014, p. 7; Hessbruegge, J., *Introductory note to the European Court of Human Rights: Hirsi Jamaa et al. v. Italy*, International Legal Materials, Vol. 51, 2012, p. 423. See also: Tinti, P.; Reitano, T., *Migrant, Refugee, Smuggler, Savior,* Oxford University Press, Oxford, 2017

17 Turanjanin, V.; Radulović, D., *Coronavirus (Covid-19) and Possibilities for Criminal Law Reaction in Europe: A Review*, Iranian Journal of Public Health, Vol. 49, No. 1, 2020a, pp. 4-11

ly challenge for democratic societies.[18] Republic of Serbia issued a mandatory isolation for entire population during the state of emergency, with some exceptions.[19] Because of the coronavirus pandemic, the President of the Republic of Serbia, the President of the National Assembly, and the Prime Minister issued a decision on March 15, 2020, proclaiming a state of emergency that would extend until May 6, 2020. The Assembly voted a resolution declaring the state of emergency to be lifted. The Government passed the Regulation on Measures During the State of Emergency the day after the proclamation of the state of emergency, with the President of the Republic's signature, which stipulates measures that deviate from constitutionally established human and minority rights.

Article 3 of the Regulation ordered mandatory isolation of migrants in the reception centres for migrants. They could only leave a centre if they had special permission from the Commissariat for Refugees and Migration of the Republic of Serbia, which was limited in time – in accordance with the reason for which it was issued – and only in justified cases, like going to the doctor or for other justified reasons.

### 3.1. Migration centres

At this point it is important to explain migration centres that exist in Serbia. Available data are from January 2019. All centres are open type, without restrictions on entry and exit between 6 a.m. and 10 p.m. during winter and 6 a.m. and 11 p.m. in the summer period.[20] In the first place, there are five Centres for asylum. The Banja Koviljača Asylum Centre was founded on December 6, 2008, by a decision of the Government of the Republic of Serbia. It is close to the town of Loznica. The facility was constructed in 1965. It was operated as a Reception Centre for Foreigners by the SFRY's Federal Secretariat for Internal Affairs during the time. Initially, asylum seekers from Africa and South America (specifically, Chile) were housed at the Centre. It was used to house asylum seekers from Eastern European countries who were under the UNHCR's mandate in the SFRY

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18 Stickle, B.; Felson, M., *Crime Rates in a Pandemic: the Largest Criminological Experiment in History*, American Journal of Criminal Justice, Vol. 45, 2020, pp. 525-536; Lundgren, M.; Klamberg, M. S., *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, Nordic Journal of Human Rights, Vol. 38, No. 4, 2020, pp. 305-318

19 See more in: Turanjanin, V., Unforeseeability and abuse of criminal law during the Covid-19 pandemic in Serbia, in: Duić, D.; Petrašević, T. (eds.), EU 2021 – The Future of the EU in and after the Pandemic, Vol. 5, 2021, Osijek, Available online at: [https://hrcak.srce.hr/ojs/index.php/eclic/issue/view/863/237], pp. 223-246

20 Commissariat for Refugees and Migration Republic of Serbia [https://kirs.gov.rs/eng/asylum/asylum-and-reception-centers], Accessed 6 April 2022

from the late 1970s to the early 1980s. It was converted into a collective centre for migrants from former Yugoslav republics in 1995 and served as such until 2005. The Government of the Republic of Serbia passed a Decree in 2006 designating the institution as an Asylum Centre. The UNHCR restored it with EU funds the following year. The Asylum Centre began operations on October 30, 2007, with mandated refugees under UNHCR protection. In June 2008, it received the first asylum applicants under the Republic of Serbia's Asylum Law. The facility was handed over to UNHCR and the Commissariat for Refugees on December 16, 2008. The Centre currently has 120 beds available. It has also had a prefabricated facility since 2012. Currently, the Centre is housing 83 migrants from Middle Eastern countries.

In June 2011, the Government of the Republic of Serbia decided to open an asylum center in Bogovadja, which is housed in a Red Cross facility. The Centre is located in the settlement of Bogovadja, Lajkovac Municipality. It comprises of a main building with sleeping accommodations, restrooms, a dining room, and a children's corner, as well as administrative buildings with an outpatient clinic, auxiliary facilities, sports fields, a playground, and parking. The centre is situated on three hectares of land in a natural setting, surrounded by woodlands and open green spaces. The total capacity is 200 beds, with 42 rooms ranging from double to multiple beds spread across two wings of the main building. There is also a Children's Corner with educational and recreational activities for children of various ages, as well as a language classroom, an internet and social corner, and an area to watch TV and socialize. Currently, there are 117 migrants from Middle Eastern nations in the centre.

The Sjenica Asylum Centre opened in December 2013 in the hotel "Berlin", which is located in the heart of the city. In March 2017, due to a heightened influx of refugees, the capacity of 200 beds was raised to 250 in a restored building of the former factory "Vesna". Accommodation, common areas, administrative, auxiliary, and special-purpose facilities, as well as parking, are all available at the Asylum Centre. The Centre also has a well-equipped kitchen where daily meals for asylum seekers are prepared. Currently, 201 migrants from Middle Eastern nations are housed at the centre.

The Tutin Asylum Centre was formed in November 2013 during an extraordinary session of the Government of the Republic of Serbia. The first migrants arrived on January 16, 2014. It is currently housed in the old administrative building of the furniture business "Dallas" on Tutin's Vidinajska 1 street. The Centre has a capacity of 100 beds and a floor space of 400 square meters. The Centre will be relocated to Velje Polje, within the Municipality of Tutin, where building of a

new Centre is already underway. In the Centre, there are now 164 migrants from Middle Eastern countries.

In 1992, the "Krnjaca" Collective Centre opened in the premises of the water company "Ivan Milutinović - PIM Standard" in Krnjaca, Palilula Municipality, Belgrade. This centre was additionally authorized for accommodation and provision of basic living conditions for asylum seekers by a decision of the Government of the Republic of Serbia in August 2014. The residential section of the Centre for Asylum, as well as the administrative building, special purpose rooms, and auxiliary facilities, make up the Centre for Asylum. The Asylum Centre contains 16 prefabricated units with 240 rooms and a combined capacity of 1,000 beds for asylum seekers. Currently, 589 migrants from Middle Eastern nations are housed at the centre.

There are also 15 receiving centres. On July 7, 2015, the Reception Centre in Preševo became the first centre for the reception and, at the time, the transit of migrants. It has a seating capacity of 1000 people. A dining room for 500 beneficiaries, two kitchens within the accommodation facility (each 10 m2), bathrooms and toilets, a bathroom and toilet for people with special needs, an outpatient clinic open 24 hours a day, a mobile dental office, a sewing workshop, and a carpentry workshop are all available at the Centre. The Centre is currently at a halt due to cost-cutting measures.

The second is the Obrenovac Reception Centre. The military barracks "Borko Marković" in Obrenovac were provided to the Commissariat for Refugees and Migration in order to shift migrants from horrific conditions in Belgrade parks to sufficient accommodation within Belgrade's jurisdiction. Needs were assessed on January 15, 2017, and infrastructure construction began to create the conditions for fast accommodation. On the 18th of January, 225 migrants were housed in facility number four. Soon after, the former barracks ambulance (office for administrative affairs and housing for Commissariat workers) and a big facility number 12 (in which a clinic for migrant examination was formed) were built. The number of people who were accommodated quickly climbed to 570, and this trend continued throughout 2017. The highest number was 1351 users, which was recorded in May 2017. The Obrenovac Centre currently houses a cafeteria with a store, an IT corner, a living room, a hairdresser and barbershop, a classroom for migrants, as well as a recreational space and a restaurant where food is delivered, as well as a recreational area and a restaurant where food is distributed. In a facility meant for an outpatient clinic, refurbishment and renovation work was completed. The entire Centre, as a key facility for migrant reception, will undergo additional adaptations and infrastructure restoration to provide even better circumstances. At the moment, the centre is home to 701 migrants from the Middle East.

The old motel "Adaševci" building, which is located near the Belgrade-Zagreb highway within the Municipality of Šid, became the Reception Centre Adaševci on November 11, 2015. It includes of lodging and commercial space, as well as special-purpose rooms, a kitchen, and parking. To ensure that everyone has a good time while at the Centre, special attention is provided to different age groups and their requirements. As a result, the Centre includes a Children's and IT corner, as well as a Mothers and Babies Corner and a Young People's Corner. A hairdresser is located in the Centre's main hall, where recipients can get free haircuts from a fellow migrant. A large and small laundry is also available. There are additional recreation fields, a children's playground, and an improvised volleyball court at the Centre. Currently, 715 migrants from Middle Eastern nations are housed at the centre.

On September 16, 2015, the former Children's Rehabilitation Centre was transformed into the Reception Centre "Principovac". The structure has a total area of 2,732 m2 and is divided into two sections. The main half is for migrants, while the second part has rooms for the Commissariat's workers, an office, a clinic, and interview, meeting, and police rooms, as well as warehouse space.

The Centre has a total capacity of 250 beds and accommodates beneficiaries in 20 rooms. Migrants also have access to 14 shower facilities, 19 toilets (10 for men, 8 for women), and 25 water faucets.

There is a Children's corner, a Mother and Child corner, an IT corner, a social corner, and rooms for occupational and recreational activities (hairdresser, carpenter, and tailor's workshop) in the area of the building designated for migrants. A volleyball court, cricket, football, and a playground for children are available to migrants, as well as table tennis equipment that may be relocated inside during colder weather. A two-hectare site is walled, with a fence length of 604 meters. The Centre features a video security system with 16 cameras that covers the common areas in the housing facilities, as well as the entrances and some areas of the yard. In the moment, there are 373 migrants from Middle Eastern countries at the Centre.

Reception centre Šid Station opened on November 24, 2015, in the midst of a surge in the number of migrants travelling through Serbia, who were taken by bus from Preševo to Šid and then boarded a train bound for Croatia. In collaboration with the Municipality of Sid, the Commissariat for Refugees and Migration opened this facility, which is located directly across from the Railway Station and near to the Bus Station. Initially, the capacity for reception was 200 people and a hundred people for extended stays. On May 31, 2017, the Centre was temporarily

shuttered. It was reopened in early December 2018 to accommodate only families with children. In the Centre, there are now 173 migrants from Middle Eastern countries.

The "Fourth Kilometre" Collective Centre in Pirot was established in 1983 to house workers involved in the building of the Pirot Hydroelectric Power Plant. From 1995 through 2005, the facility served as a refugee camp for Croatian refugees. After undergoing extensive renovations in 2016, the first batch of asylum seekers from Afghanistan, Iraq, and Syria arrived on December 19. The Centre is made up of two prefabricated barracks with four sections each containing four rooms, for a total of 32 rooms or 192 beds. A laundry room with washing and drying machines, as well as a storage room, are available from the auxiliary facilities. There is also a children's playground, as well as basketball and football courts, table tennis, and other recreational fields. In the Centre, there are now 173 migrants from Middle Eastern countries.

On October 19, 2016, the Bujanovac Reception Centre opened its doors. It is situated on a 2,000 square meter plot in the former "Svetlost" industry area. It's secluded from the rest of the town, but not too far from the centre. It has a capacity of 220 beds and primarily houses families from the Middle East. The Centre in Bujanovac, like all other facilities, works according to House norms, with Commissariat officials monitoring exit and access. The Centre is separated into two sections: one where asylum seekers are housed, and another with a large dining area, men's and women's bathrooms, as well as personal hygiene facilities. Medical personnel are also present, as they are in all other centres, with the assistance of interpreters. Furthermore, the Centre features numerous specific rooms dedicated for Commissariat workers, other relevant organizations, and the Centre for Social Work, as well as additional amenities for beneficiaries, such as the Children's Corner. Currently, 203 migrants from Middle Eastern nations are housed at the centre.

The Vranje Reception Centre is located in the south of Serbia, around 30 kilometres from the Macedonian border. The Centre first opened its doors on May 30, 2017, in a restored section of the Motel "Vranje" at the city's entrance. A total of 250 people can be accommodated. Dormitories, a common area (dining room, children's corner, sanitary facilities - men's and women's restrooms with disabled access, and a room for various activities), medical block, administrative section (premises for employees), sports grounds, and parking space are all part of the Reception Centre.

The Divljana Reception Centre opened on December 31, 2016. Two pavilions and a management building make up the complex. Migrants are housed in pa-

vilions, which have eight rooms. Each room is divided into three portions, each with six beds, a shared lobby, and a double toilet. The hotel has a total of 280 beds. Each pavilion features a lounge where people may get together and do things together. A classroom with an IT corner, a children's corner, and rooms for non-governmental groups are all located in one pavilion. The Centre is currently at a halt due to cost-cutting measures.

The Dimitrovgrad Reception Centre is located in the south-eastern portion of Serbia, in the Pirot Municipality, 5 kilometres from the Bulgarian border. On December 1, 2016, the Centre was formally inaugurated. A total of 86 people can be accommodated (74 in the actual Centre and 12 in housing containers). Dormitories, a common area (dining room, children's corner, sanitary facilities - men's and women's restrooms with disabled access, and a room for various activities), medical block, administrative section (premises for employees), sports grounds, and parking space are all part of the Reception Centre. There are eight containers in the yard (3 housing, 3 sanitary and 2 warehouses). The centre is currently at a halt due to cost-cutting measures.

On the 19th of October, 2016, the Bosilegrad Reception Centre opened its doors. A total of 60 people can be accommodated. The building is 503 square meters in size, with 189 square meters on the ground floor, 162 square meters in the attic, and 152 square meters in the basement. The following is a floor-by-floor layout of rooms: The ground floor (4 rooms, 1 sanitary block, dining room, office, corridor, washing and drying area with a sanitary block), the attic (3 rooms, 1 sanitary block), and the basement (3 rooms, 1 sanitary block) (2 rooms for workshops, sanitary facilities, warehouse, boiler room).

The Government of the Republic of Serbia and the City of Subotica decided on November 15, 2015, to open a reception centre in Subotica. The Centre is only three kilometres from the city centre and is near to the highway exit. Dormitories, administrative buildings, a new building, housing and sanitary containers, common rooms, parking lots, reception, and courtyards with parkland are currently present.

On November 6, 2016, the "Sombor" reception centre opened its doors. It consists of two buildings for migrant accommodation, common rooms, dining rooms, and sanitary blocks, an administrative unit, auxiliary facilities, parking, recreational grounds, and an auxiliary sanitary block, as well as an administrative unit, auxiliary facilities, parking, and auxiliary sanitary block. The Centre also features a fully equipped office for the Republic of Serbia's Commissariat for Refugees and Migration, a meeting room, and space for the Ministry of Internal Affairs' purposes.

A modern dining area with a food distribution line, as well as a specific purpose room for learning Serbian, English, German, History, Mathematics, Geography, and Fine Arts, are all available at the Centre. A children's playroom, a social zone, a hairdresser, and a library are all available. Free legal and psychological aid, as well as proper medical treatment, are provided to users. Basketball, football, volleyball, cricket, table tennis, miniature soccer, and darts are among the sports available to migrants.

On April 5, 2017, the "Kikinda" Reception Centre opened in Bantska Topola, Municipality of Kikinda, on the site of the agricultural enterprise "29. November". It features auxiliary facilities, parking, and recreational grounds next to the main structure, as well as common areas and special purpose rooms. There are 240 beds at the Reception Centre, which is divided into 21 rooms. Each floor comprises ten sleeping rooms ranging from four to sixteen beds, as well as a sanitary block and a bath with showers. During the winter, the Centre has its own boiler room and central heating. It features a fully equipped office for the Republic of Serbia's Commissariat for Refugees and Migration, as well as a meeting room and space for the Ministry of Internal Affairs' needs. Personal hygiene goods, clothing, and footwear are provided to migrants. A laundry and drying lounge, as well as a warehouse, are available. A kitchen is available for food distribution at the Centre. It also features a classroom where students can study Serbian, English, and computer essentials, as well as a children's playroom, a Mothers and Babies Corner, a Social Corner, and a hairdresser. Medical care, as well as free legal and psychiatric support, is provided to those who qualify. There is an equipped ambulance and a quarantine like room in case of an epidemic. Basket, football, volleyball, cricket, and table tennis are some of the sports and amusement facilities available.

## 4. METHODS

The survey was conducted in the period May-August 2021, through survey questionnaires. 120 citizens were interviewed in the areas of Banja Koviljača, Bogovađa, Sjenica and Tutin. The survey was anonymous. The Krnjača Centre is essentially located in the area of Belgrade, and does not fit into the research framework. The questionnaire consists of 10 questions. The research is designed to cover questions related to the general attitudes of the population regarding migrations that have affected the European continent in recent years due to events in Syria and other countries in the area, as well as their attitude towards migrants and the state's attitude towards migrants. In addition to the offered answers, space is left for each question so that the respondent can offer an additional answer that does not fit into the offered ones. Two initial hypotheses were set:

The population is negatively oriented towards migrants;

The majority of the population does not consider that the state has deprived migrants of their liberty in order to preserve their health.

The questions asked are as follows:

1. Should migration through Serbia be left at the current level, increase the level of migration or reduce it?
2. How do you feel about migrants - positively or negatively?
3. Do you think migrants make this country a worse place to live?
4. Is migration good or bad for the Serbian economy?
5. Would you say that migrants mostly take away workers' jobs or generally help to create new jobs?
6. Do you agree with the following statement: "There are too many migrants in my country."?
7. Do you agree with the following statement: "People in my country are more negative towards migrants or other groups that are different from them than they were a few years ago."?
8. Do you think that migration has increased the crime rate?
9. Do you agree with the state's position that during the state of emergency, migrants should have been imprisoned in migration centres?
10. Do you think that the state imprisoned migrants in migration centres because of their health, protection of society from crime or something third?

## 5. RESULTS

The first question was answered by 117 citizens. 15, 38% of respondents (18 citizens) believe that migration should be left at the current level, 82, 05% of respondents (96 citizens) believe that it is necessary to reduce migration, while only 2, 56% of respondents (3 citizens) believe that it is necessary to increase migration. Three respondents did not answer the offered question.

The second question was answered by all respondents. 77, 50% of respondents (93 citizens) feel negative towards migrants, 20% (24 citizens) positively, and 2.50% (three citizens) neutral.

The third question was also answered by all respondents. 62, 50% of respondents (75 citizens) believe that migrants make Serbia a worse place to live, while 37, 50% of respondents (45 citizens) do not think that migrants make Serbia a worse place to live.

When answering the fourth question, 85% of respondents (102 citizens) believe that migration is bad for the country's economy, while 12, 50% of respondents (15 citizens) think that migration is good for the Serbian economy. Only 2.50% (3 respondents) essentially consider this to be a complex issue, which depends on many factors.

In answering the fifth question, the largest number of respondents (60% - 72 respondents) believe that migrants mostly take away workers' jobs, while 25% of respondents (30 citizens) believe that migrants generally help to create new jobs. However, 18 respondents (15%) believe that migrants are burdened by the budget of the Republic of Serbia, they do not stay in Serbia. As a rule, jobs that domestic citizens certainly do not want to perform, and on that side, they represent a slight competition to domestic citizens.

In the sixth question, a greater division of respondents was observed. Namely, 57, 50% of respondents (69 citizens) believe that there are too many migrants in Serbia, while 42, 50% of respondents (51 citizens) do not agree with this statement.

A somewhat smaller division of citizens is visible in the statement from the seventh question. Namely, 64.10% of respondents (75 citizens) agree with the statement that people in Serbia are more negative towards migrants or other groups that differ from them than they were a few years ago, while 33.33% of respondents (39 citizens) does not agree with the statement offered. Answers 2, 56% of respondents (3 citizens) are reduced to a statement that the situation has always been the same for these groups.

When answering the eighth question, 67, 50% of respondents (81 citizens) believe that migration has increased the crime rate, while 32, 50% of respondents (39 citizens) believe that migrants have not increased the crime rate in Serbia.

The answers to the ninth question show that most of the respondents agree with the state's move that migrants had to be locked up in migration centres during the state of emergency. Namely, exactly 80% of respondents (96 citizens) believe that this was the right move by the state authorities, while 20% (24 citizens) believe that migrants should not have been locked up in migration centres. However, the question here is the legality of deprivation of liberty of migrants, i.e., whether there is in fact a collective deprivation of liberty without a valid legal basis according to the European Court of Human Rights.

The tenth question was also answered by all respondents. In terms of percentage, 37, 50% of respondents (45 citizens) believe that the state imprisoned migrants in migration centres to protect their health. Then, 55% of respondents (66 citizens)

believe that the state imprisoned migrants to protect society from migrant crime. Finally, 7.5% of respondents (9 citizens) offered additional answers. These answers boil down to three claims, namely that the state reacted in this way because it did not know what else to do with migrants, then, in order to generally protect people and spread the epidemic, and to obtain benefits and money from other countries and the European Union.

## 6. DISCUSSION

The first set of answers to the questions shows the negative attitude of the population towards migrants. It is interesting to note that in answering the first question, a certain percentage of respondents believe that migration should be increased or maintained at the current level. A number of respondents show a positive attitude towards migrants, but obviously there are also a number of people who feel neutral towards migrants. Therefore, the percentage of answers to the next few questions indicates the fact that migrants consider Serbia a worse place to live. However, we believe that a smaller percentage of respondents are right who believe that migrants do not take away jobs from domestic citizens, since these are really jobs those locals are not interested in and do not want to do.[21]

The last three issues are strictly related to criminal law. Although the relationship between migration and crime is not new,[22] today it needs detail analysis. It is interesting to note that a higher percentage of the population believes that migration from Syria and other countries has increased the crime rate. However, for now, there are still no valid statistics that could confirm this statement. A study of existing statistics does not suggest that migration has increased the crime rate.

Taking into account the negative attitude towards migrants of a larger number of respondents, the answers to the ninth question logically indicate that a higher percentage of respondents will support the confinement of migrants in migration centres. The question of the legality of such a procedure of the state is open here, which was also decided by the Constitutional Court. The Constitutional Court of Serbia has ruled on several issues related to state measures adopted during the state of emergency. The response of the Constitutional Court of the Republic of Serbia, on the other hand, was moderate and came too late. The Constitutional Court issued mostly declaratory Decision No. Iuo-45/2020 on several issues related to restrictions on citizens' rights and freedoms during the state of emergency on Sep-

[21] Fudge, J., *Precarious migrant status and precarious employment: The paradox of international rights for migrant workers*, Comparative Labor Law & Policy Journal, Vol. 34, No. 1, 2012, pp. 95-132; Sarkar, S., *Capital controls as migrant controls*, California Law Review, Vol. 109, No. 3, 2021, pp. 799-860

[22] Kinman, J. L.; Lee, E. S., *Migration and Crime*, International Migration Digest, Vol. 3, 1966, pp. 7-14

tember 17, 2020, more than five months after the state of emergency ended and more than seven months after the constitutional appeals were filed.

The Constitutional Court held that this was not an unconstitutional, arbitrary, and collective loss of liberty based on discriminatory factors and without the possibility of judicial protection in connection to the prescribed restriction in its ruling. According to this judgment, the interim ban had two purposes: it provided effective protection against serious infectious diseases among asylum seekers and irregular migrants housed in reception centres, as well as effective protection for the wider public, including all citizens.

This reasoning raises many questions. The Constitutional Court deviates from the detailed elaboration of the positions of the European Court of Human Rights on this issue and only in a few paragraphs it explains that it is not deprivation of liberty in purpose or content. Both attitudes are questionable.[23]

The majority of EU countries enable migrants to be detained upon entering the country, most commonly by border police.[24] It is thought to be extraordinarily difficult to create a global image of migrant detention.[25] The grounds for deprivation of liberty are thoroughly defined in the Convention, and a person's liberty cannot be taken away for reasons other than those listed.[26] However, because the "lawfulness" of detention under domestic legal is not necessarily the deciding factor, the Court must also determine whether domestic law, including the broad principles expressed or inferred therein, is in compliance with the Convention. First and foremost, the general concept of legal certainty must be met.

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23 For example, see reasoning in: Case *Nada v. Switzerland,* Application no. 10593/08, judgment of 12 September 2012, Reports of Judgments and Decisions 2012-V (2012) ECHR. Additionally, see: Case *Rustamov v. Russia,* Application no. 11209/10, judgment of 03 July 2012 (2012) ECHR; Case *Nasrulloyev v. Russia,* Application no. 656/06, judgment of 11 October 2007 (2007) ECHR; Case *Khudoyorov v. Russia,* Application no. 6847/02, judgment of 08 November 2005, Reports of Judgments and Decisions 2005-X (2005) ECHR; Case *Ječius v. Lithuania*, Application No. 34578/97, judgment of 31 July 2000, Reports of Judgments and Decisions 2000-IX (2000) ECHR; Case *Shamsa v. Poland*, Applications nos. 45355/99 and 45357/99, judgment of 27 November 2003 (2003) ECHR; Case *Steel and Others v. The United Kingdom,* Application no. 24838/94, judgment of 23 September 1998 (1998) ECHR; Case *A. and Others v. the United Kingdom (GC),* Application No. 3455/05, judgment of 19 February 2009, Reports of Judgments and Decisions 2009-II ECHR

24 Cornelisse, G., *Immigration Detention and Human Rights Rethinking Territorial Sovereignty*, Martinus Nijhoff Publishers, Leiden-Boston, 2010

25 Fiske, L., *Human Rights, Refugee Protest and Immigration Detention*, Palgrave Macmillan, London, 2016

26 Case *Saadi v. the United Kingdom,* Application No. 13229/03, judgment of 29 January 2008, Reports of Judgments and Decisions 2008-I (2008) ECHR; Turanjanin, V.; Soković, S., *Migrants in detention: approach of the European Court of Human Rights*, Teme, Vol. 43, No. 4, 2019, pp. 957-980

I believe that the migrants' position in the described situation essentially is deprivation of liberty in practice. The Constitutional Court here has avoided resolving the complex issues. In this area, the Court's jurisprudence is extensive, and the Constitutional Court should have commented on its stance in light of the norms established by the Court.

Finally, the answers to the tenth question confirm the initial hypothesis that the majority of the population does not believe that the state deprived migrants of their liberty in order to preserve their health. Judging by the answers of the majority of respondents, this was primarily done to protect society from migrant crime. On the one hand, we agree with this view. On the other hand, we believe that this move by the state at that time was a hasty reaction in order to prevent the uncontrolled movement of migrants and the potential spread of the infectious coronavirus disease. We have already talked about the legality of this procedure.

## 7. CONCLUSION

It could be said that in the last few years we have a conflict of several crises. On the one hand, at the beginning of 2020, in the Republic of Serbia, as in the rest of the world, the dangerous infectious disease COVID-19 appeared, the end of which is still not in sight. On the other hand, the migrant crisis is here for several years.[27] The central part of this paper deals with the research of citizens in relation to migrants, both in their general attitude and in terms of the relationship between migrants and crime. Residents of rural areas were surveyed, as we thought that due to the location of migration centres, they would be most affected by waves of migrants and possibly, crimes committed by migrants. Both initial hypotheses were confirmed, and according to our research, the population has a negative attitude towards migrants. At the same time, most respondents show distrust of the state's claim that migrants are imprisoned for their health. we believe that this move by the state at that time was a hasty reaction in order to prevent the uncontrolled movement of migrants and the potential spread of the infectious coronavirus disease. The disadvantage of this research is the small number of surveyed residents. However, due to the overall situation regarding coronavirus, we could not include a larger number of subjects. This was pioneering research, which we believe should be continued.

[27] Turanjanin, V., *Položaj mediteranskih migranata: uvertira za Rackete i drugi protiv Italije*, Arhiv za pravne i društvene nauke, Vol. 2, No. 1, 2020b, pp. 96-117

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UDK 316.662-053.81:061.1(4-67EU)
Review article

# STRENGTHENING THE ACTIVITIES OF YOUTH ASSOCIATIONS IN THE EUROPEAN ENVIRONMENT - CERTAIN LEGAL AND SOCIAL MATTERS

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***ABSTRACT***

*In the previous ten years in the EU, the youth have become one of the priority groups that is being strengthened for more intensive involvement in the life and development of society. Research has shown that the youth are quite uninterested in getting involved in political and social activities that contribute to the development of the community and society. The still current pandemic caused by Coronavirus Disease (COVID-19) has further "pushed" the youth into the virtual world because they are now forced to conduct their daily activities (for example, schooling, additional education) in an online environment. The youth, otherwise avid fans of technological achievements, are now trapped in their homes with computers, smartphones and other technological aids, thus losing direct contact with their peers and adults, remaining deprived of some of the socializing effects of the teaching process and are at risk of complete alienation.*

*EU Youth Strategy 2019-2027 addresses youth organizations, as one of the key actors that strengthen the competencies of the youth and promote their social inclusion. Youth associations and associations for the youth, in addition to providing various services and programs for the youth, strengthen empathy among the youth, raise awareness of the youth on the needs of society and, through the development of additional competencies, empower them to actively participate in community life.*

*This paper presents the results of the part of the research created within the Youth Activation Network project. The research was conducted using the focus group method, where the re-*

*spondents were representatives of youth associations and associations for the youth from entire Croatia. Research questions were focused on trying to identify and differentiate youth associations and associations for the youth from other associations, ways to activate and involve the youth in the work of associations, and assess the current legal framework of associations. The results obtained from the implementation of focus groups were transcribed, processed in Dedoose computer program and presented in the paper according to main research issues. For results analysis, content analysis method was used, as well as comparison method and contrast method.*

*The results of the research show that it is necessary to legally define work with the youth so that it can be used as one of the distinguishing criteria of youth associations and associations for the youth. Associations involve the youth as volunteers, users and service providers, and empower and motivate them to further engage in social activities. The biggest problems pointed out by the representatives of associations are related to the ways of financing the work of the associations. Although some respondents pointed out certain shortcomings, research results indicate that the existing legal framework for the work of the associations is satisfactory, while its amendments could further complicate the work of youth associations.*

*The revocation of the complex consequences of the pandemic requires the active involvement of all factors in society, where active and engaged, socially responsible and empathetic youth can be the bearers of change and improvement.*

***Keywords**: EU Youth Strategy 2019-2027, youth, youth activation, youth associations*

## 1. INTRODUCTION

The ongoing COVID-19 pandemic has affected all segments of society, so recovery is possible only by including all relevant factors. Young people who are just beginning to develop their professional, personal and political competencies must be an important stakeholder in this process. Opportunities for mobilizing this part of the population are numerous (involvement in decision-making processes, engagement in the provision of social services, implementation of information and communication technologies etc.), but associations have proven to be one of the most common forms of organization in which the youth are involved. When the EU Youth Strategy 2019-2027 defined three key lines of action (Engage, Connect and Empower), it required that youth organizations be recognized as providers of competence development and social inclusion services through youth work and non-formal educational activities.[1] Therefore, the focus of this paper is focused on exploring opportunities that would further strengthen youth associations and associations for the youth and thus contribute to the overall recovery of society.

[1] EU Youth Strategy 2019-2027, [https://europa.eu/youth/strategy/empower_en], Accessed 30 December 2021

The paper was created within "Youth Activation Network"[2] project, which aims to build a thematic network to support the youth in the process of active involvement in community life. The aim of the project is to map the current situation within the youth sector, and to explore economic and legal factors that may affect the activation of the youth. The obtained data will be used to suggest possible changes in the legislative framework or the need for additional investments in the youth sector. In this paper, we present only a part of the results obtained by implementing focus groups with representatives of youth associations and associations for the youth.

## 2. GENERALLY ABOUT THE ROLE OF THE YOUTH IN SOCIETY

The scientific study of the youth began in the late 19th century when they were recognized as a problematic part of society. Due to the consequences of economic crises, young people were looking for an identity, they were jobless, with a lot of free time and therefore prone to risky behaviours.[3] Despite all subsequent efforts to provide the youth with a well-deserved influence in society, the youth are still often marginalized and excluded. Underdeveloped African countries are a glaring example of failed youth policies,[4] but such trends are also observed in western,

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2 „Youth Activation Network" project, UP.04.2.1.06.0048, whose holder is association "Zamisli" from Zagreb in cooperation with 17 other institutions. The project connects various organizations that work programmatically for the youth, scientists, academia, business and decision makers in the processes of open dialogue on the youth. The diversity of the partners involved is a fundamental feature of the project as research and focus on the youth expands to more different institutions, at different levels. The project gives the youth the opportunity to be actively involved and be an example to their peers, while various educations and research strengthen the resources of civil society organizations working with the youth and create sustainability and visibility of working with the youth. The planned duration of the project is 30 months. One of the authors was an external research associate on the project, and she uses this data with the permission of the project manager

3 Ostrowicka, H., *Suitable enemies? Governmentality of Youth: youth as a threat*, European Educational Research Journal, Vol. 11, No. 4, 2012, pp. 534-544, [https://journals.sagepub.com/doi/pdf/10.2304/eerj.2012.11.4.534], Accessed 20 May 2021

4 Mabala, R., *Youth and „the hood" - livelihoods and neighbourhoods*, Environment & Urbanization, Vol. 23, No. 1, 2011, pp. 157-181, [https://journals.sagepub.com/doi/pdf/10.1177/0956247810396986], Accessed 20 May 2021. According to the author, in African countries, as a result of better health care and reduced child mortality, the proportion of the youth compared to the rest of the population has increased to 30%. On the other hand, economies are not developing fast enough to provide for the youth, nor is the education system keeping in step with the economy. Thus, the youth remain unemployed, left to fend for themselves, often engage in criminal and terrorist activities, and are therefore a threat to security. The measures that are taken then, unfortunately, are not aimed at their permanent training for work, but are more "mitigation measures". Even international donor organizations design their projects in a way that is not aimed at creating lasting values, projects are fragmented and brief,

more developed countries.[5] The youth are seen as "our future", which expresses distrust in their current capabilities and abilities.[6] The European Union[7] and the European Council[8] have been working more intensively with the youth for the last twenty years, by encouraging the youth to become involved and active in the community. The last cycle of the European dialogue with the youth was aimed at achieving goal 9 – Space and Participation for All, which aims to strengthen the democratic participation of the youth and ensure adequate influence of the youth in all areas of society.[9]

Numerous studies of youth participation in society indicate their inactivity and lack of interest, which is most often the result of their distrust of institutions. Although it was expected that, in the post-communist era, the youth would have a more favourable environment for action, their confidence in social and political institutions turned out to be lower than ever.[10] The youth believe that there are no real mechanisms for their influence because politicians do not respect their opinions. Therefore, the primary family still has the largest role in the social integration of the youth, which only perpetuates and deepens existing social inequalities.[11] A survey

targeted at a small proportion of the youth already in the system, while the vast majority of the youth, especially those in rural areas, remain out of reach of these programs (*Ibid*, pp. 158, 173)

5 Robbins, C. G., *Disposable Youth/damaged Democracy: youth, neoliberalism, and the promise of pedagogy in the work of Henry Giroux*, Policy Futures in Education, Vol. 10, No. 6, 2012, pp. 627-641, [https://journals.sagepub.com/doi/pdf/10.2304/pfie.2012.10.6.627], Accessed 20 May 2021

6 The initiators of various social movements that target youth groups are older people who work in a way that is not adapted and attractive to the youth (more in Elliott, T.; Earl, J., *Organizing the Next Generation: Youth Engagement with Activism Inside and Outside of Organizations*, Social media+Society, January-March, 2018, pp. 1-14, [https://journals.sagepub.com/doi/pdf/10.1177/2056305117750722], Accessed 22 May, 2021). Mabala emphasizes that raising the age limit for defining a young person (according to the African Charter to 35 years of age) marginalizes them and devalues their current capabilities (Mabala, R. *op. cit*. note 4, p 158)

7 In the field of youth regulation, the European Commission has adopted a White Paper: A new impetus for European Youth, (COM (2001)) 681, followed by the European Youth Strategy 2010-2018, which emphasizes the need to promote youth participation and support their organizations and the latest EU Youth Strategy 2019-2027, which re-emphasizes the importance of youth involvement

8 In 2010, the Council of Europe adopted a Resolution of the Council of the European Union on youth work calling on young people to take responsibility for their actions through their activism, while the 2020 resolution (2020 / C 415/01) further emphasized the importance of working with the youth with an aim of achieving the set European agendas for working with the youth

9 EU Youth Goals, [https://youth-goals.eu/yg9], Accessed 19 January 2022

10 Ilišin, V.; Spajić Vrkaš, V., *Uvod: konceptualni okvir istraživanja*, in: Ilišin, V.; Spajić Vrkaš, V. (eds.) Generacija osujećenih – mladi u Hrvatskoj na početku 21. stoljeća, Institut za društvena istraživanja, Zagreb, 2017, pp. 11-27 [http://idiprints.knjiznica.idi.hr/792/1/Generacija%20osuje%C4%87enih.pdf], Accessed 27 May 2021

11 Gvozdanović, A., *et. al.*, *Istraživanje mladih u Hrvatskoj 2018./2019.* Friedrich Ebert Stiftung, Zagreb, 2019, p. 67, [http://library.fes.de/pdf-files/bueros/kroatien/15291.pdf], Accessed 27 May 2021

conducted on a sample of 11 European countries shows the paternalistic attitude of decision-makers in public debates on youth, and the inadequacy of media announcements to the youth.[12] Contrary to popular belief that the youth are inactive, there are studies that indicate that the youth want to be politically active but are not given opportunities to do so.[13] The forms of participation that policymakers offer to the youth are marginal compared to many other existing opportunities.[14]

The youth are prone to technology that is tempting, fun and allows the creation of a "parallel reality" in which everything can be achieved easily and quickly, which in the youth creates completely unrealistic expectations of life. With the emergence of the pandemic, the youth are additionally focused on the use of technological aids in those areas that were reserved for common forms of social interaction. Thus, the youth are in danger of completely losing the property of sociability as a fundamental component of human life that connects people to social relations.[15] Due to all the above, the work with the youth needs to be intensified more than ever before, and associations can play a key role in that.

## 3. LEGAL AND SOCIAL FRAMEWORK FOR THE WORK OF ASSOCIATIONS IN THE REPUBLIC OF CROATIA

Associations are extremely important in society because they promote freedom of association, provide additional space for the promotion and representation of cer-

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12 Lahusen, C.; Kiess, J., *The Diverging Presence of Youth in Public Discourse: A Comparative Analysis of Youth-Related Debates Across Countries and Issue Fields*, American Behavioral Scientist, Vol. 5, 2020, pp. 574-590, [https://journals.sagepub.com/doi/pdf/10.1177/0002764219885426], Accessed 20 May 2021

13 Elliott, T.; Earl, J, *op. cit*, note 6, p. 11

14 Walther, A., *et. al*., *Regimes of Youth Participation? Comparative Analysis of Youth Policies and Participation across European Cities*, Young, Vol. 29, No. 2, 2021, pp. 191-209, [https://journals.sagepub.com/doi/pdf/10.1177/1103308820937550], Accessed: 20 May 2021

15 Wong, M., *Hidden youth? A new perspective on the sociality of young people „withdrawn" in the bedroom in a digital age*, New media&society, Vol. 22, No. 7, 2020, pp. 1227-1244, [https://journals.sagepub.com/doi/pdf/10.1177/1461444820912530], Accessed 21 May 2021. The most intense negative impact of digitalization on the youth was observed in Japan, where in 1978 "withdrawal neurosis" syndrome was mentioned, which means the complete social withdrawal of the youth who are demotivated to work or study (Teo, A. R., *A New Form of Social Withdrawal in Japan: A Review of Hikikomori*, International Journal of Social Psychiatry, Vol. 56, No 2, 2010, pp. 178-185, [file:///C:/Users/kor123/Downloads/ANewFormofSocialWithdrawalinJapan-aReviewofHikikomori_PubMedVersion.pdf], Accessed 25 August 2021). Subsequently, in the 1990s, the term "hikikomori" or hidden youth was mentioned, which includes people who refuse to leave the room for months, even years, while their social contacts are reduced to an online environment (Wong, M.*, op. cit*., note 16, pp. 1230). Unfortunately, this phenomenon is increasingly present in the rest of the world (Suwa, M.; Suzuki, K., *The phenomenon of „hikikomori" (social withdrawal) and the socio-cultural situation in Japan today*, Journal of Psychopatology, Vol. 19, 2013, pp. 191-198, [https://www.jpsychopathol.it/issues/2013/vol19-3/01b-Suwa.pdf], Accessed 25 August 2021)

tain interests, and affect the quality of democratic political systems.[16] There is a high probability that people who join some organizations will later be active in civil or political discourse.[17] The youth who are active in the community develop three important strengths: Capacity, Motivation and Opportunity.[18] Youth participation in associations helps them acquire certain knowledge and skills that they will need to participate in traditional political institutions.[19] An increasing problem, especially after the 2008 crisis, are the NEET youth,[20] and civil society organizations are the organizations that most often implement programs for this category of the youth.[21] In addition, the theory of social capital advocates active participation of citizens in civil society organizations as a basic component of social capital and the foundation of stable democracy because it encourages members to cooperate, show solidarity and focus on the public good.[22] According to the research on youth work, civil society organizations are the most frequent providers of numerous services for the youth, emphasizing the need for legal regulation of youth work and the professionalization of the profession of youth workers.[23] Youth work is differently regulated and not standardized in the countries of the European Union. There is a certain level of convergence on the content of youth work, emphasizing the support and strengthening of personal development of the individual with an aim of achieving empowerment, emancipation, responsibility and tolerance.[24]

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16 Šalaj, B., *Civilno društvo i demokracija: što bi Tocqueville i Putnam vidjeli u Hrvatskoj?,* Anali Hrvatskog politološkog društva, Vol. 8, No. 1., 2010, pp. 49-71, [https://hrcak.srce.hr/file/115469], Accessed 10 February 2021

17 Almond, Verba, 2000, according to: Šalaj, B. *op. cit.* note 17, p.57

18 Martin, S. *et. al.*, *Building Effective Youth Councils: A Practical Guide to Engaging Youth in Policy Making*. Washington, D.C.: The Forum for Youth Investment, 2007, [https://www.ca-ilg.org/sites/main/files/file-attachments/building_effective_youth_councils.pdf], Accessed: 27 May 2021

19 Ilišin, V. *Mladi i politika: trendovi (dis)kontinuiteta*, p. 188, in: Ilišin, V.; Spajić Vrkaš, V. (eds.) Generacija osujećenih – mladi u Hrvatskoj na početku 21. stoljeća, Institut za društvena istraživanja, 2017, Zagreb, [http://idiprints.knjiznica.idi.hr/792/1/Generacija%20osuje%C4%87enih.pdf], Accessed: 27 May 2021

20 The acronym NEET means young people Not in Employment, Education and Training. It is estimated that economic losses due to their exclusion are 1.2% of European GDP (see Majdak, M.; Baturina, D.; Berc, G., *Ples na rubu: okolnosti i iskustva položaja mladih u NEET statusu na području Grada Zagreba*, HKJU-CCPA, 21(1), 2021, pp. 89-128, [https://hrcak.srce.hr/file/370122], Accessed 27 May 2021).

21 Baturina, D.; Majdak, M.; Berc, G., *+populacije u urbanoj aglomeraciji Zagreb prema percepciji stručnjaka i mladih u NEET statusu – kako im pomoći?* Sociologija i prostor, Vol. 58, No. 218 (3), 2020, 403-431, [https://hrcak.srce.hr/file/362334], Accessed 6 December 2021

22 Putnam, 1993, according to: Šalaj, B., *op. cit.* note 17, p. 54

23 Morić, D.; Puhovski, T., *Rad s mladima - definicije, izazovi i europska perspektiva*, Agencija za mobilnost i programe Europske unije, Zagreb, 2012, [http://www.alfa-albona.hr/wp-content/uploads/2021/03/05_1340010259_Istrazivanje_o_radu_s_mladima_final.pdf], Accessed 27 May 2021

24 Working with young people: the value of youth work in the European Union, European Commission, 2014, [https://ec.europa.eu/assets/eac/youth/library/study/youth-work-report_en.pdf], Accessed 10 October 2021

An association[25] may act as an unregistered association or may acquire legal personality by registering in the Register of Associations of the Republic of Croatia kept by the competent administrative body of the county, i.e. the City of Zagreb, in electronic form unique to all associations. If an association wants to apply for funds from public sources, it must be registered and additionally entered in the Register of non-profit organizations maintained in electronic form by the Ministry of Finance.[26] All registered associations are required to prepare financial statements, keep business books and accounting in adherence to the bookkeeping principles of accuracy, truthfulness, reliability and individual presentation of positions. During the first three years of operation, all associations are obliged to keep books on the principle of double-entry bookkeeping, after which they can, in accordance with certain conditions, decide to continue with single-entry bookkeeping.

When entering in the Register, associations are classified according to the form of association, according to the target groups and according to the activities that achieve the goals prescribed by the statute of an association. The classification of the association's activities and the List of target groups are prescribed by a special regulation.[27] The classification of activities that an association will be engaged in, as well as the target groups of beneficiaries, is relevant when applying for individual tenders for project financing. If an association has a registered economic activity, it becomes a taxpayer and is obliged to register in the Register of Taxpayers kept by the Ministry of Finance.[28] As can be seen from the above, each registered association has a minimum of three identification numbers, i.e. Personal Identification Number (OIB), Registration Number and number in the Register of Non-Profit Organizations. In addition to this general legal regulation, there are a number of

[25] An association is any form of free and voluntary association of three or more natural or legal persons who, for the purposes of protecting their interests or advocate for the protection of human rights and freedoms, environmental and nature protection and sustainable development, and for humanitarian, social, cultural, educational, scientific, sports, health, technical, informational, professional or other beliefs and goals that are not in conflict with the Constitution and the law, and without the intention of gaining profit or other economically assessable benefits, are subject to rules governing the structure and operation of this form of association (Art. 4 of the Associations Act, Official Gazette No. 74/2014, 70/2017, 98/2019)

[26] Pursuant to the Financial Operations and Bookkeeping for Non-Profit Organizations Act, Official Gazette No. 121/2014

[27] Ordinance on the Content and Manner of Keeping the Register of Associations of the Republic of Croatia and the Register of Foreign Associations in the Republic of Croatia, Official Gazette No. 4/2015, 14/2020

[28] Art. 2, par. 7 of the Income Tax Act, Official Gazette No. 177/2004, 90/2005, 57/2006, 80/2010, 22/2012, 146/2008, 148/2013, 143/2014, 50/2016, 115/2016, 106/2018, 121/2019, 32/2020, 138/2020

other regulations governing certain specific associations.[29] Such legal regulation is often the subject of questioning and was therefore one of the key issues in the research we describe below.

## 4. RESEARCH METHODOLOGY

In the initial phase of the project, teams for the preparation and implementation of focus groups were formed. Team members were representatives of project partners and external experts who first prepared a framework questionnaire for the implementation of focus groups. Focus groups were held by moderators divided by counties covering the entire territory of the Republic of Croatia in the period from 8 February to 8 April, 2021. In this group, 24 focus groups were held with the participation of 80 representatives from 59 youth associations and associations for the youth. Due to the specific situation caused by the COVID-19 pandemic, all focus groups were held via Zoom platform, recorded, and respondents were recruited online by public call, email or personal contacts. The course of each focus group was transcribed and encoded in the Dedoose computer software program. For the analysis of the obtained data, the method of content analysis, methods of comparison and contrast, and the method of "cutting and gluing" similar statements were used. Prior to starting the content analysis, let's say that, in this research, as well as in all similar ones conducted by the focus group method, all potential pitfalls of this type of research

[29] In accordance with the Student Union and other Student Organizations Act, Official Gazette No. 71/2007, student associations whose records are kept by each higher education institution may be registered with higher education institutions. These are associations without legal personality, if they want to acquire legal personality they must register in accordance with the Institutions Act. According to the Free Legal Aid Act, Official Gazette 143/2013, 98/2019, an authorized free legal aid provider may also be an association that must then be entered in the additional Register of Primary Legal Aid Providers maintained by the Ministry of Justice and Administration. In addition to the Register of Associations and the Register of Non-Profit Organizations, sports associations are also entered in the Register of Sports Activities, which, in accordance with the Sports Act, Official Gazette No. 71/2006, 150/2008, 124/2010, 124/2011, 86/2012, 94/2013 , 85/2015, 19/2016, 98/2019, 47/2020, 77/2020, is managed by the competent administrative body of the county, i.e. the City of Zagreb according to the seat of the association, within whose scope is the entrusted tasks of state administration related to sports activities. Trade unions and employers' associations are additionally entered in the Register of Associations, which, in accordance with the Ordinance on the Content and Manner of Keeping the Register of Associations, Official Gazette No. 32/2015, 13/2020, is kept by the ministry in charge of labour affairs or administrative bodies of the county, i.e. the City of Zagreb, within whose scope is the entrusted tasks of state administration related to labour affairs. Pursuant to the Croatian War of Independence Veterans and Members of Their Families Act, Official Gazette No. 121/2017, 98/2019 and in accordance with the Ordinance on Keeping Records of Croatian War of Independence Veterans Associations and Cooperation and Support to Homeland War Associations, Official Gazette No. 21/18, Croatian War of Independence associations are additionally recorded in the Records kept by the Ministry of Croatian War Veterans

are present.[30] The focus group was conducted by several moderators, which could lead to uneven results. Nevertheless, all focus groups were guided by a pre-prepared questionnaire, which, at least in part, eliminated this potential shortcoming and ensured uniform coverage of topics. The problem of the dominance of one respondent and the imposition of their opinion on other respondents was annulled due to the small number of group members (3.3 on average). Although such sporadic cases can be found in the transcripts, the other respondents sufficiently elaborated their views with their answers, which can then be accepted as originally theirs. Regarding the representativeness of the sample, we believe that the same was achieved because the target group included representatives of youth associations and associations for the youth who are active in some counties throughout Croatia. Each individual moderator is well acquainted with the number and work of youth associations and associations for the youth in their area, and the representativeness of the sample was ensured by public invitation and personal contacts.

The purpose of the focus groups was to obtain data on general information on associations, opinions of representatives of associations regarding parameters that define the meaning of associations that programmatically work with or for the youth and the need for special legal regulation of youth associations and associations for the youth.

From the City of Zagreb, 12 representatives of 12 associations participated, while for the rest of the Republic of Croatia, 72 representatives of 47 associations participated (some associations have an area of activity in several counties). The largest number of associations were founded in the period from 2001 to 2010 (38.98% of them), associations founded from 2011 onwards 37.29%, while only 23.73% of participating associations were founded in the period from 1980 until 2000. The largest number of participating associations (49 of them, which is 83.05%) has less than 10 employees, while only 5 associations have more than 20 employees (8.47%). The analysis of the research results lists the original statements of the respondents coded with the letter R and the ordinal number of the respondent.

## 5. RESEARCH RESULTS

The results of the research will be grouped by the key research questions to be answered. At the very beginning of the focus groups, the question of defining the term "youth work" arose. Several respondents clearly stressed the need for a clear definition of the content of the term in Croatia, recognition and promotion of

[30] See in Skoko, B.; Benković, V., *Znanstvena metoda fokus grupa – mogućnosti i načini primjene*, Politička misao, Vol 46, No. 3, 2009, pp. 217-236, [https://hrcak.srce.hr/file/78151], Accessed 16 March 2021

youth work as a special occupation or profession[31] and that it would be very useful to organize a study program[32] or other form of education that could provide education and relevant competencies for working with the youth.[33] According to the respondents, youth work is a job that should be done by experts[34] who could design programs that could be interesting to young people, while youth work could be carried out by peers and aimed at empowering young people in preparation for their further inclusion in the community.[35]

## 5.1. Criteria for distinguishing youth associations and associations for the youth from other associations

The second key group of questions prepared for the implementation of focus groups referred to the parameters by which an association could be categorized into a group of associations working for and with the youth. Here, too, as a preliminary question, the question of distinguishing the terms "youth associations" from the term "associations for the youth" arose. Opinions of the respondents are divided on this issue, for some the youth association is only an association of young members (and therefore members of governing bodies are the youth),[36] while others are less exclusive and consider any association that allows activation and involvement of the youth is a youth association.[37]

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31 (R13) Here I would say first and foremost we need to define that youth work, working with the youth according to the law and the profession of working with the youth. So that the Employment Service does not list me as an administrator, but that my occupation exists in the system that is not 50 years outdated… They have no idea what our occupation is, it is not defined

32 (R44) …a youth worker should definitely be formalized. Realistically, studying for a youth worker would be much more useful than the large number of studies that can currently be studied in the Republic of Croatia

33 (R50) One of the things is education and recognition the acquired competencies of youth workers

34 (R3) There are certain organizations that work for the youth and that work with the youth. These two may sound almost the same in the context of language, but those are definitely not the same activities according to the content… there must be that distinction that when you work for the youth, then it must be done by professionals, and when you work with the youth, then it can be peer to peer approach without any problems

35 (R11) The first involves a systematic, long-term building of trust and empowerment of these young people so that they can implement, or get involved, activate (work with the youth, A/N)… work for the youth and so we develop some programs that perhaps may be interesting to the youth

36 (R25) To me it seems that if an association is youth association, the governing bodies should mostly comprise of the youth, and an association for the youth includes the youth, but the youth are not the majority, that would be mine definition…

37 (R53) And associations that are oriented towards the development of additional competence skills in the youth and are open to any suggestions by the youth and function in such a way that the youth are welcomed or that the youth can form various activities, associations that are not exclusive, I would call such associations youth associations

Research question: which parameters define an association as a youth association or an association for the youth?

**Table 1**. Criteria for distinguishing associations

| Categories | Terms |
|---|---|
| Defined in general acts | Provided by statute<br>The youth as a target group<br>Programs for the youth |
| Membership in an association | The youth as members<br>The youth as members of governing bodies |
| Involvement of the youth in the work of the association | The youth as users<br>The youth as service providers<br>The youth as users and service providers<br>The youth as activity development advisors<br>The youth as volunteers<br>The youth as employees<br>Youth-friendly principles of work |

*Source:* the authors

5.1.1. *Legal definition in general acts*

As we can see from Table 1, the answers of the respondents in the survey show several criteria for distinguishing these associations from all other associations. First of all, it is about the legal definition of the target group of users,[38] activities[39] and membership[40] in the founding and general acts of associations. This formal legal moment is necessary for an association to operate legally, but certain respondents emphasize that, for several reasons,[41] it should not be a decisive criterion for defining an association as a youth association and an association for the youth. A much more important criterion is the content of the activities of associations that should

[38] (R30) I mean, in our statute we end all those parameters that we looked at and wrote down what an association should do, what to act on, at the end of each sentence we ended with "the youth"

[39] (R32) …but programs aimed at the youth are mentioned, and this is important, these documents, the legal framework, must definitely emphasize the work with the user group

[40] (R20) …according to the statute, the youth are in fact members of an association and can be elected by the bodies

[41] (R56) When I look at the register of associations, each association has all the users. Anything that can be clicked, people click it and that is okay

be aimed at the youth,[42] taking into account the needs of the youth and their active involvement in the work of the association,[43] and that the programs offered by an association are aimed at the youth.[44]

### 5.1.2. *Membership in an association*

As a criterion for distinguishing between youth associations and associations for the youth, the question of members of associations and members of governing bodies displayed a high frequency of occurrence. Given the fact that the members of an association are the ones who practically plan, propose and implement the activities of the association, this criterion is very understandable,[45] with the membership in an association, the youth are involved in the work of the assembly. The answers to the question of running an association and membership in other governing bodies are varied. Certain respondents state that it is necessary for the youth to be in governing bodies since it empowers them, enables the acquisition of additional skills and competencies,[46] the youth know best the needs of the youth and therefore can best define the goals of an association.[47] The frequency of responses claiming the opposite is higher.[48] In this part as well, the answers rely on the distinction between youth associations and associations for the youth.[49] Given that being a youth is a time-limited status, the work of associations could be jeopardized by frequent changes in governing bodies due to crossing the age limit,[50]

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42 (R26) To me, the proportion of activities that have the youth as target groups or end users in relation to some overall set of activities would define an organization as an organization that works primarily for the youth

43 (R10) …means one that implements activities that are aimed at the needs of the youth and those that actively involve the youth in their work

44 (R37) Well, certainly one of the huge differences is that it is known that these programs that an association offers are exclusively for users who belong to the youth group aged 15 to 30

45 (R23) …the youth are members and make all decisions related to an association and run an association themselves, they create programs and even lead some workshops and trainings of members of an association

46 (R12) …but I think the involvement of the youth in all leading positions and in general the introduction of possibility to put the youth in leading positions is one of the main differences because a lot of associations that work with the youth, even some that work for the youth, have very a large number of people involved in these "main" functions

47 (R46) …So that the youth set strategic goals and priorities that an organization will address

48 (R44) Youth associations do not necessarily have the youth in leadership positions

49 (R77) …we think that an association for the youth can be programmatically intended for the youth, but the youth do not lead it, while for an youth association, in my opinion, it seems logical to be led by the youth.

50 (R52) It is normal that you have to have the youth if you work with the youth, you can't talk to yourself. On the other hand, as you learn to do certain things and learn everything – after 30 years, you are no longer a youth. So, as far as this governance structure is concerned, yes, it goes fast

while the limit itself is questionable.[51] Organizing the work and running an association, as well as writing and applying for projects require certain competencies to be learned, which takes time. If the age limit is accepted as a key criterion for distinguishing associations, associations are exposed to constant fluctuations in membership and uncertainty. Members who train and acquire all the necessary knowledge and skills should leave an association when they cross the age limit of 30. This problem can be alleviated in larger communities, where there are a sufficient number of new young people to take over an association. However, in smaller communities, which already lack the youth and interested stakeholders, this can seriously jeopardize the work of associations and even lead to their termination.[52] In addition, the youth can be dealt with in a quality way by associations registered for some general areas (such as human rights), and such a restriction would prevent them from working with the youth.[53]

### 5.1.3. *Ways of youth involvement*

All the mentioned associations primarily involve the youth as users of the programs and services they provide. However, as the youth are often also members of the association, the youth appear in multiple roles:[54] as service providers,[55] counsellors for the development of various youth activities,[56] activists,[57] em-

[51] The issue of defining the age limit is regulated differently, with the majority agreeing that these are people aged 15 to 30. However, the answers of the respondents show that, in practice, due to various practical issues, individuals older than 30 years are perceived as the youth. (R31)… Well, as a youth association, our members in principle range in age from 16 to 40. There are some who are 45 years old, if they are fully young in their heart and passionate, then such individuals are our honorary members

[52] (R39) Let's be realistic, the youth sector is highly dynamic and changeable and fast and at one point you have some youth, the next day they are already employed in another country, in another city, they enrol in student exchange programs, they go to college somewhere else and are gone, thus there is a need to maintain certain and certain continuity

[53] (R56) …when it comes to governing bodies, I do not think they should necessarily be exclusively made up of the youth. It would be good if some of these people are young, but associations often do not only deal with the youth, i.e. if they are declared as a youth association, maybe that is not the only thing they do and therefore I think that should not be conditioned

[54] (R9) At the same time, we are all volunteers and members and we help in these activities and, it could be said, in the implementation of certain strategies

[55] (R12) Many volunteers who get involved in our work as users also most often become future providers of youth services. For example, through designing some activities, workshops, courses for the youth, so we see both

[56] (R39) In all situations, the youth are involved as direct beneficiaries of our services and programs, but also active contributors to the development of certain activities

[57] (P39) … then they fully come up with their own ideas, how they imagine that activity and then we give them full support to design, organize, we are the absolute support and give them advice, resources, finances and everything they need to realize their ideas themselves

ployees[58] and especially as volunteers.[59] The answers to these questions give us an insight into the real role of youth associations and associations for the youth in the personal development of the youth. People who appear first in the role of users, see the quality and importance of what an association does and become volunteers themselves. This is obvious evidence of how youth associations and associations for the youth act to activate the youth in the community, motivate them and create in them the habit of participating in activities. Another value of the associations pointed out by the respondents is the possibility for the youth, who were active members and / or volunteers in the association, to be employed by an association and thus satisfy their employment needs.[60] In addition to all the above, it is very important that the way of working of an association is adapted to the youth, clear, acceptable and interesting so that the youth respond to the activities to which they are invited.[61]

## 5.2. Special legal regulation and identification of youth associations and associations for the youth

One of the goals of the "Youth Activation Network" project is to strengthen infrastructural forms that would strengthen the work with the youth through their activities in the community, because this is a prerequisite for their activation. It is unquestionable that associations are the bearers of the largest number of activities aimed at the youth, operating within the existing general legal framework for the work of associations. Starting from all the above problems related to the work of an association, one of the objectives of the research was to examine the views of representatives of associations on the existing legal framework, i.e. the need for changes.

From the obtained results, it is possible to identify the key problem of the work of associations, and that is funding. All the arguments "for" and "against" the existing or additional legal regulations start from the possibility / opportunity to finance the program and the work of associations. We must say that in this part

[58] (R52) Likewise, regarding our employee, it may be important to note, that most of our employees are youths and we are constantly educating, exchanging knowledge related to actually working with the youth population how to attract, how to work with the youth

[59] (R25) … in our case, many who were beneficiaries became volunteers and went from that role of beneficiary to the role of volunteers

[60] (R3) All association employees used to be volunteers, they are either the youth or they were the youth volunteers and as a reward they got a job with an association

[61] (R70) I would add the modus operandi, which must be appropriate for the youth; when I say modus operandi, it means from language, to content… Commitment to allowing the youth to have a real influence and participation

the answers of the respondents were often contradictory,[62] aware of the potential problems of the existing and possibly future, amended legal framework.

Research question: do you think that it is necessary to change the legislative framework for the establishment and work of civil society organizations in the direction of clearer differentiation and identification of associations that work programmatically for the youth and for the benefit of the youth?

**Table 2**. Legal framework of associations

| **Categories** | **Terms** |
|---|---|
| Legal framework of youth associations and associations for the youth | Work with the youth needs to be defined<br>There is no need to change the existing legal framework (additional regulation)<br>Changing the bookkeeping rules for associations<br>Changing the way in which associations are financed |
| Special legal regulation | Special register of youth associations and associations for the youth<br>Delimitation of associations according to economic activity criterion<br>No special register of youth associations and associations for the youth is needed |

*Source:* the authors

The obtained results presented in Table 2 undoubtedly show that, first of all, it would be necessary to legally define youth work.[63] By legally defining the concept, standards and criteria of working with the youth, we would get a clear criterion for differentiating youth associations and associations for the youth from other associations, which would facilitate the financing of these associations.[64] Nevertheless, the respondents are aware that such a delimitation could jeopardize the existence of some associations that deal with a wider range of users or activities.[65]

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62 (R48) I think it would help in some way (changing the existing legal framework), but there is a lot of danger of potentially excluding very good organizations… I don't think such a decision would be of much use at the moment

63 (R58) The first thing I think should be done is to professionalize the term of a youth worker, so that it becomes an occupation and a profession, and not a hobby for someone while looking for a real job

64 (R56) If we want to work on the status of the youth, then we need to define what are the standards and qualities and what are the categories of scoring according to which we will then differentiate associations in this area

65 (R32) …I definitely think it is not bad to have certain standards and criteria, and I do not see anything wrong with that, it would just be a shame, maybe it is a matter of that terminology, it would be a shame to isolate other associations

The majority of respondents believe that amending the existing legal framework or supplementing it would further complicate the work of associations. Arguments are based on the personal characteristics and competencies of the founders, members and employees of associations,[66] existing registration provisions,[67] which the respondents find difficult,[68] restrictive[69] and overly complicated.[70]

The next problem pointed out by the respondents is the issue of bookkeeping rules for associations. As mentioned earlier, associations are required to keep books, regardless of the scope and types of activities. Bookkeeping required specific knowledge that members and volunteers of associations, as a rule, do not have, as well as funds that cannot be raised from the project activities of associations, which can often create problems.[71] In addition, if any of the prescribed obligations are not met (through the fault of the accountant), the associations may suffer serious consequences, although there is no fault on their part.[72]

Although the financing of associations was not specifically mentioned in the prepared questions for the focus group, it imposed itself in the category of the need to change the existing legal framework.[73] The basic source of financial resources for the work of associations are projects, which are limited in time by their nature.[74] Such a way of financing prevents any long-term planning and strategic direc-

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66 (R19) I think that the very fact that it is necessary to register an association in the way the association is registered, with the statute and everything, is already a big barrier for the youth. I think the fact that the association must have a bank account so the youth, someone who is 18 years old, must go to a bank etc., already constitute a kind of barrier…

67 (R29) I would not additionally regulate the obligation in any way, I simply think that the existing burden is enough

68 (R67) I do not know if this should be changed in a special way, because it is already complicated to lead one into another, and then to make differences between associations, I do not think it would make much sense

69 (R6) to create compartments in addition to all the limitations we have, I am absolutely not for it

70 (R42) No, no, I do not support that, in fact, the institutionalization of the non-profit sector in Croatia, we are starting to look like, in my opinion, institutions, and that is how we lose, in fact, what is the point of why we exist, why we operate

71 (R31) We definitely agree with this part about separate bookkeeping, because it really costs associations too much given how much we get from the municipality and possibly some sponsorships

72 (R43) …our accountant did not submit our annual financial report to the Financial Agency (FINA) on time. It came back, he did not correct it, and in the end when the deadline passed, the financial report could no longer be submitted… which created a big problem for us in most tenders last year because we are considered non-transparent…

73 (R48) I think that the funding mechanisms for youth associations and associations for the youth should certainly be better regulated and resolved, perhaps less legally, more institutionally…

74 (R24) So I think even the problem is the way youth associations and associations for the youth are funded. They depend on certain projects and cannot develop their operations and their programs in the long run

tion of associations, complicates the regular work of an association,[75] prevents employment,[76] transparency [77] and continuity of work of associations. Apart from the fact that projects are limited in time, the deadlines for announcing tenders and the tenders themselves are not published regularly, especially during changes in the state administration system.[78] Due to such financial uncertainties, many aspects of the work of associations suffer: it is very difficult to monitor the timeliness of payments and maturities of project commitments, the implementation of project activities depends on the payment of funds and they are often late in relation to real needs.[79] Simultaneously with the implementation of existing ones, it is necessary to prepare others to apply for future tenders, all in an extremely uncertain environment[80] imposed by domestic or foreign institutions.[81] Due to all the above, the magic circle is closing: although the respondents think that it would be good to classify youth associations separately, in order to ensure financial sustainability and survival of youth associations and associations for the youth, these organizations themselves "encroach" on other departments, apply for tenders for different target groups in order to survive at all.[82]

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75 (R53) …not just this year, but for some time, for approximately six months certainly, we do not have financial support for the implementation of these programs, in general we operate more less on a volunteering basis

76 (R52) In order to keep people working with the youth in the workplace, we have to be very creative and do a lot of work, apply for a lot of projects to keep someone's job.

77 (R36) I honestly think that it is a matter of how good the website is, how much you can spend financially to create a website, I know how much we spent financially on it and worked hard every day on our website, publishing articles and other content every day, we share reports from others. And that is very important if you want to be perceived professionally and seriously by the outsider

78 (R54) In reality, continuity is something that we lack when it comes to tenders by the competent ministry, which in our case is the Ministry of Labour and Pension System, Family and Social Policy, which changes its name every year or every two to three years and every time it changes the name we can say that the things get worse, i.e. tender announcements are delayed more and more, so we are faced with voids that last for six months when nothing is being done or we are waiting for the results of a tender, these results take months and then financing is ensured for a certain period in a given year, we start implementing the tender the next year, then we have to send reports, is it really that hard for the Ministry to keep records on when the tender was announced, when the project was implemented etc..

79 (R55) …because it happened to all of us in Croatia… to implement projects for the unemployed two years later than they were supposed to be implemented, at a time when the Employment Institute has more employees than ever before

80 (R78) that we are uncertain whether the project will go for another term or not, whether we will get the money, how much will we get, we have big problems, just to mention that in the middle of December we received 50% of the funds we should have received throughout that entire year...

81 (R13) the fact that we follow the agenda of the EU or the Social Fund, the European Commission, or the City of Zagreb etc. means that the youth are never considered as a group that can express their needs… it is always about a higher political agenda or something at the EU level

82 (R75) …because we now see that associations that dealt with the youth and were primarily focused on the youth… in the absence of financial resources, turned to various other projects, programs such as

This group of questions sought the views of representatives of associations on the introduction of special registers for youth associations and associations for the youth (the same as a special legal framework for veterans' associations, for example). In this section, too, we find very contradictory views of the respondents, which are conditioned by the scope and general characteristics of the associations they represent. Certain respondents consider it necessary to specifically record youth associations in order to create preconditions for the professionalization of youth work.[83] However, even they are aware that categorization alone does not bring much if the categories do not have a purpose and meaning,[84] moreover, it could negatively affect the work of a number of associations.[85] The purpose of categorization would be to be able to apply for targeted tenders,[86] but here we return to the fact that in Croatia associations must "do everything", they must have registered in their legal acts a wide range of target groups and activities to survive. For some associations it is inevitable, for others it is unwanted competition in the financial market.[87] The next significant argument for which additional registers should be introduced is the issue of economic activity of associations. Today, in Croatia, a music band, a football club or a café can be classified as an association.[88] Without diminishing the importance of what such associations do, it is the fact that they have revenues (often generous) which makes them very different from associations funded by donations, membership fees and projects.[89] The rules of

"Zaželi"… just to save jobs, i.e. employee financing…

83 (R13) I believe that what is needed, and what was the question, is to make a certain distinction between youth associations and other associations. That would, naturally, be achieved after the professionalization of youth worker occupation, otherwise we would have a complete mess on our hands

84 (R62) Well, it would be nice, it would be nice to know which organizations are those, it would be nice to have some categories maybe for other organizations, but that those categories have to make some sense.

85 (R75) Regarding that legal framework, classification, I do not think it would be bad if there was a classification, but of course that does not mean disabling applications for other tenders, since associations deal with everything and everyone…

86 (R62) Well, perhaps if we are already talking about these categories, then it would be okay for those categories to go in the sense of linking something further, some benefit maybe for organizations working in the field of youth where they could apply for a certain tender category

87 (R56) We are all associations in the register of associations and it is enough to include the youth into a statute in one word to get a project worth HRK 1,500,000.00. That is our reality. It does not seem particularly bright to me and I think we need to stand up for the young

88 (R7) the state has created a framework, allowed the space of civil society organizations to be occupied by cafes, football clubs… when you look at the latest analyses of offices for associations, how much money went through the offices, and then we are perceived as entrepreneurs earning unprecedented money

89 (R80) that associations need to be additionally categorized and work, I definitely believe so because it is not the same to have HRK 200,000 of revenue or 2 million or 5 million of revenue. Furthermore,

general legislation apply equally to all associations, while the financial and human resources, goals and activities of associations differ significantly.[90]

On the other hand, a significant number of the respondents express dislike for the special register of youth associations and associations for the youth since they do not see any benefits[91] or see it as an additional complication of the work of associations.[92]

## 6. DISCUSSION AND CONCLUSION

During the processing of the transcript, the phrase "we are all in the same boat" was noticed, which appeared in 6 different groups and which indicates the justification of the conducted research. It is obvious that there are no criteria for differentiating, evaluating and funding associations.

Based on the views of representatives of youth associations and associations for the youth, we can conclude that the field of youth work in Croatia is still quite undefined and marginalized.[93] The research indicated several criteria according to which youth associations could be different from other associations, but it also pointed out the possible negative consequences of such categorization. Undoubtedly, it is necessary to define work with the youth, to establish standards, criteria and conditions for performing youth work, and to provide an educational program for youth work.[94] Recognition of youth worker profession does not mean preventing others from working with the youth, there would only be clear and unequivocal criteria for distinguishing between associations that provide activities, services, support or opportunities for development to the youth. Professionalization of youth work would also solve the problem of criteria for the allocation of chronically insufficient financial resources.[95]

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a sports association that directly receives certain tenders is not the same as we who have to apply, then wait for the results…

90 (R77) Certain associations are literally companies, we should call them that, they have 10, 15 or 20 employees, we have one, two, we fight for the same rights

91 (R53) …I think that four million of us have another register, I do not know what it is for, and that is all for the sake of tenders themselves

92 (R24) …I do not think that is necessary. We have several registers… We already have enough of paperwork and numbers of various registers and I do not see why youth associations should stand out and be placed in some kind of additional register

93 (R12) I still have a feeling that the youth are still, for a lack of a better word, a marginalized group, like we have these youth, what we can do with the youth, we should do something with the youth…

94 (R59) Meaning, work should be done to organize serious education for people who will work with the youth in order to strengthen these human resources, but also to work on strengthening the capacity of organizations that will work with the youth

95 (R56) It is important that we are categorized… this should be advocated because I think that is the only way in which we can distinguish youth work and decide which funds are allocated for the pro-

Although the answers of the respondents are often contradictory, most of them are not inclined to change the already complicated legal framework for the establishment and work of associations because they are afraid that the changes would bring even more paperwork. However, a significant part of the respondents would accept changes in the direction of reducing the regulation and obligations of associations, i.e. in the direction of easing the rules for bookkeeping of associations, employment and special financing of associations. We can say that there is a general consensus on the inappropriateness of the existing funding of associations. The introduction of institutional [96] and multi-annual [97] support for the work of associations is the only solution that can ensure the stable operation of associations. Respondents especially emphasize the importance of local self-government[98] which should, in combination with other government levels,[99] be the main bearer of funding for youth associations and associations for the youth. The public often has a rather negative image of the civil sector in general,[100] both youth associations and associations for the youth,[101] thus it is necessary to improve communication and cooperation with all levels [102] and government institutions,[103] and increase the responsibility of those who evaluate and monitor projects.[104] As one respondent stated: (R51) "Well, my vision for the future is to fix things, to introduce more

fession in relation to these general activities from organizing for example conferences or something similar.

96 (R40) In my opinion, primarily financial support must absolutely be multiannual…

97 (R49) Financial dependence on project financing should be reduced and long-term institutional support should be strengthened in this regard

98 (R29) This is perhaps an appeal mostly to local governments and self-governments to invest a little more money when it comes to working with the youth

99 (R40) …to break them down into different levels means that the state provides one sum of money, the county provides the second sum of money and the local community, i.e. local self-government units provide the third, naturally, I mean in proportion to their budget and means. So without networking all three sectors, i.e. the three public sector levels, it is impossible for everyone to know what is happening and what is being financed

100 (R74) …civil society is perceived as a competition to politics, as long as it is perceived as an enemy and not as a partner offering services that local units do not offer, so they can offer them through civil society…

101 (R36) I often think that it is considered that youth associations should exist, that they should do their job, but they should do it independently, no one takes them seriously anyway

102 (R64) …however, for example, it would be great to have maybe more cooperation with decision makers… for example, it would be good to have maybe a little more intensive cooperation at different levels of decision-making…

103 (R5) …without cooperation with educational institutions and their founders, we cannot work with the youth on anything…

104 (R75) …It is a matter for donors and evaluators to monitor this a little better and create some type of a framework within which certain associations are classified

fair play into financial situation and in all other aspects, and then we, as a society, will have an easier time."

The paper presents only a part of the extensive material obtained by organizing focus groups, a lot of good suggestions and comments did not fit into the scope of this paper. From the results, it can be unequivocally concluded that youth associations and associations for the youth need to be further strengthened, especially financially, in order to be able to operate smoothly on the empowerment and activation of the youth. There is a need to continue to systematically explore the challenges that youth associations face in order to maximize their potential for the recovery of society as a whole. The challenges posed in this pandemic and post-pandemic time are an opportunity to create new patterns of behaviour of all relevant stakeholders in society, especially those authorized to make decisions that guide the further development of society.

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UDK 342.7-053.2:004.7
Review article

# CHALLENGES OF PROTECTING CHILDREN'S RIGHTS IN THE DIGITAL ENVIRONMENT*

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***ABSTRACT***

*The imperative of every state is to protect the children's rights as the most vulnerable social group. The protection of children's rights has been particularly intensified with the adoption of the UN Convention on the Rights of the Child (1989), which promotes four basic principles – non-discrimination, the right to life, participation in decision-making and active participation in resolving issues that affect their lives, as well as the best interests of the child. The consequences of the (still actual) COVID-19 pandemic are visible in many areas, including the protection of children's rights. Namely, children had to get used to the "new normal" in an extremely short period of time, which in certain segments had an adverse effect on their development and social integration.*

*The effects of the COVID-19 pandemic are also visible in the digital environment, which brings with it a number of positive and negative aspects in relation to children and their rights. Although the virtual environment has made it possible to fulfil one of the universal rights of children – the right to education, it has intensified a special form of violence – virtual, cyber violence that threatens the safety of children in the "new normal". It is important to emphasize that the Council of Europe has adopted Recommendation CM/Rec (2018)7 of the Committee of Ministers to member states on Guidelines for Respect, Protection and Exercise of the Rights of the Child in the Digital Environment. Given that the digital environment shapes children's lives in different ways, creating opportunities, but also certain risks to protect their well-being, this document recommends that member states review their legislation, policies and practices to promote the full range of children's rights in the digital environment and providing effective responses to all the impacts of the digital environment on the well-being of children and the enjoyment of their human rights. European Union policies in the field of protection of children's rights are also very important. Through its policies, the European Union seeks to enable every child to realize his or her full rights. The European Union's Strategy on the rights of the child sets children apart from the leaders of tomorrow and the citizens of today. For the issues of this paper, a particularly important part of the Strategy are the guidelines for creating policies*

* This paper is product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strorssmayer University of Osijek under the project nr. IP-PRAVOS-2 „Legal protection of family and vulnerable groups of society"

*aimed at protecting the rights of children in the digital society. In addition to the above, there are a number of other documents of the Council of Europe and the European Union for the protection and promotion of children's rights, which are analyzed in the context of digitalization. Special emphasis is placed on contemporary issues of development and protection of children's rights to privacy in the digital environment, the right to access the Internet and digital literacy, but also cyber violence as a form of endangering the child's safety, and the discussion on which issues was further stimulated by the COVID-19 pandemic.*

***Keywords**: children's rights, cyber violence, digital environment, the COVID-19 pandemic*

## 1. INTRODUCTION

Children's rights are universal and require the same level of protection at all times. Protecting these rights is a particular challenge for states because of their notion of children as a vulnerable social group. As expected, social changes that affect many spheres of life also affect children's rights. Although the established international legal standards for the protection of children's rights are characterized by universality, living conditions in the digital environment require their adaptation. Digitalization is a process that has been going on for decades, but the COVID-19 pandemic has accelerated that process in certain segments. The consequences of accelerated digital development naturally also affect children and the protection of their rights. Today, children are involved in the use of digital technologies from an early age, on the one hand voluntarily, out of their own curiosity, and on the other hand "forcibly" due to social adaptation and following modern trends.

Through their policies, the Council of Europe and the European Union are establishing a number of mechanisms to protect the rights of children in line with the challenges of modern times. The unavailability of modern technologies as a prerequisite for the realization of certain rights of children leads to the development of the phenomenon of digitally neglected children who are denied the exercise of their modern rights. Guided by the principles of the best interests of the child, equality and non-discrimination, the Council of Europe and the European Union promote the harmonization of children's rights in Europe. Digitalization, which brings about a number of changes, requires states to adapt the existing legal system to new standards and modes of operation. Therefore, the rights of children should be placed in the context of the new age and its benefits should be used, which can also improve the social position of children. It is immanent that society progresses and develops, but that progress must not be to the detriment of children as the most vulnerable social group. In this regard, the development of children's rights in the digital environment is accompanied by a number of challenges arising from cyber violence. The European soft law contained in numerous documents seeks to establish mechanisms for the protection of children's contemporary rights and to prevent potential dangers that could undermine the whole concept of protecting their rights.

The aim of this paper is to point out the challenges of protecting the rights of children in the digital environment, but also the synergy and interdependence in the realization of individual rights of children created by digitalization. First of all, in order to better understand the issue of children's rights, the global significance of the Convention on the Rights of the Child is pointed out, whose universal standard of the best interests of the child is the basis for protecting and promoting children's rights. Also, the paper discusses European soft law sources for the protection of children's rights in the digital environment and evaluates their effectiveness. Relevant documents of the Council of Europe and the European Union are analyzed, which seek to preserve and strengthen the rights of children in the digital environment, pointing out the complexity of their application in practice. Since the COVID-19 pandemic has had an additional impact on the digital environment of children, it required the application of these previously established rules and also provided some answers to the question – can their application adequately protect the rights of children in the digital environment? Every social change entails positive and negative aspects, creating new approaches in regulating certain issues. Therefore, the position of the child in the digital environment is pointed out in the third chapter by redefining the concept of socially neglected child in the modern context. The fourth chapter of the paper analyzes certain rights of children related to digitalization, with special reference to the right to access the Internet. Analyzing (European) legal documents, in the fifth chapter is emphasize the importance of preventing cyber violence. In addition, the question of whether the right to access the Internet should be recognized as a modern right of children is answered. Finally, the effectiveness of the existing legal regulation is assessed, the future challenges of protecting the rights of children in the digital environment are pointed out, and suggestions for further research are given.

## 1. INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF CHILDREN'S RIGHTS

### 1.1. 1989 UN Convention on the Rights of the Child

Children, as subjects of rights, thus holders of rights and obligations, fully enjoy human rights.[1] Although the Convention on the Rights of the Child[2] (hereinafter: CRC) sets out the basic principles of protection of children's rights – the right to

[1] Philosophers of law Hart and Wellman have questioned the concept of the rights of the child, but their renunciation contradicts the modern understanding of the position of the child since they have legal rights recognized and enforceable by the courts. More about it: Tucak, I., *Dijete kao nositelj prava*, in: Rešetar, B. (ed.), Dijete i pravo, Pravni fakultet u Osijeku, Osijek, 2009, pp. 63-84, p. 74-75

[2] UN Convention on Rights of the Child (CRC), Official Gazette, International Agreements, No. 12/1993

life, survival and development, the right to act in the best interests of the child, the right to non-discrimination and the right to participate[3] – these rights are further protected by the establishment of appropriate safeguards by legal instruments of a regional nature, such as those of the Council of Europe and the European Union. The CRC, as the most important international document regulating the protection of children's rights, has established universal patterns of protection of their rights.[4] The CRC imposes an obligation on signatory states to create mechanisms for the protection of children's rights within their legislation.[5] Children's rights can be divided into the following categories: rights to survival, right to development, protection rights and participatory rights.[6] From the aforementioned categories of children's rights, it can be concluded that an important feature of the protection of children's rights is pedocentrism,[7] i.e. pedocentric approach in which the interests and rights of the child are placed at the center of every family[8] as fundamental social units.[9] However, even three decades after the adoption of the CRC, its important feature is the universality which is manifested in the establishment of the best interests of the child.[10] The best interests of the child are the standard by which the competent national authorities undertake to apply them when making decisions concerning the child. However, acting in the best interests of the child is not directed only towards state bodies, but also towards parents who make every decision related to the child based on his/her best interests.[11] The universality of the standard of the best interests of the child is also reflected in the fact that it

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3 Vučković Šahović, N.; Petrušić, N., *Prava deteta*, Pravni fakultet Univerziteta u Nišu, Niš, 2016, p. 78

4 It is important to point out that the CRC codifies the rights of children and for the first time guarantees a number of civil, political, social, cultural and many other rights of children without discrimination on the grounds of color, sex, religion, political or other beliefs, property, social origin or any other characteristics. Šernhorst, N., *Ustavnosudska zaštita prava djece*, in: Rešetar, B. (ed.), Dijete i pravo, Pravni fakultet u Osijeku, Osijek, 2009, pp. 85-116, pp. 88-89

5 Hrabar, D., *Obiteljsko pravo u sustavu socijalne skrbi*, Narodne novine, Zagreb, 2019, p. 164

6 Čović, A., *Prava deteta – evolucija, realizacija i zaštita*, Institut za uporedno pravo, Beograd, 2017, p. 18

7 About pedocentrism: Pedocentrizam, 2022, [https://proleksis.lzmk.hr/41187/], Accessed 8 February 2022

8 Hrabar, D., *Uvod u prava djece,* in: Hrabar, D. (ed.), Prava djece – multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 13-38, p. 23

9 Speaking of the family as a fundamental social unit, it is important to point out that there are certain rights of the child within the family. According to the CRC, these are the child's right to live with his or her parents, to upbringing, to know his or her own origins, and to develop. More about it: Hrabar, D., *Prava djece u obitelji*, Revija za socijalnu politiku, Vol. 1, No. 3, 1994, pp. 263-267, pp. 265

10 Article 3 (1) of CRC, *op. cit.,* note 2

11 Bubić, S., *Standard „najbolji interes djeteta" i njegova primjena u kontekstu ostvarivanja roditeljskog staranja*, in: Bubić, S. (ed.), Zbornik radova – Drugi međunarodni naučni skup Dani porodičnog prava „Najbolji interes djeteta u zakonodavstvu i praksi", Vol. 2, No. 2, Pravni fakultet Univerziteta „Džemal Bijedić" u Mostaru, Mostar, 2014, pp. 11-31, p. 12

applies to every treatment of the child, whether formal or informal in nature.[12] Therefore, every opinion of the child should be respected, his or her rights must be consistently enforced and respected, and the introduction of a comprehensive approach by relevant actors in the protection of children's rights is crucial.[13] Due to universal principles, the CRC is today, more than 30 years after its adoption, still an innovative document that opens up opportunities to protect children's rights in the digital environment. Due to the possibility of adapting CRC to the conditions of the digital environment, states apply the concept of the best interests of the child – criteria for assessing the child's well-being in the physical world, which is applicable in the digital environment. Taking into account the best interests of the child in the digital environment as a dynamic concept, the primary task of states is to ensure children's right to information (in a broader sense), protection from harmful conduct in the digital environment and transparency in assessing the best interests of the child.[14]

### 1.2. Council of Europe and European Union

The European system of protection of children's rights is implemented by the Council of Europe and the European Union. According to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms[15] (hereinafter: ECHR) as a key Council of Europe document regulating the protection of human rights, children enjoy all guaranteed human rights – the right to access to justice, non-discrimination, the right to respect of family and private life and many others, including the right to education.[16] The European Social Charter[17] (hereinafter: ESC) emphasizes the importance of educating children.[18] In addition to the above-mentioned Council of Europe documents, the Convention on the

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12 Medić, I., *Najbolji interes djeteta u europskim prekograničnim predmetima*, in: Župan, M. (ed.), Prekogranično kretanje djece u Europskoj uniji, Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2019, pp. 9-60, p. 12

13 Hrabar, D., *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010) – family law aspect,* in: Kutsar, D.; Warming, H. (eds.), Children and Non-Discrimination – Interdisciplinary textbook, University Press of Estonia, 2014, pp. 77-90, p. 82

14 Point 13 of General comment No 25 (2021) on children's rights in relation to the digital environment (General comment No. 25), CRC/C/GC/25, 2 March 2021

15 Official Gazette, International Agreements, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/5005, 1/2006, 2/2010

16 *Ibid*., art. 2 of the Protocol 1 ECHR

17 Official Gazette, International Agreements, No. 15/2002

18 More detail: Majstorović, I., *Europski obiteljskopravni sustav zaštite prava djece*, in: Hrabar, D. (ed.), Prava djece – multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 39-62, p. 47

Exercise of Children's Rights,[19] guaranteeing procedural rights to children, is also important. The Council of Europe has also adopted a number of other documents – guidelines and recommendations, which aim to implement the internationally established standard of protection of the best interests of the child.[20] Speaking of the European Union and its system of protection of children's rights, it is necessary to emphasize the Charter of Fundamental Rights of the European Union (hereinafter: CFR),[21] the adoption of which cataloged the rights and freedoms in the European Union. This has enabled a more adequate impact on the development of law within family law, which in the substantive sense is the responsibility of the Member States.[22] In addition to the right to respect of private and family life, the CFR emphasizes other children's rights. The CFR very generally emphasizes the right to education,[23] which is especially important to interpret in the context of the digital environment, creating an obligation for the state to enable the implementation of this right in special circumstances. However, in the context of children's rights, the most important provision is Article 24 of the CFR, which guarantees the right of children to protection and care in order to ensure their well-being. This provision clearly shows the consistency in the implementation of the CRC and the standards of the best interests of the child, so the European Union also puts children at the center of its activities and policies. In addition, there is an obligation for public authorities to always act with the aim of protecting the interests of the child.[24] The special emphasis on the provision of "children's rights" in Article 24 of the CFR can be interpreted as a further contribution to the development of soft law in the field of children's rights,[25] i.e. the development of children's policy,[26] which is a guarantee of protection of children's rights in the digital environment.

Although the existing legal framework allows for the protection of children's rights in the digital environment, both internationally and at European level, the Coun-

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19 Official Gazette, International Agreements, No. 1/2010

20 *Priručnik o pravima djeteta u europskom pravu,* Ured za publikacije Europske unije, Luxembourg, 2016, p. 25, More details on the adopted documents for the protection of children's rights within the Council of Europe: *Ibid*.

21 Official Journal of the European Union, C 202/389, 7 June 2016

22 Korać Graovac, A., *Povelja o temeljnim pravima EU i obiteljsko pravo*, in: Korać Graovac, A.; Majstorović, I. (ed.), Europsko obiteljsko pravo, Narodne novine, Zagreb, 2013, pp. 25-52, p. 26

23 Art. 14 of CFR, *op. cit*., note 21

24 Art. 24 (2) of CFR, *op. cit.,* note 21; Korać Graovac, *op. cit*., note 22, p. 46

25 Petrašević, T*., Dijete u pravu Europske unije*, in: Rešetar, B. (ed.), Dijete i pravo, Pravni fakultet u Osijeku, Osijek, 2009, pp. 273-296, p. 287

26 Rešetar, B., *Dijete i pravo – interdisciplinarni pristup*, in: Rešetar, B. (ed.), Dijete i pravo, Pravni fakultet u Osijeku, Osijek, 2009, pp. 297-310, p. 298

cil of Europe and the European Union seek to raise awareness of the importance of protecting children's rights in the complex conditions of digitalization through a series of recommendations, declarations, resolutions and strategies as part of soft law.

With the Recommendation of the Committee of Ministers of the Council of Europe and the Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment (hereinafter: Recommendation CM/Rec (2018)/7)[27] and Annex thereof, the Council of Europe points to the importance of developing and protecting the rights of children in line with the development of modern technologies. Although digital technologies, as well as their use, are presented exclusively in a positive light, it is necessary to legally regulate their use and thus protect the weakest social group – children, who today through digital technologies exercise the right to education, expression, communication and socialization.[28] The Council of Europe also emphasizes the duty of its member states to ensure an adequate level of protection of children's rights in the digital environment, and therefore recommends: *i*) reviewing legislation, practices and policies aimed at protecting children, *ii*) familiarizing the competent bodies with the Recommendation and clarifying its provisions to children in a clear way, *iii*) familiarizing business entities and taking appropriate measures to protect children, *iv*) cooperating with the Council of Europe in the development of strategies and programs that create a framework for the protection of children's rights in the digital environment, and *v*) reviewing the Recommendation at least every five years,[29] which is in line with the ever-changing digital technologies that also affect children's rights. However, a prerequisite for the implementation of all these recommendations is to provide access to the digital environment. The Council of Europe clearly points out that the unavailability of digital content reduces the conditions for children to exercise their rights, which makes it necessary to ensure adequate access to modern technology, which should be free in public spaces, including educational institutions. Speaking of children's rights in the digital environment, a bigger problem than inadequate access to modern technology is the neglect of these children's rights in rural areas, children with disabilities, children in alternative care and children involved in international migration. These forms of neglect of children's rights could be interpreted as forms of modern, digital discrimination. Although ensuring the availability of modern technologies is unquestionably the most important precondition for ensuring the rights of children in the digital environment, the

[27] Recommendation CM/Rec(2018)7 of the Committee of Ministers to member states on Guidelines for Respect, Protection and Exercise of the Rights of the Child in the Digital Environment

[28] *Ibid*., Introductory provisions of Recommendation CM/Rec(2018)/7

[29] *Ibid*., points 1-5 of the introductory provisions of the Recommendation CM/Rec(2018)/7

conditions and provisions related to the use of digital technologies should be clear, transparent, understandable and adapted to children.[30]

An integral part of the Recommendation are the Guidelines for Respecting, Protecting and Exercising the Rights of the Child in the Digital Environment, which define a child as a person under 18, and the digital environment as an environment that includes information and communication technologies, including Internet, mobile technology, digital networks and bases.[31] The basic principles and rights of the Guidelines are the best interests of the child – a generally recognized international standard for the protection of children's rights adapted to the conditions of the digital environment, the child's right to ability development, non-discrimination and procedural rights.[32] The Guidelines seek to achieve several goals. First, they seek to provide Council of Europe member states with a basis for creating policies and laws aimed at protecting the rights and welfare of children in the digital environment, as well as developing a coordinated approach between member states to achieve much-needed harmonization in protecting children's rights in the digital environment. Second, in addition to emphasizing the role of the state, the Guidelines also identify businesses as relevant actors in the protection of children's rights in the digital environment, primarily by fulfilling the envisaged obligations regarding the protection of children's rights and providing support in their promotion. Finally, the importance of the Guidelines is reflected in the fact that they open the possibility of implementing actions and cooperation that achieve the desired goals of protecting the rights of children in the digital environment.[33] The Guidelines also point to the importance of non-discrimination, emphasizing the rights of children with disabilities in the digital environment. It can be seen that the digital environment has a dual function – on the one hand, it is pointed out that digitalization poses a potential danger of increasing vulnerability of children, while on the other hand, it opens the possibility of strengthening and protecting their rights, for which a preventive approach of the states is necessary, i.e. the creation of appropriate policies.[34]

The Council of Europe Strategy for the Rights of the Child (2016–2021) provides guidelines for the regulation and protection of children's rights in the digital environment. Unlike the aforementioned Recommendation, which is primarily aimed at the obligations of member states, the Strategy sets out the objectives of

30 *Ibid*., chapter 3.1 of Guideline for respecting, protecting and exercising the rights of the child in the digital environment

31 *Ibid*., chapter 1

32 *Ibid*., chapter 2

33 *Ibid*., chapter 1

34 *Ibid*., chapter 2.3

the Council of Europe, such as promoting the right to non-discrimination, the right to access information, freedom of expression and others, as well as concrete actions environment.[35]

Through a number of policies, the European Union seeks to protect children's rights and enable their full implementation. The European Union made a significant step forward in regulating children's rights in 2006, when the first Strategy on the Rights of the Child was adopted.[36] [37] The ubiquitous digitalization and the COVID-19 pandemic have prompted the European Commission to adapt the Strategy on the Rights of the Child in 2021,[38] as a strategic document for shaping policies for the protection of children's rights in the European Union. In the context of the digital environment, an important part of the 2021 Strategy is the chapter on digital and information society issues. This chapter emphasizes that digital technologies have their advantages and disadvantages, and that due to the COVID-19 pandemic, children are increasingly exposed to digital devices to which social and cultural life has "moved", which has consequences for children's health. It follows that digitalization is an inevitable process that requires the regulation of certain rights, especially of children as the most vulnerable social group. This issue requires Member States to ensure equal access to digital technology, the Internet, the development of digital competences and centers for safer Internet. The importance of the European Union Strategy on the Rights of the Child is also evident in the fact that it pays special attention to artificial intelligence and measures for legal regulation of this issue.[39] Following the Strategy on the Rights of the Child, the European Parliament adopted a Resolution[40] emphasizing the importance of the European Union in implementing digital literacy as a precon-

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35 Council of Europe Strategy for the Rights of the Child (2016-2021), Council of Europe, 2016, p. 20, 21, Available at: [https://edoc.coe.int/en/children-s-rights/7207-council-of-europe-strategy-for-the-rights-of-the-child-2016-2021.html], Accessed 10 February 2022

36 Rešetar, B., *op. cit.,* note 26, p. 308

37 With its EU Strategy on the Rights of the Child, the European Commission is in fact emphasizing the goals that need to be achieved at Member State level in the direction of protecting children's rights. The Strategy is always focused on current problems and threats, so the Strategy for 2021 emphasized the consequences of the COVID-19 pandemic and digitalization on children's rights. More details on European Union documents on children's rights: Hrabar, D., *Prava djece u EU – pravni okvir*, in: Korać Graovac, A.; Majstorović, I. (eds.), Europsko obiteljsko pravo, Narodne novine, Zagreb, 2013, pp. 53-72, p. 66

38 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU strategy on the rights of the child, COM/2021/142 final, 24 March 2021

39 *Ibid*.

40 European Parliament resolution of 11 March 2021 on children's rights in view of the EU Strategy on the rights of the child (2021/2523(RSP))

dition for exercising children's rights, combating digital threats and preventing exclusion.[41] In line with the efforts for equal opportunities for access to digital technologies, especially websites and mobile applications, the Directive[42] of the same name was adopted, which, in the context of children's rights and digital technologies, pays special attention to children with disabilities in accessing and exercising digital rights.

## 2. THE POSITION OF CHILDREN IN THE DIGITAL ENVIRONMENT

In a digital environment that operates according to specific rules and laws, it is important to ensure the implementation and protection of children's rights and to point out the dangers of such an environment. The constant expansion of the digital environment includes digital networks, their content, artificial intelligence, biometrics, applications, the so-called augmented reality, automated systems and more.[43] All of the above leads to the creation of a kind of digital culture[44] and digital citizenship. In particular, children today must be equal digital citizens who use digital technology in the right way, approach its use with caution and know how to protect their own rights in the digital environment.[45] Therefore, the characteristics of the child as a digital citizen are knowledge of the use and interpretation of digital content, assessment of its credibility and critical thinking about the opportunities and challenges of the digital environment, which is related to education, empowerment and protection, as the challenges of 21st century digital citizenship.[46] Digital technologies bring many benefits to children, especially in terms of education, access to information and economic opportunities.[47] Among other things, in relation to children, there are opportunities for decentralization of hierarchical relationships, a greater degree of cooperation, innovation and cre-

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41 *Ibid*., point 31 of Resolution

42 Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, Official Journal of European Union, L 327, 2 December 2016

43 General comment No. 25., *op. cit.,* note 14

44 More about it: Pasqualetti, F.; Nanni, C., *Novi mediji i digitalna kultura. Izazov odgoju,* Kateheza, Vol. 27, No. 3, 2005, pp. 244-265

45 Richardson, J.; Samara, V.*, Lagani koraci koji pomažu djeci da postanu digitalni građani*, Vijeće Europe, 2020, p. 4. Available: [https://rm.coe.int/lagani-koraci-koji-pomazu-djeci-da-postanu-digitalni-gra-ani/16809e74dc], Accessed 9 February 2022

46 Isman, A.; Canan Gungoren, O., *Digital Citizenship*, The Turkish Online Journal of Education Technology, Vol. 13, No. 1, 2014, pp. 73-77, p. 73

47 *Djeca u digitalnom svijetu – stanje djece u svijetu 2017*., UNICEF, 2017, p. 3. Available: [https://www.unicef.hr/wp-content/uploads/2015/09/Izvjestaj-HR_12-17_web.pdf], Accessed 9 February 2022

ativity.[48] However, in addition to all the advantages of the digital environment that enable the implementation of certain rights of children, there is another side of the environment expressed in negative phenomena – social isolation, loneliness, dissatisfaction,[49] cyber violence, as well as the phenomenon of "too much information", loss of privacy and increasing exposure to virtual pedophilia.[50] [51] When it comes to the dangers of modern technologies, primarily the Internet, which enables the exercise of many "digital" rights, the role of parents in preventing the negative consequences of its use is also important. Thus, parents can provide parental mediation, which can include educational procedures, dialogue with the child and setting special rules.[52] Due to all the above, children today exercise most of their guaranteed rights with prior digital literacy, which refers to the knowledge of digital technologies and their use. This is a prerequisite for some other actions in the digital environment, primarily media literacy.[53] The fact that almost 90% of children and young people use the Internet every day fully justifies the need to implement digital literacy.[54] The realization of certain children's rights also leads to changes in the context of living standards. The CRC guarantees the right of children to a standard of living which, *inter alia*, should lead to the physical, mental, moral and social development of the child, with the obligation of the state to enable parents to exercise this right.[55] New obligations are imposed on states, more precisely the obligation to establish new standards. In order to realize the rights of children in the digital environment, every child should be provided with access to the Internet, which is imposed as their modern right. In general, the neglect of modern children's rights – the right to access the Internet, the right

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48 Nikodem, K.; Kudek Mirošević, J.; Bunjevac Nikodem, S., *Internet i svakodnevne obaveze djece: analiza povezanosti korištenja interneta i svakodnevnih obaveza zagrebačkih osnovnoškolaca*, Socijalna ekologija, Vol. 23, No. 3, 2014, pp. 211-236, p. 212; See also: Stoilova, M.; Livingstone, S.; Khazbak, R., *Investigatin Risks and Opportunities for Children in a Digital World: a rapid review of the evidence on children's internet use and outcomes*, Innocenti Discussion Paper 2020-03, UNICEF Office of Research – Innocenti, Florence, 2021, p. 20-22

49 Borić Letica, I.; Velki, T., *Rizična ponašanja djece i mladih na internetu,* in: Velki, T.; Šolić, K. (eds.), Izazovi digitalnog svijeta, Fakultet za odgojne i obrazovne znanosti Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2019, pp. 61-104, p. 81

50 *Ibid*.

51 On the disadvantages of the digital environment for children, see: The digital environment [https://www.coe.int/en/web/children/the-digital-environment], Accessed 9 February 2022

52 Blažeka Kokorić, S., Utjecaj novih informacijsko-komunikacijskih tehnologija na obiteljski život, Medijske studije, Vol. 11, No. 22, 2020, pp. 81-101, p. 92

53 Lisičar, H., *Pravni aspekti zaštite maloljetnika u elektroničkim medijima*, in: Hrabar, D. (ed.), Prava djece – multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 119-146, p. 140

54 Borić Letica, I.; Velki, T., *op. cit.,* note 49, p. 69

55 Čović, *op. cit.,* note 6, p. 17

to education and the right to privacy and access to information in the digital environment, leads to the phenomenon of "digitally neglected children" as opposed to the term "socially neglected child".[56] A digitally neglected child would be a child who is denied access to modern digital technologies, both in material and formal terms. How to explain the impossibility of access to these technologies in material and formal terms? Digital neglect in the material sense would mean the failure of the state to provide the necessary infrastructure for normal functioning in the digital environment. Apart from the state, the responsibility for the child's digital neglect in some cases lies with the parents, whose duty is to provide the child with all the necessary conditions for his/her development (to which it is necessary to add their financial capabilities).[57] On the other hand, digital neglect in the formal sense would mean the fulfillment of material preconditions, but without significant content that would follow the real needs of children. A closely related problem with the term digitally neglected child is discrimination in the digital environment, which directly leads to the endangerment of children's rights. Therefore, any form of discrimination, and thus digital neglect, would be eliminated by providing equal access to digital technologies and the rights of children associated with them. In particular, children may be discriminated against in the digital environment and thus prevented from exercising their rights by: *i*) exclusion from the use of digital technologies, *ii*) receiving unwanted hate messages and *iii*) automated processes resulting from filtering data on children in the virtual environment.[58] Although the European Union promotes equality of all its citizens, including children, statistical indicators need to be taken into account in order to develop their rights in the digital environment. A key problem in this regard is the pronounced European inequality.[59] Awareness of the development of rights lies with the children themselves. In 2019, only 0.4% of children were digitally deprived in Iceland, while this percentage was 20.8% in Bulgaria and 23.1% in Ro-

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56 On the notion of the socially neglected child: Hrabar, D., *Obiteljsko pravo*, Narodne novine, Zagreb, 2021, p. 20

57 Speaking about children's rights in the modern, digital context, the standard of living, in addition to the usual rights, includes the right to access the Internet, which ensures the child's standard of living. In this sense, parents would be obliged to act in accordance with their abilities, while in the other direction, the duty of the state through numerous mechanisms to enable the exercise of this right. Art. 27: Standard of living [https://archive.crin.org/en/home/rights/convention/articles/article-27-standard-living.html], Accessed 9 February 2022

58 Points 9 and 10 of General comment No. 25, *op. cit.,* note 14

59 Thus, in Portugal, 10% of households do not use the Internet because the connection costs are too expensive, compared to Denmark, the Netherlands or Luxembourg, which do not have such problems at all, making digitalization and guaranteeing children's rights in these countries safer. Households – reasons for not having internet access at home [https://ec.europa.eu/eurostat/databrowser/view/isoc_pibi_rni/default/table?lang=en], Accessed 21 February 2022

mania.[60] In addition to digital deprivation, it is important to note the percentage of children who are not interested in digital media. While this percentage is only 2.6% in Ireland, it is as high as 17.3% in Bulgaria.[61] Also, an important indicator of the position of children in the digital environment is the percentage of children who are insecure in the use of digital technologies as a mechanism for exercising their individual rights.[62] These are all challenges that children face, which place the obligations of legislators to respond more promptly and solve the problems caused by digitalization, especially the problem of inequality. In order to eliminate certain negative indicators regarding children's digital competencies, which are also necessary for the exercise of certain rights, the European Union seeks to promote children's digital skills through numerous programs and provide them with the necessary infrastructure to exercise their modern rights.

## 3. THE RIGHT TO ACCESS THE INTERNET – THE MODERN RIGHT OF CHILDREN?

Digitalization, and partly the COVID-19 pandemic, have especially made certain children's rights a reality. In fact, the need to regulate and guarantee modern rights, such as the right to access the Internet, the right to education and the right to access information and protect privacy in the digital environment, has been particularly emphasized. These rights are interrelated in a cause-and-effect relationship, which can be explained as follows. If a child today does not have the right to access the Internet, his/her right to education through distance learning tools is endangered or almost prevented. This directly violates the international standard of children's right to education. Ultimately, it is necessary to guarantee children the right to access information and express their opinions, because if this right were denied, children would not be active social participants. The Council of Europe and the European Union actively advocate the implementation of these rights of children in the digital environment, striving to ensure equal opportunities for every child in the digital environment, but also to protect them from all dangers that could harm their rights. In general, the digital environment has not brought new rights to children, but imposes an obligation on states to apply the framework of existing rights to the said environment.

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60 Ayllon, S. *et al., Digital diversity across Europe: Policy brief September 2021*, 2021, p. 4. Available at: [https://www.digigen.eu/wp-content/uploads/2021/09/DigiGen-policy-brief-digital-diversity-across-Europe.pdf]

61 *Ibid*., p. 5

62 Denmark has 3.7% of insecure children when it comes to technology, and Bulgaria is again leading in a negative sense, with 16.8% of insecure children. *Ibid*., p. 6

The digital age, which has been evolving since the beginning of the 21st century, especially in the context of the COVID-19 pandemic, has shown that the right to access the Internet is becoming one of the fundamental human rights.[63] However, the right to access the Internet in this paper is only colloquially stated as a right, given that international documents call on states to include this right in the group of fundamental human rights. However, although not included in the body of fundamental human rights, the right to access the Internet can also be interpreted in the context of other guaranteed rights, especially in European law.[64] Some states have designated the right to access the Internet as a fundamental human right, and thus the right of children.[65]

Today, the Internet has become a global service that provides a number of possibilities, so it is necessary to define it as one of the human rights. It is almost impossible to talk about the right to education of children in the digital environment if the right to access the Internet under equal conditions is not provided. In addition, the inability to access the Internet affects the child's right to access information and the freedom of expression as fundamental rights of democratic societies. Back in 2005, when the Internet practically began to develop in the form in which it is present today, as many as 70% of children in European countries used the Internet.[66] The harms of the Internet have led to the fact that children today need to be guaranteed not only the right to access the Internet, but also the right to secure access to the Internet. There are a number of advantages that the Internet provides to children in the realization of their rights. First of all, children are at the source of information, they gain different views of the world around them, they are given the opportunity to connect with other peers.[67] The Internet, which can be viewed as part of the digital environment in a broader sense, is (in) directly related to the participatory and protective rights of children. On the one hand, the Internet provides an opportunity for children to be better informed and thus active advocates of these same rights, which can be interpreted as a participa-

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63 This statement is confirmed by the conclusion of the United Nations, which defines the Internet as a fundamental human right, calling on states to provide implementing measures for everyone to access the Internet, with particular condemnation of intentional obstruction or obstruction of Internet access. UN: Internet access is now a basic human right [https://www.teachthought.com/technology/un-internet-access-now-basic-human-right/], Accessed 11 February 2022

64 In the context of the ECHR, the right to access the Internet is interpreted through the right to freedom of expression. Đukić, D., *Pravo na pristup internetu kao ljudsko pravo*, Strani pravni život, Vol. 60, No. 3, pp. 205-217, p. 207

65 Of the European countries, Estonia, Finland and France have more specifically defined the right to access the Internet. *Ibid*.

66 Čović, *op. cit.,* note 6, p. 60

67 Stoilova, M.; Livingstone, S.; Khazbak, R., *op. cit.,* note 48, p. 7

tory right, while on the other hand, negative connotations related to the right to use the Internet affect their protection rights.[68]

The right to access the Internet needs to be interpreted from a broader perspective, as the inability to access it may jeopardize other rights, such as the right to play. The CRC envisages the right to play as an obligation of states to recognize the child's right to free time, which should include play and other activities appropriate to the child's age, as well as participation in cultural life.[69] Thus, it can be concluded that the right to play would also include the right to play in a virtual environment.[70] This issue was especially prompted by the COVID-19 pandemic when children were prevented from playing in the usual way due to lockdown and social distance measures. Given that the effects of children's right to play include socialization, the establishment of friendships and learning about social dynamics,[71] the question arises whether such effects are achieved in play in the digital environment? Playing in a virtual environment can hardly achieve effects like the one in physical form, but such a concept needs to be interpreted through the right to play in the modern world because a different approach would lead to a violation of the guaranteed right. The European Union has recognized the importance of regulating the use of the Internet, which is why in 2012 the European Strategy for a Better Internet for Children[72] was adopted, emphasizing the modern challenges of using the Internet in relation to children. This Strategy is based on four basic principles: *i*) establishing quality content for young people on the Internet, *ii*) raising awareness and empowerment when using the Internet, *iii*) creating a safe environment for children using the Internet and *iv*) combating sexual abuse and exploitation of children through the Internet.[73] The Strategy is also charac-

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68 Coppock, V.; Gillet-Swan, J. K., *Children's rights in a 21st century digital word: Exploring opportunities and tension,* Global Studies of Childhood, Vol. 6, No. 4, 2016, pp. 369-375, p. 370

69 Payà Rico, A.; Bantulà Janot, J., *Children's Right to Play and Its Implementation: A Comparative, International Perspective*, Jorunal of New Approaches in Educational Research, Vol 10, No. 2, 2021, pp. 279-294, p. 280

70 Digitalization accompanies children from an early age, and the right to play through digital technologies begins from an early age when kindergarten children get the opportunity to play on computers, which shows the importance of educators in learning to act in a digital environment. See: Plowman, L.; Stephen, C.; McPake, J., *Growing Up with Technology: Young children learning in a digital world*, Routledge, London, 2010, p. 10. Available at: [https://www.researchgate.net/publication/41530139_Growing_Up_with_Technology_Young_children_learning_in_a_digital_world]

71 Mrnjaus, K., *The Child's Right to Play?!,* Croatian Journal of Education, Vol. 16, No. 1, 2014, pp. 217-233, p. 226

72 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Strategy for a Better Internet for Children, COM (2012)196 final, 2 May 2012

73 *Ibid*., Introductory provisions of the European Strategy for a Better Internet for Children. The importance of this Strategy is also evident in the fact that it defines the concept of media literacy as a

terized by the effort to make children active participants in the digital society by encouraging them to, in addition to using the Internet, also create content, which would consequently allow them to develop digital skills.[74] In relation to the safe use of the Internet, the Strategy emphasizes three "security pillars" – government policies, parents and children themselves.[75]

The right to access the Internet is a complex issue and a contemporary cause of child inequality. As expected, the biggest problem with Internet access is in poorer countries as opposed to more developed ones. According to statistics, only 1 in 25 children in Europe does not have access to the Internet. However, an additional problem is the fact that almost half of the websites are in English, which is why children cannot find or understand the requested information.[76] The complexity of the right to access the Internet is once again evident in the following way. Speaking of English-language sites, it is to be assumed that not all children can and do know English, which ultimately depends on their abilities. It is clear that the linguistic inadequacy of the website is a kind of discrimination, especially problematic for the European Union, which guarantees linguistic diversity and availability of content in all 24 official languages. However, in order to better understand the right to access the Internet in the European Union, statistical indicators need to be taken into account. At the level of the 27 Member States of the European Union, in 2021 as many as 92% of households had access to the Internet, an increase of 6% compared to 2016.[77] There is no doubt that the COVID-19 pandemic has affected the increase in the number of Internet users. Given the constant emphasis on the development of digital skills, in 2019, 56% of EU citizens had basic or intermediate digital skills, which is an increase of 2% compared to 2015.[78] It follows that the right to access the Internet has been implemented at the level of the European Union, although no document explicitly obliges Member States to implement this right.[79] Although it is necessary to promote the equality of all children in the exercise of their rights, it is difficult, almost impossible, to

protective mechanism for children and youth in the use of electronic media. See: Lisičar, H., *op. cit.*, note 53, p. 143

74 Chapter 2.1.2. of European Strategy for a Better Internet for Children, *op. cit.,* note 72

75 *Ibid*., chapter 2.3 of European Strategy for a Better Internet for Children.

76 Djeca u digitalnom svijetu – stanje djece u svijetu 2017., *op. cit.,* note 47, p. 17

77 Level of internet access – households [https://ec.europa.eu/eurostat/databrowser/view/tin00134/default/table?lang=en], Accessed 11 February 2022

78 Individuals who have basic or above basic overall digital skills, [https://ec.europa.eu/eurostat/databrowser/view/tepsr_sp410/default/table?lang=en], Accessed 11 February 2022

79 However, research indicates differences in the Member States regarding the availability of the Internet or computers, which has led to the term digital deprivation – 5.3% of children in Europe are dealing with this problem. Digital diversity across Europe: Recommendations to ensure children across Europe equally benefit from digital technology, [https://www.digigen.eu/news/digital-diversity-across-eu-

guarantee any right to every child, including the right to access the Internet. For example, every child is guaranteed the right to a (reasonable) standard of living, even though millions of children are starving. The same argument could be used with regard to the right to access the Internet, but this issue is much more complex given that, in addition to the existing problem of inequality and guaranteeing children's rights, it further deepens children's inequality in exercising their rights.

As it follows international standards for the protection of children's rights, in the context of the right to access the Internet, the European Union should reduce the cost of Internet connection, provide more public access points, eliminate all inequalities in access to the Internet and make the Internet available on digital devices on the go.[80]

### 3.1. The right to education in the digital environment

The right to education is one of the rights of children, which with its social dimension enables every child to participate in society.[81] Apart from the social dimension of education, there is also its economic dimension, according to which it must be available to everyone.[82] The complexity of this right stems from the CRC, according to which it can be interpreted bilaterally – as a process, which is manifested in its gradualness and a means of achieving societal goals, and which relates to the development of the child in the broadest sense.[83] Education in the digital environment is undergoing a number of changes.[84] Technological changes and new pedagogical approaches have led to increased competitiveness, which can affect the development of the quality of educational institutions, but also deepen inequalities among students due to the need to ensure digital technologies as an integrative part of the teaching process.[85] The price of modern technology and

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rope-recommendations-to-ensure-children-across-europe-equally-benefit-from-digital-technology/], Accessed 18 February 2022

80 Djeca u digitalnom svijetu – stanje djece u svijetu 2017., *op. cit.,* note 47, pp. 29, 31

81 Korać Graovac, A., *op. cit.,* note 22, p. 42

82 Vučković Šahović, N.; Petrušić, N., *op. cit.,* note 3, p. 184

83 Hrabar, D., *Prava djece u obiteljskom zakonodavstvu,* in: Hrabar, D. (ed.), Prava djece – multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, 2016, pp. 63-82, p. 74

84 The concept of digitalization of education needs to be followed from several aspects. In order for it to be achievable as a guaranteed right of children, it is necessary to adapt pedagogical approaches to education, because otherwise, the basic goals of education are not met. Pettersson, F., *Understanding digitalization and educational change in school by means of activity theory and the levels of learning concept,* Education and Information Technologies, No. 26, 2021, pp. 187-204, p. 189

85 Bryant, P., *Making education better: implementing pedagogical change through technology in a modern institution*, in: Zorn, A.; Haywood, J.; Glachant, J-M. (eds.), Higher Education in the Digital Age: Moving Academia online, Edward Elgar, Cheltenham/Northampton, 2018, pp. 35-54, p. 36

its (economic) availability, in connection with education in a new, virtual environment, emphasizes inequalities among children and their discrimination.[86] In the context of European law, the right to education needs to be viewed from the perspective of the European Union and the Council of Europe. The CFR provision of Article 14 guarantees the right to education, i.e. in addition to the general provision on the right to education, the possibility of free compulsory schooling is also envisaged.

As European Union law provides for the equality of all European citizens in the exercise of their rights, the same applies to the right to education. Therefore, the restriction of this right should always be predictable, have a legitimate aim, be justified and non-discriminatory.[87] All these characteristics of education, especially the emphasis on its universality, were called into question by the emergence of the COVID-19 pandemic, which also meant the forced digitalization of education. In that sense, it is necessary to see a kind of threat to this right through the already mentioned social and economic dimension. Although the COVID-19 pandemic, i.e. the first lockdown, lasted relatively short, the digitalization of education in this regard should not reverse the social roles and authorities of children, primarily by turning the role of parents into teachers. Although digitalization potentially leads to the scarcity of children's social relations, a particularly important problem regarding education in the digital environment is its economic dimension. Digitalization of education, which undoubtedly leads to better access to teaching materials and better insight into students' educational "weaknesses",[88] may have a negative effect if the fact that parents ensure the child's right to education in accordance with their capabilities is not taken into account. In other words, if a child does not have access to a computer or the Internet, he/she is denied the right to education as a universal right important for the development of his/her personality. The issue of prompt digitalization of the right to education is also manifested in the insufficient level of digital literacy.[89] Given that the European Union's policies seek to ensure the right to education of every child, in order to fully implement this right in the digital environment, it is necessary to establish a single

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86 Winkler, S., *The impact of COVID-19 on children's rights*, EU and Comparative Law Issues and Challenges Series, Vol. 5, 2021, pp. 580-600, p. 593

87 Priručnik o pravima djeteta u europskom pravu, *op. cit.,* note 20, p. 135

88 More about it: The opportunities and challenges of digital learning [https://www.brookings.edu/research/the-opportunities-and-challenges-of-digital-learning/], Accessed 14 February 2022

89 A good part of European countries still do not have an incorporated definition of digital literacy in their legislation. However, those countries that define the term digital skills, define it as pedagogical methods of using digital technologies, basic computer skills, data retrieval skills and the like. European Commission/EACEA/Eurydice, *Digital Education at School in Europe: Eurydice Report*, Publications Office of the European Union, Luxembourg, 2019, p. 26

definition of digital literacy, as recommended by the Committee on the Rights of the Child.[90] Regarding the forced digitalization of education with the emergence of the COVID-19 pandemic, the European Network of Ombudspersons for Children (ENOC) highlighted the fact that European countries quickly introduced distance learning platforms protecting the right to education as a fundamental right of children while warning against discrimination due to the unequal availability of digital technologies.[91] Although the right to education in the European Union in the already mentioned digital environment is often called into question due to lack of digital skills and the economic dimension of device availability, such statements are not sustainable.

The importance of the right to access the Internet and digital technologies in the context of education is also important due to the fact that between 16 and 46% of children use the Internet to fulfill school obligations, as a direct part of the teaching process.[92] Not to be overlooked is the fact that European households on average have more than one digital device needed to learn in a digital environment, while more than 70% of parents recognized the "forced" digitalization of education during a pandemic as a mechanism to strengthen their child's autonomy.[93] Thus, it is evident that there are material conditions for the feasibility of digitalization of education at the level of the European Union, which does not jeopardize the implementation of this right of children. However, the challenges are the lack of motivation in the sense that during the pandemic 50% of children were less interested in the teaching process compared to the period before ("forced digitalization").[94] Following international standards, as well as the protection of the universal right to education in the context of digitalization, guided by the best interests of children, the European Union has developed an Action Plan for Digital Education (2021–2027). It emphasizes the importance of the right to education as part of the European acquis, in two segments: *i*) providing the necessary infrastructure and equipment, and *ii*) developing digital skills and literacy.[95] All of

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90 More details: points 99-105 of General comment No. 25., *op. cit.,* note 14

91 *European Network of ombudspersons for Children (ENOC) – ENOC Bureau Statement* „Children's rights in the context of the COVID-19 outbreak." Available at: [http://enoc.eu/wp-content/uploads/2020/04/ENOC-Bureau-statement-on-CR-in-the-context-of-the-COVID-19-outbreak-FV.pdf], Accessed 14 February 2022

92 Smahel, D. *et al., EU Kids Online 2020: Survey results from 19 countries*, 2020, p. 25, [DOI: 10.21953/lse.47fdeqj01ofo]

93 Mascheroni, G.; Saeed, M.; Valenza, M.; Cino, D.; Dreesen, T.; Zaffaroni, L. G.; Kardefelt-Winther, D., *Learning at a Distance: Children's remote learning experiences in Italy during the COVID-19 pandemic*, UNICEF Office of Research – Innocenti, Florence, 2021, pp. 9, 20

94 *Ibid*., p. 16

95 European Education Area – Digital Education Action Plan (2021-2027) [https://education.ec.europa.eu/focus-topics/digital/education-action-plan], Accessed 14 Februrary 2022

the above points to the fact that the European Union protects the right to education as a universal right of children by adapting it to the conditions of a modern, digital environment.

### 3.2. The right to access information and protect privacy

One of the rights of children that is the subject of modern scientific debate is the right to access information. According to the CRC, the child has the right to access information, whereby the state has the duty to provide mechanisms that, on the one hand, allow children access to various information, and on the other hand, protect children from harmful and unwanted content. Consequently, there is a conventional obligation of states to protect the privacy of children. In a broader sense, the right of access to information needs to be interpreted in addition to the child's right to freedom of expression.[96] In addition to regulating this right at the international level, the CFR, as part of the primary legislation of the European Union, also regulates the issue of the right to expression and information, which relates to the freedom to receive and disseminate information and ideas. Therefore, the obligation of data protection is imposed, which must be processed fairly and legitimately.[97] In addition, in relation to the right to access information, there is also the right to respect private and family life and communication,[98] which is necessary to ensure in the digital environment when information becomes easily accessible.[99] The unavailability of information in the digital age would mean discrimination *per se*, especially if a significant part of the information is placed online and there is no access to the Internet, which again raises the issue of children's vulnerability and availability of information.[100] In the conditions of digitalization of society, the right of children to communicate through modern technologies is especially relevant. Today, children are required to participate in groups on various messaging platforms through which important information on the issue of education, extracurricular activities and the like is exchanged. As a rule, the issue of the right to access the Internet reemerges here – if this right is not available, it entails the issue of other rights of the child in the digital environment, which is

96 Čović, A., *op. cit.,* note 6, p. 15, 16

97 Articles 8 and 11 of CFR, *op. cit.*, note 21

98 *Ibid*., art. 7 of CFR

99 Vojković, G., *Opća uredba o zaštiti osobnih podataka*, in: Velki, T.; Šolić, K. (eds.), Izazovi digitalnog svijeta, Fakultet za odgojne i obrazovne znanosti Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2019, pp. 175-202, p. 179

100 Bisson, C.; Bochet, J., *Ljudska prava u digitalno doba: međunarodni i europski pravni okvir*, in: Luatti, L. (ed.), III. Susret ljudskih prava: Ljudska prava u doba digitalnog građanstva, Vodnjan, Istarska županija, 2017, pp. 12-23, p. 18

characterized by the speed of information dissemination and the importance of its quick application.

The right to access information and the right to speak are extremely important rights for children because they enable children to become fulfilled social beings, as well as to express views on issues related to them by any means, including modern digital technologies.[101] The Council of Europe recognized the importance of the right of access to information in Recommendation CM/Rec (2018)/7. It is the duty of the state to ensure that children have complete freedom of expression and access to information on all issues important to them, regardless of the medium used.[102] However, the obligation to provide access to information and express opinions in the digital environment includes developing children's awareness of the proper use of information and expressing their views so that certain actions or consumption of their rights would not endanger the rights of others.[103] Information must be available to children in an understandable and adapted way and therefore a large amount of information available to children will not be a guarantee of protection of this right if its content is not easily accessible, written in a way understandable to children and adapted to age and maturity of children. As a rule, children need to be provided with information that is crucial for their development and interests, which includes information on health, education, sexuality, as well as the rights they face in the digital environment.[104] Ensuring the availability of information to children must also be correlated with restricting access to certain information. Such action is in the best interests of the child as it filters content that is harmful to children, which would in fact harm their rights. However, this possibility is not unlimited either, but must be in line with international and European standards of restricting fundamental human rights.[105] As a specific example of data endangerment, phishing based on identity theft is cited, leading the victim (in this case a child) to reveal sensitive personal data on a fake website.[106]

The right to access information and freedom of expression fall into the category of democratic rights and any restriction thereof potentially restricts the social activities of children. Therefore, any restriction of the right to access information and express an opinion must be proportionate, i.e. it must pass a proportionality test

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101 Djeca imaju pravo na informaciju, slobodu izražavanja mišljenja i na privatnost, [https://www.medijskapismenost.hr/djeca-imaju-pravo-na-informaciju-slobodu-izrazavanja-misljenja-ali-i-na-privatnost/], Accessed 16 February 2022

102 Point 16 of the Recommendation CM/Rec(2018)/7, *op. cit.*, note 27

103 *Ibid.*, point 17 of the Recommendation CM/Rec(2018)/7

104 *Ibid.*, point 18 of the Recommendation CM/Rec(2018)/7

105 *Ibid.*, point 20 of the Recommendation CM/Rec(2018)/7

106 Borić Letica, I.; Velki, T., *op. cit.*, note 49, p. 88

which assesses the usefulness of some information, or the possibility of expressing an opinion and the legitimacy of denying that right, guided by the best interests of the child.[107] Consequently, neither digitalization nor the COVID-19 pandemic should be used as an excuse to prevent the implementation of this right, because such an environment requires the availability of as many information sources as possible so that children can maintain their role as active participants in society. Speaking of protecting children's privacy, the General Data Protection Regulation (hereinafter: GDPR) is important at European Union level. One of the rights provided by the GDPR is the right to be forgotten, according to which every person, and especially children as a vulnerable group, have the right to have their data removed from the Internet, in the context of the digital environment.[108] This right starts from the fact that children, compulsorily or voluntarily, use digital technologies and the Internet, often unknowingly making numerous personal data available. Thus, no matter how much attention is paid to the child and the protection of his/her rights and interests, the child is not and cannot be fully aware of the dangers arising from sharing data on the Internet as a globally available service. It is therefore essential to ensure that children have the right to be forgotten so that the right to access information and express opinions does not adversely affect their privacy.[109] The GDPR pays special attention to children under the age of 16 in order to protect their data. Therefore, children under the age of 16 may use certain online services for which personal information is required, only with parental consent, while this consent is not required for preventive or counseling services offered exclusively to the child.[110]

In order to strengthen the protection of the privacy of children in the digital environment, the Council of Europe has adopted a Declaration on the need to

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[107] The right of access to information and the freedom of expression of children should thus be restricted only if it is for the purpose of protecting the rights of others, national security, public order or public health. Briefing: Children's rights in the digital age, [https://home.crin.org/issues/digital-rights/childrens-right-digital-age], Accessed 16 February 2022

[108] Brian, S.; Brian, O., *Children's rights online: challenges, dilemmas and emerging directions*, in: van der Hof, S.; van den Berg, B.; Schermer, B. (eds.), Minding Minors Wandering the Web: Regulating Online Child Safeti, Information technology and law series, Vol. 24, 2014, pp. 19-38, p. 24

[109] Lievens, E.; Vander Maelen, C., *A Child's Right to be Forgotten: Letting Go of the Past and Embracing the Future?,* Latin American Law Review, No. 2, 2019, pp. 61-79, p. 65, 66. The right to protection of children's privacy is not only related to the actions of children, but also to parents who, by sharing content about children, can significantly contribute to the violation of the child's right to privacy. Thus, in this case, digital services can conflict the parent's right to freedom of expression and the child's right to privacy. More about it: *Ibid*.

[110] Art. 8 GDPR, [https://gdpr-info.eu/art-8-gdpr/], Accessed 20 February 2022

protect the privacy of children in the digital environment.[111] [112] The Declaration thus starts from the fact that personal data can be used for the benefit of children, but also points out that there are challenges to their protection, especially when it comes to artificial intelligence. The Declaration points to the negative aspects of digitalization and the consequences that the COVID-19 pandemic has left on the issue of children's privacy, given that it has intensified the use of digital technologies and the Internet. The preventive approach of the Declaration is based on the fact that the protection of children's right to access information and their privacy should be enabled by conducting technology risk assessments on children's rights, interstate coordination of competent authorities and taking advantage of digital technologies for children. The child, in accordance with his or her best interests, must be able to express his or her views on all matters relevant to him or her, both physically and digitally. Information service providers should therefore pay much more attention to children and their consent to the use of certain digital content, which would further affect the more responsible approach of children in relation to the use of information. By contrast, children would *de facto* cease to be perceived as a vulnerable social group that deserves special care from all social actors, especially in the digital environment.

## 4. CYBER VIOLENCE

Although the paper has repeatedly pointed out that the digital environment provides a number of benefits for children, especially in terms of exercising their rights (such as the right to education, the right to access information, etc.), this environment also characterize side effects that may threaten children's rights. In this case, we are talking about cyber threats characterized by the use of the Internet and digital technologies and their execution by children or adults. Cyber violence include cyberbullying, grooming, hate speech, misinformation, child trafficking,

[111] Declaration by the Committee of Ministers on the need to protect children's privacy in the digital environment, Decl(28/04/2021), Adopted by the Committee of Ministers on 28 April 2021 at the 1402nd meeting of the Ministers' Deputies

[112] The European Court of Human Rights in the K.U. v Finland (2872/02) stressed the importance of protecting a child's privacy online. Namely, an unknown person published the data of a 12-year-old child on a dating page without his knowledge, which violated the child's privacy. The court pointed out that in this case it is a potential threat to the welfare of the child, with special emphasis on the age of the child and his vulnerability. This decision of the European Court of Human Rights is also important because it obliged the legislators to react to social changes, first of all, technical development and adjust the legislation accordingly. Fenton-Glynn, C., *Children and the European Court of Human Rights*, Oxford University Press, Oxford, 2021, p. 50.; Pöysti, T., *Judgement in the case of K.U. v Finland*, Digital Evidence and Electronic Signature Law Review, Vol. 6, 2009, pp. 34-45, p. 34

and a number of other threats[113] which are committed through the Internet and threaten a child's dignity. Therefore, cyber violence could be divided into *i*) violence posed by adults, which are mainly acts related to sexual predation towards children, and *ii*) violence posed by children to other children (e.g. hate speech in the digital environment). Such forms of violence, committed in the circumstances of the digital environment, are collectively called digital violence. Simply put, it is violence committed through digital technologies, i.e. their intentional use for the purpose of harming one or more persons.[114]

Understanding importance of protecting children from modern forms of violence started at the beginning of the 21st century when the Council of Europe's Cybercrime Convention[115] defined criminal offenses related to child pornography involving the use of computer systems. The Convention criminalized the acts of *i*) producing, *ii*) offering, *iii*) distributing, *iv*) procuring and *v*) possessing child pornography through a computer system.[116] With the development of modern technologies, new dangers in the digital environment are developing to the detriment of children, so in addition to the aforementioned acts of the Convention on Cybercrime, the criminal offense of sex grooming has also developed. Sex grooming has the following characteristics: it takes place in cyberspace, it is done by using digital technologies, all with the purpose of using the vulnerability of children as a social group in the digital environment.[117] In the countries of the European Union, between 8 and 39% of children between the ages of 12 and 16 have received a message of sexual content, with messages of such content being equally targeted at both boys and girls.[118] On the other hand, an increasingly common problem of children in the digital environment is cyberbullying, which is intentional and repeated harm through electronic text.[119]

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113 Livingstone, S.; Bulger, M. E., *A global research agenda for children's rights in the digital age*, Journal of Children and Media, Vol. 8, No. 4, 2014, pp. 317-335, p. 322

114 Zečević, I., *Odgoj i obrazovanje djece o sigurnoj uporabi digitalnih tehnologija: vodič za nastavnike*, Save the Children in North West Balkans, Sarajevo, 2021, p. 24

115 Convention on Cybercrime, Official Gazette, International Agreements, No. 9/2002; European Treaty Series – No. 185

116 *Ibid*., art. 9 of the Convention on Cybercrime

117 Herceg Pakšić, B., *Virtualna komunikacija i izazovi kaznenog prava novog doba*, in: Velki, T.; Šolić, K. (eds.), Izazovi digitalnog svijeta, Fakultet za odgojne i obrazovne znanosti Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2019, pp. 155-174, pp. 162-163

118 Smahel, D. *et al., op. cit.,* note 92, p. 83

119 Duvnjak, I.; Šincek, D., *Vršnjačko nasilje u digitalnom svijetu*, in: Velki, T.; Šolić, K. (eds.), Izazovi digitalnog svijeta, Fakultet za odgojne i obrazovne znanosti Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2019, pp. 105-122, p. 107

The most common form of cyber violence is online hate speech, which directly violates a child's dignity in the digital environment. Hate speech is any speech that expresses hatred towards a certain social group according to gender, age, origin, etc.[120] Hate speech can also be corroborated by statistical indicators. At the level of European countries, between 4 and 48% of children between the ages of 12 and 16 receive a hate speech message at least once a month, whereas between 11 and 31% of them receive such content several times a year.[121] This issue has also been recognized at the level of the European Union, which has regulated this cybercrime against children by the Directive on combating the sexual abuse and sexual exploitation of children and child pornography,[122] encouraging harmonization of this issue at Member State level.[123] Why is it important to link children's rights in the digital environment and these cyber violence? Primarily, in this way, digital technology and the environment, which provides many opportunities for children, are viewed in a negative context, which prevents children from exercising their rights in a safe way. The consequences of cyber violence are far-reaching, which is why they can be an incentive for states to act more persistently in protecting the modern rights of children which need to have equal legal status as the "regular" ones. Ensuring safe access to the Internet and the use of digital technologies without violence is in the best interests of the child. Hitting a child, calling them names, kicking and the like in the real world is equivalent to cyberbullying, grooming and other unwanted forms of digital violence in the digital environment, which equally insult the child's dignity and the right to protection from all forms of violence as another international standard. [124]

In accordance with the aforementioned issue of cyber threats that violate the rights of children in the digital environment, the recommendations of the European Network of Ombudsperson for Children (ENOC) are also important. According to the report, violence against children in the digital environment can be prevented through national and interstate cooperation, creating modern policies that would define a clear way to combat sexual offenses related to digital technologies,

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120 Herceg Pakšić, B., *op. cit.,* note 117, pp. 157-159

121 Smahel, D. *et al., op. cit.,* note 92, p. 66

122 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Official Journal of the European Union, L 335/1, 17 December 2011

123 More about it: Herceg Pakšić, *op. cit.,* note 119, pp. 164-165

124 More about it: Hrabar, D., *op. cit.,* note 37, pp. 53-72. The increasing incidence of violence in the digital environment obliges the European Court of Human Rights to reconsider the right to respect for private (and family) life and the right to freedom from inhuman or degrading treatment. Fenton-Glynn, *op. cit.,* note 112, p. 399

providing tailored information to children and necessary support.[125] Recommendation CM/Rec(2018)/7 places special emphasis on general measures to protect children in the digital environment and measures aimed at protecting children from sexual abuse. The Council of Europe is thus committed to creating child protection mechanisms to protect children from exposure to certain digital content, whereby states should establish systems to determine the age of children and thus reduce their exposure to harmful content. With regard to hate speech, the Council of Europe is committed to strengthening the role of businesses in developing policies aimed at combating online hate speech as a means of seriously endangering children's rights.[126] Since sexual abuse of children through the Internet is a more serious offense, the Council of Europe places the responsibility of the protection of children on judicial authorities that should establish unique digital prints (so-called hashes) to identify perpetrators of criminal offences of online sexual exploitation via the Internet faster and easier.[127]

Taking into account that between 10 and 45% of children between the ages of 9 and 11 use social networks on a daily basis,[128] it is justified to strive for effective measures to protect their rights in the digital environment. Although these statistics could point to the fact that the European Union's GDPR has not achieved the desired effect on children's data protection on the Internet,[129] in the digital environment it is extremely difficult to regulate and prevent every area, including this one. Even though it is generally perceived that social networks can endanger children's rights by unwanted actions (which, unfortunately, is the rule in most cases), endangering children's rights is possible just by accessing the Internet, whether it is used for educational or other purposes. All this calls into question the statement that the right to the Internet is a modern right of children. Given the stated dangers arising from its use, should the Internet be characterized as a modern right of children? The answer is yes because the entire digital environment has many benefits for children, especially in special situations such as the COVID-19 pandemic where "forced" digitalization of education has taken place. However, in order for this right to be purposeful, it is necessary for states to establish mechanisms for its protection. Numerous European family legislations in the context of parental responsibility and upbringing of children state the right, duty and responsibility of

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125 European Network of Ombudspersons for Children (ENOC), Position Statement on „Children's Rights in the Digital Environment", p. 5, Available at: [http://enoc.eu/wp-content/uploads/2019/10/ENOC-2019-Statement-on-Childrens-Rights-in-the-Digital-Environment.pdf], Accessed 16 February 2022

126 Points 55-60 of the Recommendation CM/Rec(2018)/7, *op. cit.*, note 27

127 *Ibid.*, points 61-66 of the Recommendation CM/Rec(2018)/7

128 Smahel, D. et al., *op. cit.,* note 92, p. 28

129 *Ibid.*, p. 29

parents to supervise the child on social networks, i.e. in the digital environment.[130] While the state sets the basic framework for protection through its legislation, parents set a strategy of active, restrictive mediation or sharing, thus providing guidance to children on the proper use of digital technologies and related content.[131]

## 5. CONCLUSION

The modern digital environment has affected many areas, including children's rights. As a rule, the digital environment has brought many benefits to children, such as faster information flow or more accessible education, but also many challenges in protecting these rights. The negative implications of digitalization, such as digital deprivation and social alienation, are not negligible. This actually means that in some cases this process is carried out formally, and not substantively, which results in the neglect of the child as a social being. Digitalization has not given rise to new rights, but requires the adaptation of existing rights to the modern environment, guided by the established standard of the best interests of the child. The Council of Europe and the European Union have adequately responded to the challenges of protecting children's rights in the digital environment, with the COVID-19 pandemic only intensifying the process, as evidenced by the following facts. First, these organizations realized the importance of regulating the digital environment at the beginning of the 21st century when the Convention on Cybercrime was adopted, which for the first time set guidelines for the development of virtual crimes against children. On the other hand, these organizations are characterized by an interdisciplinary approach to the protection of children's rights in the digital environment, which is especially evident in emphasizing the role of business entities in providing an appropriate level of protection of children's rights in the digital environment.

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130 An example of the above is Croatian Family Law Act, Official Gazette, No. 103/2015, 98/2019. Thus, in order to protect the rights of the child and act in the best interests of the child, Article 95 states that parents have the right, duty and responsibility to monitor the child in his association with other persons, as well as communication on social networks and other forms of electronic communication prohibit socializing and communication that is not in the best interests of the child. The following can be concluded from this provision. Monitoring of teaching through distance learning tools is the realization of the child's right to education, guaranteed by international law. However, excessive use of social networks, which can potentially lead to some form of digital violence, falls within the scope of the parent's obligation to monitor the child and in his best interest to prevent/limit the use of resources that are not in his best interests. The importance of this provision is also reflected in the fact that states have begun to realize that today it is necessary to protect the best interests of the child and his well-being not only in the real but also in the digital environment that brings many challenges.

131 Borić Letica, I.; Velki, T., *op. cit.*, note 49, pp. 90, 91

There are more and more questions about whether European soft law sufficiently protects the rights of children in the digital environment. Its effectiveness stems from the analyzed documents, but also from specific statistical indicators, given that states thus receive clear guidelines on how to protect children's rights, and the modality of this arrangement depends on the state itself. In that case, can we talk about absolute equality of children in the European Union? The principle of equality is a guideline that seeks, through available mechanisms at Member State level, to harmonize, as far as possible, the rights of children and to guarantee fundamental rights to everyone. Such a level of equality could be achieved, for example, by guaranteeing the right to access the Internet. Based on that, children would exercise other rights, which would ensure equality, more precisely, a precondition for equality in the exercise of children's rights.

Although it was pointed out earlier that digitalization does not create new rights, children's right to access the Internet leaves a lot of room for discussion. It is clear that today this right is not fully guaranteed, but the states are still being called upon to provide all the necessary instruments for its implementation. Non-implementation of the right to access the Internet also leads to increasing discrimination against children, because many rights in the digital environment are related to access to the Internet, especially the right to education and access to information. Discrimination against children in the digital environment leaves numerous consequences, not only in legal, but also in psychological and social terms. The inability to exercise any of the child's rights runs counter to his or her best interests, and so does the inability to access the Internet. All this speaks in favor of the fact that access to the Internet should be recognized as a right and constitute one of the rights in the modern catalog of children's rights. Cataloging the rights of children in the digital environment is certainly desirable, but at the level of the European Union, it is currently done through soft law documents. It is paradoxical to talk about modern children's rights, such as the right to access the Internet, while in some parts of the world children still do not have guaranteed fundamental rights such as the right to education or an adequate standard of living.

Cyber violence pose major challenges in protecting children's rights in the digital environment, primarily because of their "invisibility", which prevents a prompt response to prevent violations of children's rights. The problem also lies in the fact that often only children are taught how to protect themselves from cyber violence, but not the parents who are the first to be called and required to protect their rights and interests. De facto, parents in these cases do not have sufficient knowledge of how to protect the interests of their children who are generally aware of these dangers. Future legal regulation of these issues should be more focused on

defining ways to protect children from cyber threats in order to prevent exposure to these threats.

Thus, the *pro futuro* challenges regarding children's rights in the digital environment are the need for their cataloging, the elimination of inequalities in access to digital rights, and a stronger response to cyber violence. In addition, documents of the Council of Europe and the European Union, in accordance with the participatory rights of children, increasingly advocate their involvement in the processes of creating policies for the protection of children's rights. Therefore, future research questions in this area need to focus on the participation of children in the processes of making relevant policies to protect and promote their rights in the digital environment.

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Topic 4

# EU and the future

UDK 347.78:004.7(4-67EU)
316.77:342.721
Preliminary communication

# PRESENT AND FUTURE - A PREVIEW STUDY OF FACEBOOK IN THE CONTEXT OF THE SUBMITTED PROPOSAL FOR DIGITAL MARKTES ACT*

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***ABSTRACT***

*In this paper authors analyse a case of Facebook which was assessed by German competition authority – Bundeskartellamt. Facebook has been suspected of abusing its dominant position in the context of protection of personal data. This case was subsequently considered by the competent national judicial authorities, which finally referred the questions to the Court of Justice of the European Union (Oberlandesgericht Düsseldorf) in case C-252/21. At the present stage of the proceedings are published exclusively Application and Request for preliminary ruling. The authors aim heads to examine the disputed action of platform in the context of the proposed Digital Markets Act and to confront them with the obligations imposed by this proposal for a regulation for new category of entities – so called- gatekeepers.*

***Keywords:*** *Competition law, dominant position, gatekeepers, Proposal for Digital Markets Act*

* This work was supported by the Slovak research and development agency on the basis of Contract no. APVV-19-0424 and APVV-17-0561 - Human rights and ethical aspects of cyber security

## 1. INTRODUCTION

The purpose of this article is to analyse the Facebook[1] case, which began to be assessed by the German competition authority - the Bunderkartellamt on March 2, 2016. After a thorough examination of the decisive circumstances, competition authority issued a decision on 6 February 2019 prohibiting Facebook from combining user data from various sources. This case deserved the attention of the professional public for several reasons: competition law is closely interlinked with the field of personal data protection, more specifically the German competition authority found that Facebook's terms and conditions were inconsistent with the GDPR regulation. And last but not least, the popularity of perhaps the most well-known social network, used every day by millions of its users who are interested in where their sensitive personal data go and which entities ultimately use it, contributed to the interest in this case. Lastly, in literature we meet with opinions that regulatory tendencies in relation to gatekeeper we find currently in the consumer protection law, personal data protection law[2] and ultimately in competition law.[3]

Against Bundeskartellamt's administrative decision concerning Facebook was lodged complaint to the Oberlandesgericht Düsseldorf on 11 February 2019. The legal case therefore went from administrative level to judicial proceedings. However, the competent German judicial authorities has not yet issued a final verdict (whereas only preliminary decisions have so far been rendered). After the hearing, which took place on 24 March 2021 the court decided to stay the proceedings and to refer questions to the Court of Justice of the European Union for a preliminary ruling according to Art. 267 TFEU.

The Oberlandesgericht Düsseldorf has referred overall 7 questions to the Court of Justice of the EU (some consisting of several partial sub-questions) and the proceeding is conducted under file no. C-252/21, between the parties to the original national judicial proceedings, thus Facebook (1. Facebook Inc., USA, 2. Facebook Ireland Ltd., Ireland, 3. Facebook Deutschland GmbH, Hamburg, Germany) as the complainant in the main proceedings, against the Bundeskartellamt, with the participation of the Verbraucherzentrale Bundesverband.[4]

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1 For the purposes of this article, we will use the term „Facebook" as used in the administrative and judicial proceedings, even though the term Meta is already relevant at present

2 Hutchinson, Ch., S.; Treščáková, D., *The challenges of personalized pricing to competition and personal data protection law*, European Competition Journal, 2021, DOI: 10.1080/17441056.2021.1936400

3 Mazúr J.; Patakyová M.T., *Regulatory Approaches to Facebook and Other Social Media Platforms: Towards Platforms Design Accountability*, Masaryk University Journal of Law and Technology, Vol. 13, No. 2, 2019, pp. 219–242, [https://doi.org/10.5817/MUJLT2019-2-4]

4 Federal association of consumers

It is indisputable, that the discussed case of Facebook could be analysed from a several legal points of view, what is finally reflected in other scientific literature, which we will refer to in this contribution. However, our aim is to describe the course of proceedings across the various stages and analyse the specific practices of the digital platform and dispensation that Facebook is found culpable for, in the context of the Proposal for the Digital Markets Act. In terms of the used methodology, we will analyse publicly available decisions (and partial decisions) of competent authorities and related legislation. Subsequently, the specific practices of the concerned platform would be examined, and then we will accede to their subsumption under the rules set out in the Digital Markets Act and describe the consequences, which the applicability of this Act would (or could) cause.

## 2. CASE OF FACEBOOK - ASSESSMENT OF THE GERMAN COMPETITION AUTHORITY (BUNDESKARTELLAMT)

Interesting and stimulating question was posed by Anna Blume Huttenlauch in her contribution (which was published shortly after the commencement of the proceedings) - and therefore: "Is there a market on which Facebook is "dominant", i.e. do social networks constitute a market for the purpose of antitrust analysis?"[5] We identify with the analysis and subsequent arguments of the author in the cited article, and we point out to the fact, that under the current conditions we can already state that even services for which no monetary compensation is paid can, in principle, constitute a market - in the light of the diversion made by the Commission in its decision-making[6] but also in the light of the changes made, for example, by Germany in particular in their national legislation (9th amendment to the GWB- § 18(2)- which has changed the existing case law). [7] In this context, we also refer to the findings of Botta and Wiedemann who assert that" …we take for granted that the online platform has a substantial degree of market power in order to be considered dominant (e.g. the platform owns a large amount of personal data, while network effects discourage new entries in the market), and thus its market behaviour could fall within the scope of Art. 102 TFEU…"[8]

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5 Huttenlauch, D. A. B., *How many "Likes" for the German Facebook Antitrust Probe?* Competition Policy International, Vol. 6, 2016, p.1, Available online at: [https://www.blomstein.com/perch/resources/cpi-facebook-investigation-15.8.2016.pdf], Accessed 29 March 2022

6 *Ibid.,* p. 2

7 Bejček, J., *O vlivu digitalizace na soutěžní právo – mnoho povyku pro nic?* in: Scuhoža, J.; Husár, J., Hučková, R. (eds.): Právo, obchod, ekonomika VII. Košice: Univerzita P.J. Šafárika v Košiciach, 2017, p. 28

8 Botta, M.; Wiedemann, K., *Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision*, Journal of European Competition Law & Practice, Vol. 10, No. 8, 2019, p. 466, [https://doi.org/10.1093/jeclap/lpz064], *referring to* Graef, I., *Market Definition and Market Power in*

The Bundeskartellamt is a German competition authority. The scope and competencies of this institution are regulated by the German Act against Restraints of Competition (Competition Act) (hereinafter also „GWB")[9]. Part 2 Competition Authorities, Chapter 1 General Provisions Section, § 48 Competencies of the GWB states that „The competition authorities are the Bundeskartellamt, the Federal Ministry for Economic Affairs and Energy, and the supreme Land authorities competent according to the laws of the respective Land."[10] In relation to the specific powers of this institution is crucial above all article 48 paragraph 3 „The Bundeskartellamt shall monitor the degree of transparency, including that of wholesale prices, and the degree and effectiveness of liberalisation as well as the extent of competition on the wholesale and retail levels of the gas and electricity markets and on the gas and electricity exchanges. The Bundeskartellamt shall without delay make the data compiled from its monitoring activities available to the Bundesnetzagentur."

As mentioned above, administrative proceedings against Facebook was initiated on March 2, 2016. As one of the main objective for initiating proceedings was that user and device-related data which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from the social network. The proceeding did not address the issue of information processed on the use of the social network after users registeration.[11] This might initially seem essential, especially with regard to the protection of personal data, which should be assessed by the data protection authority. Germany does not have one central Data Protection Authority but a number of different Authorities for each of the 16 German states (*Länder*) that are responsible for making sure that data protection laws and regulations are complied with. In addition the German Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte* für *Datenschutz und Informationsfreiheit* – 'BfDI') is the Data Protection Authority for telecommunication service providers and represents Germany in the European Data Protection Board.[12] However,

*Data: The Case of Online Platforms,* World Competition, Vol. 38, No. 4, 2015, pp. 473–506; Filistrucchi, L.; Geradin D.; van Damme E., *Identifying Two-Sided Markets,* World Competition Vol. 36, No. 1, 2013, pp. 33–59

9 *The official title of the law in the German language* - Gesetz gegen Wettbewerbsbeschränkungen (GWB)

10 Act against Restraints of Competition (Competition Act – GWB), Federal Ministry of Justice, Federal Office of Justice, [https://www.gesetze-im-internet.de/gwb/BJNR252110998.html]

11 Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 1, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

12 Data protection laws of the world, National Data Protection Authority, Germany, [https://www.dlapiperdataprotection.com/index.html?t=authority&c=DE], Accessed 18 January 2022

these considerations are quickly changed by the fact that Facebook has an official headquarters in Ireland, and, therefore, the above-mentioned authorities would not be competent following the relevant provisions "…and the lead supervisory authority under Article 56(1) of the GDPR is the Irish supervisory authority, since Facebook Ireland is Facebook's main establishment in Europe, operates the social network in Europe, uses standard terms of service in all Member States of the European Union and is the controller for the processing of personal data for the entire territory of the European Union within the meaning of Article 4(7) of the GDPR."[13] Data Protection Commission announces decision in Facebook (Meta) inquiry on 15th March 2022. The decision followed an investigation by the Data Protection Commission into a series of twelve data breach notifications received between 7 June 2018 and 4 December 2018. The investigation focused on Meta Platforms' compliance with GDPR Articles 5(1)(f), 5(2), 24(1), and 32(1) in relation to the processing of personal data relevant to the twelve breach notifications. As a result of its investigation, the DPC determined that Meta Platforms violated Articles 5(2) and 24(1) GDPR. In the context of the twelve personal data breaches, the DPC determined that Meta Platforms lacked appropriate technical and organizational measures that would allow it to readily demonstrate the security measures that it implemented in practice to protect EU users' data. Meta Platforms Ireland Limited were fined with €17 million [14]

Bundeskartellamt considered it necessary to intervene from a competition law perspective because the data protection boundaries set forth in the GDPR were clearly overstepped, also in view of Facebook's dominant position. [15] As follows from the official documents of the German competition authority and as it is usual in assessing whether a dominant position has been abused, Bundeskartellamt from a factual point of view took into account the relevant facts and circumstances of the case. To the category of relevant facts we should include for instance, the nature of Facebook, quantity of daily/weekly/monthly users within the defined territory (Germany), what are the basic principles of its operation, basic aspects

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13 Case C-252/21, *Meta Platforms and Others,* Request for a preliminary ruling of 24 March 2021, [https://curia.europa.eu/juris/showPdf.jsf?text=&docid=242143&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1565434], Accessed 1 May 2022

14 Data Protections Commission, Data Protection Commission announces decision in Meta (Facebook) inquiry
15th March 2022, [https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-meta-facebook-inquiry], Accessed 12 April 2022

15 Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, pp. 1-2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

of the conditions of use of this social network, or even mentioning "subsidiaries" social networks belonging to Facebook as a result of the merger. It is also desirable to mention the division of Facebook users into daily users and monthly users in order to illustrate the power of the user base. As it is set out in the decision of the Bundeskartellamt in the case of Facebook, in 2018 the number of daily active users in Germany was 23 million, while 32 million users were classified as monthly active users.[16]

From a factual point of view, it is possible to access Facebook.com via the websites www.facebook.com, www.facebook.de or via a mobile app. Facebook. Private Facebook.com use is conditional upon registration by creating a user profile. Using their real names, users can enter information on themselves and their personal situation and set a profile picture. The registration process is crucial mainly because during the process of registration platform requires to express consent with the conditions, under which this platform can be used. Based on this information, a personalised site is created for each user, which is subdivided into three subsites: the "profile", "home" and the "find friends" pages. Users can see the latest news ("posts") of other private and commercial users in the "Newsfeed" on their start pages. The order of appearance is based on an algorithm to match the user's interests. Facebook Messenger is integrated into the social network and serves for real-time bilateral or group communication. In the social network, Facebook.com offers a variety of further functionalities, e.g. a job board, an app centre or event organisation.[17]

Not only private users but also businesses, associations or business individuals can use Facebook.com to publish content in the social network to increase their reach. Publishers can create their own pages to publish content and connect with private users, e.g. via subscriptions or likes. Facebook funds its social network through online advertising offered to publishers and other businesses. The ads match a social network user's individual profile. The aim is to present users with ads that are potentially interesting to them based on their personal commercial behaviour, their interests, purchasing power and living conditions.[18] In these circumstances it

[16] Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

[17] *Ibid*., p. 2

[18] Case Summary 15 February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

is distinct, that Facebook has long been more than just a social network that connects its users in order to share statuses, photos, videos, or other information. It is also possible to argue that Facebook goes beyond the traditional definition of the platform in terms of the sharing economy, based on P2P activities.

From a legal point of view, the competition authority considered it important to define at first market definition. Based on the concept of demand-side substitutability, Bundeskartellamt stated that we understand Facebook as „private social network market with private users as the relevant opposite market side. The relevant geographic market is Germany. "[19] The new provisions of the German Competition Act were also taken into account in defining the market „....new provisions of Section 18(2a) and (3a) of the German Competition Act (GWB), the Bundeskartellamt first of all examined Facebook's business model and its special characteristics as a multi-sided network market with free services."[20] In analysing the nature of Facebook, the Bundeskartellamt came to the expected conclusion that this platform is not just a social network. „... Facebook.com Facebook offers an intermediary product, which, according to the content of its services, is a combination of a network and a multi-sided market pursuant to Section 18(3a) GWB. Essentially the product is a network financed through targeted advertising, which forms a multi-sided market precisely because of this form of financing. "[21]

Then competition authority divided the Facebook users into two basic groups with regard to the nature and objectives they carry out through the online platform "...key user groups are private users using Facebook.com without monetary compensation on the one hand, and advertisers running targeted advertisements on the other. Indirect network effects exist between the two user groups."[22]

In relation to market dominance Bundeskartellamt came to conclusions that, according to Section 18(1) in conjunction with (3) and (3a) GWB, Facebook is the dominant company in the national market for social networks for private users because, based on an overall assessment of all market power factors, the company has a scope of action in this market that is not sufficiently controlled by competition. [23]

Following the abusive data policy it has been found that using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-

[19] *Ibid.*, p. 3
[20] *Ibid.*, p. 4
[21] *Ibid.*, p. 4
[22] *Ibid.*
[23] *Ibid.*, p. 5

related data from sources other than Facebook and merge it with data collected on Facebook, constitutes an abuse of a dominant position in the social network market in the form of exploitative business terms under Section 19(1) GWB's general clause. Considering the assessments made under data protection law in accordance with the General Data Protection Regulation (GDPR), these are inappropriate terms that harm both private users and competitors. [24]

After a thorough examination of the available evidence and facts, the BKA finally issued a decision by which „Bundeskartellamt has prohibited the data processing policy Facebook imposes on its users and its corresponding implementation pursuant to Sections 19(1), 32 GWB and ordered the termination of this conduct. The prohibition refers to the terms of processing personal data as expressly stated in the terms of service and detailed in the data and cookie policies as far as they involve the collection of user and device-related data from other corporate services and Facebook Business Tools without the users' consent and their combination with Facebook data for purposes related to the social network. The Bundeskartellamt also prohibited the implementation of these terms and conditions in actual data processing procedures which Facebook performs based on its data and cookie policies."[25] The concerned entity was not fined as a result of the decision in question; instead, the assessor gave the entity a 12-month period to implement the alleged practices contained, in particular, in Facebook's terms and conditions for used data.

In this context, it is also necessary to emphasize the fact that the whole administrative procedure lasted from 20 March 2016 to 06 February 2019 (when the decision on the merits was given). The investigation results in a high-profile[26] and extensive decision.[27] The investigation process and the decisive factual and legal circumstances were also published in abbreviated summary form.[28] Finally, the

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24 *Ibid*., p. 7

25 Case Summary 15 February 2019, *Facebook*, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 12, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 12 April 2022

26 Witt, A. C., *Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case*, The Antitrust Bulletin, Vol. 66, No. 2, 2021, pp. 276–307, [https://doi.org/10.1177/0003603X21997028]

27 6th Decision Division, B6-22/16, Bundeskartellamt, [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5], Accessed 29 March 2022

28 Case Summary 15 February 2019, *Facebook*, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing Sector: Social networks Ref: B6-22/16 Date of Decision: 6 February 2019, Bundeskartellamt, p. 2, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 29 March 2022

recent Facebook decision by the Bundeskartellamt represents the 1rst case of exploitative conduct sanctioned by the national competition authority in the digital world.[29]

We also consider it necessary to refer to the literature, which addresses the issue of the possibility of analysing defined procedures through competition law instruments in which we encounter two currents of opinions. According to the contribution of *Schneider*[30] we meet with opinion which „...rejects the possibility that privacy or data protection concerns can be analysed and remedied under competition law"[31], whereas the contribution of Schneider can be described as the one that „argues in favour of the interaction of these areas of market regulation and thus of the Bundeskartellamt´s approach against Facebook.[32] Schneider also pointed to a change in perspective comparing the approach of the European Commission and the Bundeskartellamt noting, that German competition authority „...focuses its analysis on the zero-price side of the market of social networking services, which the EU Commission did not do in prior investigations against digital platform owners" referring to the other relevant decision-making activities of the Commission.[33]

As the second aspect author draws attention to the choice of legal basis by the Bundeskertellamt „…while the Commission in both the Google/Double Click and the Facebook/Whatsapp investigations focused on traditional exclusionary conduct as the basis of the violation, the German antitrust authority apparently centres its investigation on the existence of an exploitative conduct under art.

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29 Marco, B.; Wiedemann, K., *op. cit*., note 9, pp. 465–478, [https://doi.org/10.1093/jeclap/lpz064]

30 Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, pp. 213–225, [https://doi.org/10.1093/jeclap/lpy016]

31 Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, Page 2 [https://doi.org/10.1093/jeclap/lpy016] reffering to: Manne, G., A.; Wright, J. D., no.8, 250, 258; Kerber, W., *Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection,* Journal of Intellectual Property Law & Practice, Vol. 11, 2016, p. 856

32 Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, Page 2 [https://doi.org/10.1093/jeclap/lpy016] reffering to: Huttenlauch, A. B., *How many likes for the German Facebook Antitrust Probe?*, Competition Policy International, 2016, Available online at: [http://www. blomstein.com/perch/resources/cpi-facebook-investigation 15.8.2016.pdf.], Accessed 29 March 2022

33 Schneider, G., *Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*, Journal of European Competition Law & Practice, Vol. 9, No. 4, 2018, Page 2, [https://doi.org/10.1093/jeclap/lpy016]

102 TFEU." [34] Finally, as is follows from the decision of the German competition authority, as the initial legal framework was finally not used art. 102 TFEU, but national provisions of German regulation (Sections 19(1), 32 GWB). This procedure was reasoned by Bundeskartellamt as follow: "...according to the catalogue of facts set forth in Article 102 sentence 2 lit. a TFEU, any abuse may consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. However, the examination has shown that the concept of protection developed by German case law on the general clause of Section 19(1) GWB, which relies heavily on decisions about values based on both fundamental rights and ordinary law in order to determine abusive conduct, has so far found no equivalent in European case law or application practice. The intended prohibition is therefore based on Section 19(1) GWB in conjunction with the relevant domestic case law. Pursuant to Article 3(2) sentence 2 of Regulation 1/2003, the Member States are not precluded from adopting or applying stricter national provisions in their territory in order to prevent or punish unilateral actions by undertakings".[35]

## 3. FROM THE ASSESING OF BUNDESKARTELLAMT TO THE GERMAN JUDICIAL AUTHORITIES

In accordance with the instructions on rights of appeal of the decision of 09 February 2019, Facebook addressed the appellate court (Düsseldorf Higher Regional Court) appeal and requested the suspensive effect of the appeal to be restored. Düsseldorf Higher Regional Court rendered a court decision (of a preliminary nature) on 29 August 2019. At the request of the applicants, the suspensive effect of their appeals against the administrative decision of the Bundeskartellamt's decision of 6 February 2019 was ordered and declared the appeal admissible. The interim ruling will be further briefly discussed below, after a concise analysis of the Bundeskartellamt's reasoning. Detailed analysis of the court order would go beyond the scope of this contribution and therefore we will only point out to selected aspects that we consider most fundamental.

Firstly, we fully identify with the view, that this preliminary decision was decision in favour of Facebook.[36] As it is apparent from the reasoning of decision, court

[34] *Ibid*., p. 3

[35] 6th Decision Division, B6-22/16, Bundeskartellamt, p. 257, [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5], Accessed: 29 March 2022

[36] Marco, B.; Wiedemann, K., *op. cit*., note 9, pp. 471, [https://doi.org/10.1093/jeclap/lpz064]

directly stated in the reasoning of the decision, that it tends to „...the annulment of the contested decision is predominantly probable." [37]

As first the court first emphasized, that "… there are serious doubts as to the legality of these resolutions by the antitrust agency."[38] Currently, the aspect of doubt about the legality of an administrative decision entitles the acting court to grant the appellant's request for suspensory effect. Secondly, at the same time the court commented on data processing issues, stating that "…the data processing by Facebook which it complained about does not give rise to any relevant competitive damage or any undesirable development in competition. This applies both with regard to an exploitative abuse to the detriment of consumers participating in the social network of Facebook and with regard to an exclusionary abuse to the detriment of an actual or potential competitor of Facebook."[39] In this regard, we also point out the statement of Botta and Wiedemann "….*inter alia*, the Court argues that causality between Facebook's dominant position and users agreeing to its terms of service cannot be proven, and that the excessive data collection leads to neither an abusive situation nor a loss of control for consumers, as the latter knowingly and willingly consent to the data processing."[40]

On the contrary, the court agreed with the definition of the relevant market „...it can be assumed that the Bundeskartellamt has correctly defined the relevant product and geographic market and that *Facebook* is the norm addressee of the abuse prohibition pursuant to Section 19 GWB on that market for social networks for private users in Germany ".[41] In addition, the court agreed with the other assessment of the competition authority "…Furthermore, it can also be assumed as correct that the Office's assessment that the "Terms of Use" provided by *Facebook*, in-

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37 Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6

38 Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 5

39 Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6

40 Botta, M.; Wiedemann K.*, op. cit.,* note 8, p. 471, [https://doi.org/10.1093/jeclap/lpz064]

41 Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 7

cludingthe "Data Directive" and the "Cookie Directive", are conditions or terms of business within the meaning of Section 19 (2) no. 2 of the GWB." [42]

But finally Düsseldorf Higher Regional Court states that "…Facebook cannot be found to have violated the abuse prohibition in Section 19 Paragraph 2 No. 2 GWB. This is because the Bundeskartellamt has not carried out sufficient investigations into an "as-if" competition and, as a result, has not made any meaningful findings on the question of which terms of use would have been formed under circumstances of competition." Following the mentioned findings "…. Facebook cannot be accused of having abused its dominant market position within the meaning of Section 19 (1) GWB either. According to this general clause, the abuse of a dominant market position is prohibited."[43]

## 4. QUESTIONS REFERRED TO THE EUROPEAN COURT OF JUSTICE FOR A PRELIMINARY RULING (C-252/21)

The documents published so far show, that Düsseldorf Higher Regional Court at the hearing on 24 March 2021, stayed the proceedings by the court order. For the purposes of the main proceedings, the Düsseldorf Higher Regional Court considered it necessary to answer the questions referred to the Court of Justice of the EU. Referred questions concern in particular interpretation of the selected provisions of the GDPR regulation and article 4(3) of the TEU. While the GDPR Regulation does not need to be presented separately, article 4(3) TEU discuss about principle of sincere cooperation, more precisely defines, that the "Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."[44]

The proceeding conducted at Court of Justice of the EU is traceable under the file number C-252/21. Currently are available to the public solely Application and Request for a preliminary ruling. As the questions referred about the interpretation of GDPR regulation and TEU are too extensive, we will try to focus only on selected aspect.

By the first preliminary question, the Düsseldorf Higher Regional Court is practically asking whether the German competition authority has the competence to assess the contractual terms relating to data processing of Facebook in the context

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42 Unofficial translation of the decision - *Facebook. /. Bundeskartellamt* The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), pp. 6-7

43 *Ibid.*, p. 6

44 Art. 4 (3) Treaty on European Union (Lisbon)

of GDPR regulation and issue an order to end breach of such regulation. By the sub-question, the national court essentially asks whether it is compatible with the principle of sincere cooperation, when at the same time, the lead supervisory authority in the Member State in which is the undertaking established, within the meaning of Article 56(1) of the GDPR is investigating the undertaking's contractual terms relating to data processing.

The sixth preliminary question is whether consent, as defined in Article 6(1)(a) and Article 9(2)(a) of the GDPR, can be given effectively and freely to a dominant undertaking such as Facebook Ireland, in accordance with Article 4(11) of the GDPR as it points to the competences of the competition authority in the intentions of the GDPR. Last, the seventh preliminary question is basically directed to that if the national competition authority has the competence to assess the terms of the undertaking in context the GDPR.

In summary, the questions referred to the Court of Justice of the EU do in fact seek to interpret the provisions of the GDPR and the principle of sincere cooperation and aspect of the competition are only marginal. We consider question number 6 and number 7 to be a marginal part of competition issues.

## 5. A FEW REMARKS ON THE SUBMITTED PROPOSAL OF THE DIGITAL MARKETS ACT

The previous formation of the European Commission reflected the priorities in the digital field through its priority - Digital Single Market.[45] Within the current second priority of the European Commission – Europe fit for the digital age, were on 15 December 2020 published two proposals for the regulation – Digital Services Act and Digital Markets Act. While Digital Services Act aims to contribute to the proper functioning of the internal market for intermediary services, set out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected, [46] Digital Markets Act lays down harmonised rules ensuring contestable and fair markets in

[45] Hučková, R.; Sokol, P.; Rózenfeldová, L., *4th industrial revolution and challenges for european law (with special attention to the concept of digital single market)*, in: Duić, D.; Petrašević, T. (eds.), EU law in context – adjustment to membership and challenges of the enlargement, Conference book of proceedings. – Osijek, Vol.2, 2018, pp. 201-215, Available online at: [https://hrcak.srce.hr/ojs/index.php/eclic/issue/view/313/]

[46] Art. 1 of the Proposal for Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final

the digital sector across the Union where gatekeepers are present.[47] Undoubtedly, the European Union is attempting to harmonize in specific areas.[48]

Digital Markets Act introduces a new category - so called gatekeepers. The market power of these entities lies primarily in the fact that they have a very stable position in the defined areas and represent a type of "gateway" for commercial users, which is necessary to overcome to enter the relevant markets. For this reason too, these entities are referred to in the current proposal for the regulation Digital Markets Act as gatekeepers. These entities will be identified on the basis of qualitative (Art. 3 para. 1. a-c) of Digital Markets Act) and quantitative criteria (Art. 3 para. 2. a-c) of Digital Markets Act). In the Article 2 DMA defines gatekeeper as provider of core platform services designated pursuant to Article 3, online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, advertising services- including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services, in the category of core platform services.

The published Act on Digital Markets in its non-binding part, resp. the preamble quite clearly states that "there are more than 10,000 online platforms in the European digital economy and most of them are SMEs, with a large number of large online platforms receiving the largest share of total value added."[49] From the above mentioned qualitative and quantitative indicators is evident, that this is a group of so – called "Big Tech"[50], also referred to by the abbreviation GAFAM (Google, Amazon, Facebook, Apple, Microsoft), while it is not excluded that other entities could be marked as gatekeepers according to established criteria. In this context we also emphasize that the nature of the DMA regulation consists on *ex ante* rules.

The obligations for the gatekeepers arising from their position, ie. for entities fulfilling qualitative and quantitative criteria, are enshrined in Art. 5 and Art. 6 of the proposal for a regulation Digital Markets Act. Article 5 of the DMA is referred to as "Obligations for gatekeepers" and Article 6 of the DMA is referred to as "Ob-

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47 Art. 1 of the Proposal for Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final

48 Dolný, J.; Mrázová, Ž., *Recent Developments in European Company Law: Harmonisation of Restructuring and Cross-border Conversion*, in: Evolution of Private Law – New Challenges, Publisher Instytut Prawa Gospodarczego, pp. 63-71

49 Dôvodová správa, DMA, p. 1

50 Cabral, L., Haucap, J., Parker, G., *et. al.*, *The EU Digital Markets Act*, Publications Office of the European Union, Luxembourg, 2021, p. 9, [https://publications.jrc.ec.europa.eu/repository/handle/JRC122910], Accessed: 1 May 2022

ligations for gatekeepers susceptible of being further specified." Article 6 can be seen as a legal basis for a relatively new element - more specific, as creator of space for dialogue between the concerned gatekeeper and the European Commission to fulfil specific obligations. As the proposal for a DMA regulation presupposes, individual obligations arising from this regulation will be directly incorporated into the technological solutions (procedures) used by the gatekeeper for a particular product. As a result, for a specific category of obligations falling under Art. 6 DMA, further clarification will be required, which will be accomplished directly by the concerned entity with the cooperation of the European Commission.

For the purpose of completeness must be specified, that legal act prior to the Digital Markets Act was Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which is a P2B (Platform to Business) regulation. In the literature, we meet with the statement that Regulation 2019/1150 was to a large extent also a model regulation for the Digital Services Act.[51] In this regard, we note that Regulation 2019/1150 laid down obligations for online intermediary providers, which consisted in particular of the requirement of transparency, unrestricted availability and complexity of the business conditions of online intermediary service providers vis-à-vis the commercial user. In addition, Regulation 2019/1150 imposed an obligation on the online intermediary service provider to indicate the main parameters determining the order and reasons for the relative importance of those main parameters compared to other parameters.

In order to maintain regulatory consistency, the Digital Markets Act builds on Regulation 2019/1150, not only by building on the definitions set out in Regulation 2019/1150, but also by the fact that the Commission can benefit from the transparency that online brokerage services and search engines must 2019/1150 to ensure that practices which, according to the list of obligations, could be illegal if access guards were involved. These aspects indicate, that Regulation 2019/1150 was in certain aspect a predictor of the Digital Markets Act.

## 6. SCRUTINIZED PRACTICES OF FACEBOOK IN TERMS OF RULES DEFINED BY DIGITAL MARKETS ACT

It is necessary to introduce that *Kerber* and *Zolna*, for instance, have already comprehensively dealt with the case of Facebook in an article which goes beyond the

[51] Busch, C,; Mak, V., *Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation*, Journal of European Consumer and Market Law (EuCML), 2021, p. 12, European Legal Studies Institute Osnabrück Research Paper Series, No. 21 - 03, [https://ssrn.com/abstract=3933675], Accessed 1 May 2022

scope of this paper. [52] Kerber and Zolna pointed in particular to the Article 5(a) of DMA, which defines that "in respect of each of its core platform services identified pursuant to Article 3(7) DMA, a gatekeeper shall refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679." In this regard, we also add that article 6(a) DMA would be relevant, falling into the category of obligation susceptible of being further specified. In practice, this will mean that there will be a dialogue between the concerned company and the European Commission on the technical incorporation of this obligation.

Whether and how the situation would change in the case of Facebook if we were based on the assumption that the DMA regulation is in force, hence applicable? First to be mentioned is that the nature of the DMA Regulation lies in its *ex ante* effects. Therefore, if an entity is identified as a gatekeeper, it is its duty to act in accordance with the wording of the DMA regulation. These obligations therefore result directly from his position. Consequently, no further investigation is required, if we could, for example, compare this with the necessity to define the relevant market in the context of competition. What is crucial for the nature of digital markets - is the ability of a fast, efficient and effective tool. As it turned out, competition law institutes have so far served very effectively to prosecute practices with certain digital specificities. Such enforcement through competition law institutes would prove problematic in the context of time - that is, the reasonable duration of proceedings by competition authorities that investigate and ultimately sanction such practices. This fact is also emphasized by the Commission in its proposal for a regulation DMA "… Article 102 TFEU does not always allow intervening with the speed that is necessary to address these pressing practices in the most timely and thus most effective manner."[53] Secondly, the institute of non-abuse of the dominant position may not be suitable and applicable in every case "…the Commission considered that Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers, given that a gatekeeper may not necessarily be a dominant player, and its practices may not be captured by Article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets. ".[54]

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[52] Kerber, W.; Zolna, K. K., *The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law*, 2021, [https://ssrn.com/abstract=3719098 or http://dx.doi.org/10.2139/ssrn.3719098], Accessed 29 March 2021

[53] Explenatory memorandum to Digital Markets Act, p. 8

[54] *Ibid.*

If we were based on the assumption, that company Facebook (currently already Meta) would be designated as a so-called gatekeeper, under ideal circumstances, combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services will be prohibited for this company. However, we consider it crucial that refraining from combining personal data may be validated by the consent of the user. It is questionable in this context that, if the conditions for using the platform were formulated in such way - that the platform could only be used under the given conditions- how and whether this would change the current situation. From a purely theoretical point of view (not just applying to the Facebook case) it would be an interesting concept that users would be given room to decide - one group of users would only have access to the basic service package provided that their data (from the third parties) would be not collected and further processed, while users who choose to provide their data as an alternative to "currency" would have additional benefits at their disposal. However, in the outlined case, special consideration should be given to legislation governing customer equality and non-discrimination.

## 7. CONCLUSION

Competition law is currently used as one of the tools to penalize the practices of large online platforms. These practices contain digital specificities, mostly in the context of personal data protection, the processing of large amounts of data generated by activity on these platforms, or the access of their competitors to the market (if the gatekeeper is in a dual position). Large online platforms, which could fall under the definition of a gatekeeper, have significant market power and it is unlikely that in the near future there will be entities in the defined areas that could compete with them or provide users with an alternative. This stable position provides the platforms a space to create conditions that may not be beneficial to users in all circumstances, not only in terms of data protection, but also in terms of the creation of the offer presented to them on the basis of the collected data. In this way, the position of commercial users of these platforms is also weakening. In the field of digitization, however, the ability to intervene quickly and efficiently is crucial. Referring to the Facebook case study, it can be stated that the classic tools of competition law can be perceived as effective, but they can be not very flexible in the dynamically evolving digital environment. The proceedings of the national competition authority began in 2016, with the administrative proceedings being referred to the national judicial authority, which referred preliminary questions to the Court of Justice of the EU, whereas the court considered it necessary to answer referred questions for the purposes of the main proceedings. The

proposed Digital Markets Act aims to address the issue of the competitiveness of the digital markets with new categories of obligations. These obligations are the result of an examination of the most fundamental unfair practices of gatekeepers and their aim is to eliminate them. The role of the Digital Markets Act is therefore to supplement or create an "extension of competition law" in the form of stricter rules for extremely large online platforms, which currently have a large market power in the defined markets of the digital sector. Obligations of gatekeeper resp. the objective of the proposal for the DMA does not interfere with the obligations created by the competition law framework, competences and powers for competition authorities, which are imposed and entrusted under the competition law rules. In practice, this will mean that if the access guard violates competition law rules even though he has complied with the obligations set out in the Digital Markets Act, his conduct may and will normally be affected by competition law. Simultaneously, Member States are not permitted to enact national legislation in the defined area that regulates the same aspects as DMA, in order to maintain regulatory consistency at EU Member State level.

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Preliminary communication

# THE POSITION AND REGULATION OF GATEKEEPERS IN THE CONTEXT OF THE NEW EUROPEAN LEGISLATION*

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***ABSTRACT***

*Over the last two decades, a better digital transformation has fundamentally changed the global economy and society. Digital services have become new tools and their importance for our social and economic life will continue to grow. When we adopted the e-commerce directive 20 years ago, many digital services and platforms such as Google, Amazon or Booking were in their initial stage or did not yet exist. The blockades as the consequence of the COVID pandemic have now strengthened the role of online platforms. People have changed their habits towards the online world so that they can do business, shop, work, learn and socialize. COVID-19 has led to an increase in online e-commerce and an increase in fraud, unfair practices, and other illegalities of various formats. The crisis has exposed the system's existing gaps and weaknesses, which has allowed dishonest services and traders to exploit people's current insecurity.*

*The Commission has proposed an ambitious reform of the digital space, a comprehensive set of new rules for all digital services, including social media, online marketplaces and other online platforms operating in the European Union: The Digital Services Act and The Digital Markets Act.*

*In this article, we will look at the Commission's proposal for The Digital Markets Act (DMA), which was published on December 15, 2020. In the last few years, it has been concluded*

* This work was supported by the Slovak Research and Development Agency under the Contract no. APVV-19-0424 "Innovative business: intra-corporate transformation, digital challenges, and the advent of artificial intelligence"

*that a small number of large digital platforms act as "gatekeepers" because they are essential gateways between business users and their potential customers. This allows these platforms to take advantage of the enterprise users' dependence on their services by imposing unfair business conditions. As this issue may not be adequately addressed in competition law, it has led the European Commission to propose a Digital Markets Act (DMA). The DMA should introduce more flexibility and adaptability in terms of imposing the "gatekeeper" obligations.*

*In this article, we will focus on the question of which digital platforms should be subject to ex ante regulation, and thus also the obligations contained in the DMA proposal. The methodology used to identify the "gatekeepers" cannot be separated from the problems that ex ante regulation seeks to address, as otherwise the DMA could end up regulating the wrong set of companies. The DMA proposal describes "gatekeepers" as providers of the core platform service (CPS) that meet three cumulative quality criteria. These criteria are presumed to be met if the relevant CPS provider meets the quantitative size thresholds. DMA includes a mechanism that allows CPS providers who meet these quantitative thresholds to escape labelling.*

*This article reveals the various provisions of the DMA and explains why the Commission has decided to regulate "gatekeepers" and how it can prevent the damage caused by large digital platforms.*

***Keywords**: Digital Market Act, Digital platforms, Digital Service Act, Digital transformation, E-commerce, Gatekeepers*

## 1. INTRODUCTION

Digital technologies have become a daily part of our lives, and the global situation, lasting for over two years, in connection with the ongoing COVID-19 pandemic has made it even more evident. The vast majority of our activities take place online. However, this fact has pointed out several shortcomings and legal questions related to the conduct of activities in the online environment.[1] In addition to the protection of personal data, illegal content on the Internet, geoblocking or consumer protection, a number of large platforms have recently emerged in the digital market environment, benefiting in some way from the sector in which they operate and representing a key position in today's digital economy. As a result of gaining their status, these platforms act as intermediaries for most transactions between end-users and commercial users. These large platforms[2] increasingly act as

[1] Bejček, J., *On the Impact of Digitalization of Economy and Competition Law – a Storm in a Teacup?*, in: Suchoža, J.; Husár, J.; Hučková, R. (eds.), Právo, obchod, ekonomika VIII., Košice: University of P.J. Šafárik in Košice, 2018, pp. 23 – 42, ŠafárikPress UPJŠ, ISSN 2453-921 X, ISBN 978-80-8152-649-7, available at: [https://poe.pravo.upjs.sk/wp-content/documents/POE_2018_zbornik.pdf], Accessed 25 May 2022

[2] Online platforms are generally defined as exclusive intermediaries, who stand between the direct service provider and the customer as the addressee of the service. – see more De Franceschi, A., *Uber Spain and the "Identity Crisis" of Online Platforms*, Journal of European Consumer and Market Law, 2018, Vol. 7, No 1, pp. 1-4, [https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/7.1/EuCML2018001], Accessed 26 March 2022

gateways and have a permanent position as a result of strengthening existing barriers to market entry. The European Commission argues that this anti-competitive behaviour could lead to "inefficient results in the digital sector in terms of higher prices, lower quality as well as less choice and innovation to the detriment of European consumers".

So far, the regulation of online platforms has generally been left to the Member States. The basic regulatory framework in relation to online platforms and online services is Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, especially electronic commerce, in the internal market (Directive on electronic commerce). It should be borne in mind that this Directive on electronic commerce was adopted in 2000 and that the current period of digitalisation calls for new legislation that sufficiently reflects the dynamics and developments in this area. In Article 1 paragraph 5 point b) Directive on electronic commerce is stipulated that "This Directive shall not apply to questions relating to agreements or practices governed by cartel law", the very wording of the Directive on electronic commerce precludes its application or its impact on competition rules. Therefore, until now, the legislation related to platforms and competition issues has been governed by primary law, starting with Article 101 Treaty on the Functioning of the EU, and the relevant secondary law. Secondary legislation completing the legal framework of competition legislation consists primarily of regulations.[3] Several experts share the need for new legislation to[4] be adopted at pan-European level, thus avoiding fragmentation of legislation and inconsistent access to and reduction of these large platforms at national level. It is therefore necessary to adapt legislation to current business models and to allow them to operate on the market for the benefit of the consumer, while guaranteeing a high level of protection of its candidates while protecting competition. The current competition and anti-trust policy is considered too slow to keep pace with this digital era. The new digital legislation was foreseen by the second priority of the current composition of the European Commission - a Europe fit for the digital age. As it states, "Europe must now strengthen its digital sovereignty and set standards instead of following the standards of others

[3] Important is also - Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186

[4] Rudohradská S.; Treščáková, D., *Proposals for the digital markets act and digital services act – broader considerations in context of online platforms*, in: Duić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, 2021, pp. 487-500, available at: [https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18317/10025] or Dolný, J., Mrázová, Ž., *Recent Developments in European Company Law: Harmonisation... of Restructuring and Cross-border Conversion*, in: Evolution of Private Law: New Challenges, Instytut Prawa Gospodarczego Sp. z o.o., 2020, pp. 63 – 71

– with a clear focus on data, technology and infrastructure."[5] It can therefore be concluded that DMA is one of the first initiatives of its kind to comprehensively regulate the strength of the largest digital companies. The new legal framework should therefore make it possible to guarantee the safety of users in promoting the development and competitiveness of companies in the sector. This legislative package consists of two separate proposals for regulations, on the one hand, the Digital Services Act (DSA)[6], which concerns the regulation of digital services and their content and on the other hand already mentioned above - Digital Market Act (DMA).

## 2. CALL FOR THE NEW LEGISLATION

Proposal of a Regulation of the European Parliament and of the Council of 15 December 2020 on contestable and fair markets in the digital sector (COM/2020/842) final 2020/0374 (COD) can be described as *ex ante* regulation, which represents a kind of superstructure of competition law. Directly in the binding part of the Regulation it is stated that the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) is not affected by the Regulation.[7] Traditional competition law institutes (e.g. abuse of a dominant position) have so far served as the basic legal framework for penalising the practices of "gatekeepers" of access, but such practices or conduct currently exhibit features of digital specificities which can hardly be sanctioned by standard regulatory instruments.[8]

Several online platforms have emerged in the digital markets – often as part of their own ecosystems – which have become key structural elements of today's digital economy and mediate the vast majority of transactions between consumers and businesses. The emergence of these access platforms is accompanied by three main problems: i) insufficient possibility of competition and weak competition in platform markets; ii) unfair trading practices towards commercial users; and iii) fragmented regulation and supervision of entities operating in these markets. These problems are caused by market failures, which hinder the self-corrective

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5 *A Europe fit for the digital age: Empowering people with a new generation of technologies*, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en], Accessed 27 March 2022

6 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [14124/20- COM (2020) 825 final] - Opinion on the application of the Principles of Subsidiarity and Proportionality

7 Art. 1 of the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final 2020/0374 (COD)

8 Broadbent, M., *The Digital Services Act, the Digital Markets Act, and the new competition tool*, Center for Strategic and International Studies, p. 4, 2020, available at: [https://apo.org.au/node/309351], Accessed 27 March 2022

process. The characteristics of the digital market may reinforce barriers to entry to the "watchdog" markets.

Trade relations are characterised by an extremely high degree of dependence and unbalanced negotiating positions. In addition, different national rules are issued in the EU as a partial response to the problems identified, leading to fragmented regulation and supervision. By weakening competition and market competitiveness problems arise, which may ultimately lead to market inefficiencies in terms of higher prices, lower quality, limited choice and lower levels of innovation to the detriment of European consumers. Addressing these challenges is particularly important given the size of the digital economy (estimated at 4.5% to 15.5% of global GDP in 2019) and the important role of platforms in digital markets.[9]

Digital market forces lead to huge efficiency gains. However, they also create a certain dynamic with a sudden radical decline in competition and a concentration of economic power around certain entities, where "the winner takes everything". The creation of this dynamics can lead to monopolistic markets without control and harm consumers in the long term, as IT business is sometimes tied to the use of technology platforms that do not have real competition. In digital markets, this position of platforms is referred to as "gatekeepers" because it is the gateway to these markets for other participants.[10]

While there are more than 10,000 such online platforms in the European digital economy and most of them are small and medium-sized enterprises, a small number of very large online platform companies receive the largest share of the value. As "gatekeepers" between businesses and citizens, they benefit from strong network effects. Some of them exercise such control over entire platforms that, in principle, existing or new market players cannot compete with them, no matter

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9 Accompanying document of the Regulation of the European Parliament and of the Council 2020/0374 of 15 December 2020 on competitive and fair markets in the digital sector (Digital Markets Act) COM (2020) 842 final 2020/0374 (COD) Note by the authors: The Commission consulted a wide range of stakeholders, whether from the private sector or users of digital services, civil society organizations, national authorities, academia, the technical community, international organizations, as well as the general public, on the preparation of this legislative package. A number of complementary consultation steps have also been taken to fully capture stakeholders' views on issues related to digital services and platforms

10 Alison group, *Máte Apple? Toto by ste mali vedieť. Alebo máte Android? Aj pre vás je to dôležité*, 2021, [https://www.alison-group.sk/report-bezpecnosti/mate-apple-toto-by-ste-mali-vediet-alebo-mate-android], Accessed 25 May 2022

how innovative and beneficial they may be.[11] Several sources[12] have highlighted and pointed out the economic strength of large online platforms that allow many businesses and consumers to access the digital economy. These are online intermediaries that bring together people or businesses seeking information, transactions and social interaction (buyers, sellers, advertisers, software manufacturers and users, providers of ancillary services, *etc.*).[13] Smaller businesses are increasingly reliant on a number of very large online platforms to access digital markets and consumers – the "gatekeepers" of the market. It is difficult for innovative digital firms and start-ups to compete with these very large online platforms. Their impact is amplified by the opacity and complexity of their large ecosystems and the significant information advantage they have over ordinary business users. The rapid rise of large digital platform firms creates unprecedented business models and technologies, but also tests the ability of governments and regulators to ensure fair and pro-competitive markets. Slow-moving competition policy instruments are not sufficiently equipped to fully address digital challenges.[14]

Accordingly, in December 2020, the European Commission adopted DMA to regulate the "gatekeepers" of the digital world by imposing direct restrictions on the behaviour of technology giants. Although the Commission did not specifically name any companies, it proposed criteria that will certainly capture, among others, e.g. Google, Facebook, Amazon, Apple, Microsoft, IBM, SAP and many others. These private undertakings have a strong intermediary position as they connect a large number of users with a large number of other undertakings.[15]

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11 As announced in March 2020 in the Digital Services Act package – an ex ante regulatory tool for very large online platforms acting as gatekeepers, the initial impact assessment is available, available at: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en], Accessed 25 May 2022

12 Cremer J. *et al.*, *Competition policy for the digital era: Report,* 2019, available at: [https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf], Accessed 25 May 2022; Furman, J. *et al.*, *Unlocking digital competition: Report of the Digital Competition Expert Panel*, 2019, Crown copyright ISBN 978-1-912809-44-8, available at: [www.gov.uk/government/publications] or [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf], Accessed 25 May 2022; Nadler, J.; Cicilline, D. N., 2020., *Investigation of competition in digital markets: Majority staff report and recommendations,* available at: [https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519], Accessed 25 May 2022

13 Cabral, L.; Haucap, J.; Parker, G.; Petropoulos, G.; Valletti, T.; Van Alstyne, M., *The EU Digital Markets Act,* Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-29788-8, [doi:10.2760/139337], JRC122910

14 *Ibid.*

15 Alison group, *loc. cit.,* note 10

DMA is one of the EU's latest efforts to create protection barriers for platforms, which seeks to prevent large technology companies, gatekeepers, from abusing their market power and to allow new and smaller firms to have a fair environment. While some types of anticompetitive behaviour are well known from classic competition cases, multilateral platforms based on personal data have found new ways of tying, bundling and self-preferencing that pose new challenges.[16]

The EU is currently also carrying out other additional policy enforcement activities, such as launching an investigation against Apple in June 2020, in relation to the conditions under which its app store had to be used. Particularly in the area of music streaming services, Apple has imposed on developers the obligation to use their own in-app purchasing system, as well as restrictions on developers' ability to inform iPhone and iPad users about alternative, cheaper out-of-app purchasing options. On 30 April 2021, following a preliminary investigation, the Commission sent a statement of objections informing Apple of its preliminary view that it had distorted competition in the music streaming market by abusing its dominant position to distribute music. streaming applications via its App Store.[17]

## 3. THE AIM OF THE DIGITAL MARKET ACT

DMA regulation is often referred to as a new competitive tool.[18] The objective of this Regulation is therefore to provide a fairer business environment for commercial gateway users. Users depend on these gateways if they want to offer their services in the Single Market. Everything is aimed at protecting end-users so that they can choose from better services and access them at fairer prices. In the area of merger control, the European Commission has invited Member States to refer (digital) cases to the Commission where a merger may significantly affect competition. These clarifications must allow the European Commission to assess concentrations similar to the non-notified Facebook and Instagram merger. This resulted in the consideration of a new competition instrument that would complement the existing competition law provisions at EU level in the form of a proposal

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16 Broadbent M., *Implications of the Digital Markets Act for Transatlantic Cooperation*, Center for Strategic and International Studies, 2021, available at: [https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation], Accessed 25 March 2022

17 An example is also the launch of an investigation against Facebook on 4 June 2021. The purpose of the investigation is to assess whether Facebook has infringed EU competition rules by using advertising data collected mainly from advertisers to compete in markets where Facebook operates, such as advertisements. According to the Commission, the formal investigation will also assess whether Facebook connects its online classified advertising service 'Facebook Marketplace' to its social network, thus infringing EU competition rules

18 Broadbent M., *op. cit.*, note 8, p. 8

for a DMA regulation. The proposal is in line with the DMS proposal and the Commission's digital strategy by contributing to ensuring a fair and competitive digital economy, one of the three main pillars of policy orientation and objectives published by the Commission in its Communication "Shaping Europe's digital future".[19]

As an example of sanctioning the conduct of large online platforms by standard competition law institutes, we cite the case of Facebook. The German antitrust authority (Bundeskartellamt) initiated proceedings[20] against the company in 2016, following a suspicion of abuse of a dominant position regarding the use of the platform's user data. The German authorities decided that Facebook abuses its dominant position on the market when collecting, linking, and using users' data, thereby violating the rules on the protection of personal data, which may also be an abuse of its dominant position by imposing unfair terms on Facebook users. The German antitrust authority did not impose a fine on the company concerned, but an obligation to incorporate defined rules into its terms of service and prohibited the company from automatically linking data on users from other sources to Facebook accounts without the users' permission. Since Facebook did not agree with the decision, it appealed to the Higher Regional Court of Dűsseldorf, which ordered the suspension of the Bundeskartellamt's decision. Finally, the case was brought before the Federal Court of Justice of the Federal Republic of Germany, which referred the questions for a preliminary ruling to the EU Court of Justice (C-252/21).[21] However, the case has not yet been finalised. The dispute is significant in terms of the further direction of regulation on the Internet and the decision is considered a milestone in the area of the right to privacy of internet users. The decision closes a three-year investigation of Facebook by the German Antitrust Authority. "*Facebook will no longer be able to force its users to agree to the virtually unrestricted collection of non-Facebook data and its assignment to Facebook users' accounts*," said Andreas Mundt, head of the antitrust office. According to the Authority, Facebook abused its position by forcing users to allow it to collect data from other services belonging to the company, such as WhatsApp and Instagram, but also from third party websites and to associate them with Facebook

[19] Regulation 2019/1150 of the European Parliament and of the Council (EU) of 20 July 2019 on the promotion of fairness and transparency for commercial users of online intermediation services, (Text with EEA relevance), [2019], OJ L 186

[20] Bundeskartellamt Case B6-22/16, 6 February 2019, available at: [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html], Accessed 25 March 2022

[21] Case C-252/21, Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc. and Others v Bundeskartellamt, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CN0252], Accessed 15 May 2022

accounts.[22] The case in question was also analysed in more depth in the Slovak professional paper.[23]

Another notable example from Austria and Germany is Amazon, which has faced an investigation of its anti-competitive behaviour since 2018. Amazon has been investigated in relation to the application of unfair terms to vendors, which included a wide range of contractual terms such as the decisive place of dispute Luxembourg, the extension of vendors' liability, the authorisation to block vendors' accounts, the conditions for returning goods and payments, the imposition of confidentiality obligations and others.[24] Finally, the proceeding ended with a settlement where Amazon voluntarily accepted commitments to refrain from using certain practices. The investigation itself lasted over seven months.[25]

With reference to the examples in question, it can be hypothesised that regulation using the instruments of current competition law is not excluded, however they are relatively lengthy procedures. In addition to the problem of subsuming the modern practices of "gatekeepers" of access under standard regulatory competition instruments, a possible fragmentation of the internal market appears to be a risk, which could be caused by the inconsistent approach of Member States to penalise "gatekeepers" of access and requires close interaction between national competition authorities.

## 4. WHO IS A "GATEKEEPER"

A "gatekeeper" is a large online platform that has not yet been legally defined. This platform has such an impact that it controls access to digital markets and has gained a strong position in them.[26] For gatekeepers, DMA defines both quantitative criteria (relating to indicators such as market shares, the number of users affected by the operation of the platform, the time users remain on the platform site and the annual economic revenues of the platform) and qualitative criteria

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22 Deutschlandfunk, Bundeskartellamt zu Facebook und GoogleBonn gegen Silicon Valley, 22 June 2021, available at: [https://www.deutschlandfunk.de/bundeskartellamt-zu-facebook-und-google-bonn-gegen-silicon-100.html], Accessed 25 March 2022

23 Kalesná K.; Patakyová M. T., *Digital platforms: competition law versus ex ante regulation*, Právny obzor, Vol. 104, No. 1, 2021, pg. 31, available at: [http://www.pravnyobzor.sk/12021/po12021-kalesna-patakyova-digital-platforms-competition-law-versus-ex-ante-regulation.pdf] Accessed 25 May 2022

24 Cabral, L. *et. al.*, *loc. cit.*, note 12

25 Report 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 2017, COM (2018) 482 final, 18 June 2018

26 Clevinger, A., *What is a Gatekeeper in marketing: definition and tips*, 5 May 2021, available at: [https://snov.io/glossary/gatekeeper/], Accessed 25 March 2022

(which are more difficult to identify but could, for example, indicate the ability of the platform to control access to a large number of users). For the first time, in Article 3 paragraph 1, DMA introduces and defines a new concept, a new category of entities – "gatekeepers" of the approach. Accordingly, a provider of essential platform services shall be designated as a gatekeeper of access where: a) it has a significant impact on the internal market; b) it operates a core platform service that serves as an important gateway for commercial users to end-users; and c) it has an established and lasting position in its activities or can be expected to achieve such a position in the near future.

This status implies obligations for the data subject consisting in carrying out of certain practices, refraining from certain action or prohibiting a certain action, which are further defined in the article below. In line with the opinion of the national competition authorities on DMA, this legislation has been identified as an effective complementary instrument. Following the above, the role of the European legislative authorities is made more difficult by the fact that it is quite difficult to maintain a balance between creating an environment open to digital innovation so that it can be globally competitive, while maintaining a high level of protection for users of these platforms and protecting competition.[27]

Defining which platforms will be designated as "gatekeepers" and therefore subject to the obligations and prohibitions of DMA is important for several reasons. Firstly, this is important for platforms that may potentially fall under the criteria set for appointment, as designated "gatekeepers" will be subject to a comprehensive set of obligations and prohibitions that will have a significant impact on their business operations. Secondly, the designation criteria must avoid the pitfalls of excessive and insufficient inclusiveness. Excessive inclusiveness may adversely affect the strength of the obligations and prohibitions imposed on designated "gatekeepers", as some digital platforms that are not apparent "gatekeepers" (because they are not a necessary gateway between the enterprise and end-users) are nevertheless concerned that they will be designated for them (because they will meet the quantitative thresholds set out in Article 3 paragraph 2 of the Act) are likely to lobby against DMA, thereby reducing its industrial support. These conditions will be met if the company has:

- a strong economic position, a significant impact on the internal market and is active in several EU countries,
- a strong intermediary position, which means that it connects a large user base with a large number of enterprises,

[27] Cabral, L. *et. al.*, *loc. cit.*, note 13

- (or will soon have) a firm and lasting market position, which means that it is stable over time.[28]

Among the duties of "gatekeepers" we include:[29]

a. notification obligation: e.g. when the service provider of the underlying platform meets all the thresholds of the gateway administrator, it shall inform the Commission thereof within three months;

b. the obligation to ensure freedom for users: this includes, for example, freedom of pricing for corporate users (allowing business users to apply different prices and terms to the same products or services through third-party online intermediation services), freedom to do business outside the platform (allowing business users to promote their assortment and conclude contracts with their customers outside the gatekeeper's platform), and others;

c. the obligation of data portability in accordance with the GDPR;

d. mandatory transparency provisions:
   - in online advertising: providing advertisers and publishers with information on the prices they have to pay and the remuneration to be paid to them for the advertising services of the gatekeeper, and providing them with information on the measurement tools and information necessary to enable them to carry out their own independent activities, verifying the advertisements hosted by the gatekeeper's platform;
   - in search engines: ensuring access to other providers of online search engines under fair, reasonable and non-discriminatory conditions for the evaluation, querying, click-through and display of search data by end-users;
   - for profiling: the provision of descriptions of how consumer profiles used by the gatekeeper in their core platform services are controlled in a technologically independent manner.

e. Equal access to app stores: fair and non-discriminatory general conditions of access for business users to the software app store.

On the other hand, "gatekeepers" are also subject to certain prohibitions:[30]

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28 European Commission, *The Digital Markets Act: ensuring fair and open digital markets*, 2021 [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en], Accessed 25 March 2022

29 Domokos, M.; Horvát, K.; Petrányi, D.; Szendrő, S., CMS: law, tax, future, *Digital Markets Act: a new and fair business framework for large platforms*, 2022, available at: [https://cms.law/en/int/publication/digital-markets-act], Accessed 15 May 2022

30 *Ibid.*

a. Prohibition of combining personal data without the consent of the GDPR: it is forbidden to combine personal data obtained from the services of the core platform with personal data from any other services offered by the gateway administrator or with personal data from third party services and from logging end-users into other services of the gatekeeper in order to combine personal data, without the consent of the GDPR.

b. Prohibition of preventing or restricting corporate users from raising issues with any relevant public authority in connection with any practice of the gatekeeper.

c. Prohibition of mandatory subscription to other services: users are not required to subscribe to or register for other core platform services as a condition of accessing, registering or registering for any of the core platform services.

d. Information barrier: competition with commercial users no longer uses publicly available data generated or provided by business users of the services of the underlying platform.

e.qNon-discrimination in the evaluation: more favourable treatment of the products and services of the gatekeeper compared to similar services or products of third parties is prohibited and fair and non-discriminatory conditions must apply to such evaluations.

The regulation in question also includes penalties which, in the event of non-compliance with the DMA rules, fines up to ten percent of the company's total worldwide annual turnover or penalties of up to five percent of the average daily turnover will be imposed on the operators concerned.[31] Consequently, in the event of a systematic breach by the "gatekeepers" of the obligations imposed by the DMA, additional remedies may be imposed on the "gatekeepers" following the market investigation. However, such remedies will have to be proportionate to the offence committed. Where necessary and as a last resort, non-financial remedies may be imposed. These may include behavioural and structural measures, e.g. the sale of a (part of a) business.[32]

## 5. DIGITAL SERVICE ACT

Although DSA is not the subject of this article, its connection with DMA is significant, we will at least marginally approximate its main contours. Digital services cover a wide range of online services, from simple websites to Internet infrastruc-

[31] Alison group, *loc. cit.,* note 10

[32] European Commission, *The Digital Markets Act: ensuring fair and open digital markets, loc. cit.,* note 28

ture services and online platforms. The rules specified in the DSA apply primarily to online intermediaries and platforms (e.g. social networks, app stores and online platforms for travel and accommodation, etc.) The DSA contains rules governing online platforms of the gatekeepers. Trafficking and the exchange of illicit goods, services and online content is also a major concern. Online services are also being abused by the manipulative algorithmic systems to amplify the spread of disinformation and for other malicious purposes. Despite a number of targeted, sector-specific interventions at EU level, there are still significant gaps and legal burdens that need to be addressed. There are many discussions on aspects related to illegal content and responsibility for such content. The liability regime of online platforms under the conditions of the existing regulation was processed in a valuable article by Rózenfeldová and Sokol.[33] On the other hand, the Digital Markets Act (DMA), regulates the market behaviour of digital platforms.[34]

The pandemic clearly demonstrated how quickly and to what extent irrationality can prevail regardless of education and age. In India, reports spread through social media have led to pogroms.[35] In response to the Australian radical´s shooting at a mosque in Christchurch, New Zealand, which was broadcast live on social media, Microsoft's president, Brad Smith, argued that the technology sector needs to do more, including working with governments, through legal guidance and working with regulators. In response to the massacre, New Zealand's Prime Minister Jacinda Ardern called on Facebook to introduce "ethical algorithms". Facebook has indeed come up with artificial intelligence that should block live broadcasts in a similar violent case. The Cambridge Analytica case was also a big problem for this company. This was a large-scale abuse of private data for commercial policy purposes, with possible overlap into the electoral process. Until then, and even shortly after, Facebook was reluctant, and according to some statements, unable, to effectively regulate content.

At the political level, the problem, as Urmas Villmann said, is that minority votes receive extreme attention. Some politicians (Donald Trump, Ľuboš Blaha) have seized the opportunity to spread their agenda based on negative emotions and

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33 Rózenfeldová, L.; Sokol, P., *Liability regime of online platforms new approaches and perspectives*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 3, 2019, p. 871

34 CMS: Francis Lefebvre, *Régulation des marchés numériques. La proposition de la commission est maintenant sur la table*, 2021, available at: [https://cms.law/fr/fra/news-information/regulation-des-marches-numeriques], Accessed 25 March 2022

35 Author's note: Pogrom is a violent action against a religiously, racially, or nationally defined group of people, usually associated with murder and looting. In a broader sense, mass violent action against any group of the population

half-truths through social networks. On the other hand, research shows that most people are aware that they receive free internet services in exchange for giving up part of their privacy and that this trade suits them. Targeted advertising, however, has not only benefited consumers in the form of free services or more relevant advertising, but above all has increased the competitiveness of small and medium-sized enterprises, which have been able to start effective advertising campaigns with a minimum budget and thus compete with established players. In this way, internet platforms have managed to increase competition on the market more than all the antitrust authorities combined.

It can therefore be said that one of the main shortcomings of DMA is the very definition of "gatekeepers". They do not really hold a dominant position within the economy as a whole. In digital services, too, there is intense competition between platforms, while at the same time their position on the market is constantly being confronted by new innovators. The only space where the gatekeepers have the ability to influence the rules of the game is on their own platform. There, they have full control over the setting of conditions for users but have no incentive to set them unfavourably. This is best seen in the various practices that the DMA proposal restricts or directly prohibits.

## 6. CONCLUSION

At present, the European institutions have consistently pointed out that attempting to legislate on the subject at European level is undoubtedly more effective than at national level.[36] According to the European Commission, DMA will address the way in which some technology companies have used their size and ingrained position to become "gatekeepers" whose control over access to digital markets gives them disproportionate power over other companies and consumers. The adoption of DMA[37] will increase companies' chances of finding a foothold in digital markets and help them overcome barriers stemming from market failures or unfair trading practices of "gatekeepers". It will offer a customized regulatory solution in

[36] CMS: Francis Lefebvre, *loc. cit.*, note 34

[37] On 25 March 2022, a so-called "fast-paced political agreement" was concluded between the European Parliament and the EU Member States on DMA. Internal Market Commissioner Thierry Breton said: "This agreement concludes the economic part of our ambitious reorganisation of our digital space in the EU internal market. We will quickly work on determining the "gatekeepers" on the basis of objective criteria. They will have to comply with their new obligations within 6 months of designation. Through effective enforcement, the new rules will bring increased competition and fairer conditions for consumers and business users, allowing more innovation and choice on the market. No company in the world can turn a blind eye to the prospect of a fine of up to 20% of its global turnover if it repeatedly breaks the rules." European Commission, *Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets*

an environment where there is currently a gap. This will encourage the emergence of alternative platforms that could provide quality innovative products and services at affordable prices. A significant reduction in the fragmentation of the internal market is also expected, thereby unlocking the growth potential of the digital single market.[38] The new rules, which created a level playing field, would allow small and medium-sized enterprises (including commercial users competing with "gatekeepers")[39] to grow across the internal market by removing significant barriers to market entry and expansion. It can be expected that the planned measures could also lead to greater competition between platforms for commercial users. This is expected to translate into higher quality services at more competitive prices and also in higher productivity. In addition, commercial users would have more confidence in online sales as they would be protected from unfair practices.[40] The burden on the Commission to implement this initiative (especially the redistribution of existing jobs) is low compared to the economic benefits. National authorities would have to bear some minor administrative costs.[41] Ultimately, DMA gives the Commission the power to conduct market surveys to ensure that the obligations laid down in the Regulation are kept up to date in the constantly evolving reality of digital markets.

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UDK 352:004.738.5]:614.4
Review article

# „SMART CITY" CONCEPT AS A POSSIBLE ANSWER TO NEW CHALLENGES IN POST-COVID ERA

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***ABSTRACT***

*The "Smart City" concept and "smart digitalization" represent implementation of information and communication technologies in local government units. This is a new approach to local governance in managing various local government services and delivery of goods. Local government represents a form of political and administrative territorial organization, with specific local tasks and services regarding the local community. It has a separate jurisdiction and specific autonomy and functions mostly independently of the central government administration. Different administrative and political systems have different models of local government organization. The position of local government units depends on the degree of centralization present in the political system. Local government organization and public authorities are focused on delivery of goods and maintaining various public services for the local community, and their services usually have a local character. Their radius of influence is territorially limited in local units and social communities connected with these units. Services and tasks provided from local government units are specific because they usually influence daily life and quality of living in the local community. The concept of "Smart City" and implementation of "smart digitalization" in managing local public tasks and delivery of local services and goods can improve local governance and help in establishing an efficient model of local government administration. In this paper a comparative and deductive approach is used to explain main elements of the "Smart City" concept and their application to local government tasks and obligations. Second, it uses a synthetic approach to explore how implementation of "smart digitalization" and the "Smart City" concept can be used as an efficient tool for social, economic, and political challenges in the post-Covid era.*

***Keywords:*** *challenges, digitalization, local self-government, smart cities*

## 1. INTRODUCTION

The Smart City model is new approach in local governance, established as a result of implementation of information and communication technologies in managing local government administration. This model represents a unique approach in the

administration of various local government activities, from political participation of the citizens and other subjects in local society, to delivery of local public goods and services. "Smart City" is not only a digital platform for the connection of various local activities. It is a model which provides the institutional answer of local government bodies with possible solutions for many various political problems and challenges in the local community. In that sense, the digital platform is a basic tool for implementation of information and communication technology to support local government services and tasks. The second aspect of the implementation of digital technologies is a proactive approach in implementation of different digitalizing public services important for daily life in the local community. This proactive approach needs to ensure flexible digital services, which can be adopted according to the interests of local users and promote the possibility of political and democratic participation of citizens in the local community. It can detect two main approaches in the development of "Smart City" government. The first is in relation to the participation of citizens in the political, social and economic life of the local community.[1] Implementation of the "Smart City" model needs to ensure opportunity of participation, which includes interaction between local government bodies, non-government organizations and other citizens in local community. That includes various forms of e-government services such as e-referendum, e-election, e-participation, possibility of discussion in social networks and digital platforms developed for such purposes, etc. All of these services represent implementation of the e-democracy concept in organization and functioning of the local community.[2] The second approach is related to delivery of public goods and services provided from local public bodies and institutions. The implementation of e-administration services can improve the quality and availability of those services and ensure interaction between citizens as users and local public authorities as providers. That can ensure the possibility of two way-communication, where local authorities have feedback from citizens, which helps in improving local government services. On the other hand, citizens can impact on the quality and efficiency of delivering services and goods through interaction with local government bodies and other local services providers.

The implementation of "Smart City" government depends on the organization of the local government system. Different countries have different models of local government organization implemented in their territorial organization. Some countries prefer territorial organization with large local government units, other

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1 Irvin, R.; Stansbury, J., *Citizen Participation in Decision Making: Is it Worth the Effort?,* Public Administration Review, Vol. 64, No. 1, 2004, pp. 55–65

2 Anderson, L.; Bishop, P., *E-Government to E-Democracy*, Communicative Mechanisms of Governance, Vol. 2, No. 1, 2005, pp. 5 – 26

countries develop organization of territory with small local units. According to this, jurisdiction and authorities of the local government units are not the same as their fiscal and administrative capacity. Large local government units usually have large institutional capacity with more administrative, personal and material resources. They can manage many different local public tasks or organize delivery of local public services and goods. Also, they organize various social and economic activities which connect many of the local interests of citizens in the community. The size of local government units can be important in determining what type of services and local public tasks can be the jurisdiction of local governments in their relationship with central government administration and their decentralized territorial bodies. The balance between central government administration and local self-government units depends on the organizational model of local self-government and level of decentralization in managing public services and disposition of public authorities between central and local government bodies. The implementation of the "Smart City" model and application of smart digitalization in local self-government can be easier if local government units have personal, institutional, and administrative capacity for their application.[3]

In the post-Covid era, two main processes can be predicted which could be caused in local self-government. The first process is consolidation related to the economic and social impact on the development of society, including local self-government. That includes implementation of adoptive measures for the harmonization of the negative influence of measures for protection against spreading disease in the community. Local self-government was the supporting factor to the central government administration in implementation measures against Covid-19, and first affected by their negative effects. Measures against Covid-19 were centrally managed, but local government units were observed and supported their implementation on the local community. The second process is advancing in implementation of new digital technology, as a result of implementation of Covid measures such as self-isolation and quarantine. The extension of technical limits with physical measures such as quarantine, isolation, self-isolation, limitation of interpersonal contacts to prevent spread of disease opened up the possibility of implementation of digital technology for distance communication. Many people were prompted to use digital technology to manage daily tasks and obligations and to communicate with other people. That situation encouraged rapid expansion of the application of new digital technologies, including developed digital platforms with incorporated models of e-government. A special type of those models was the "Smart City" model, which is a form of smart digitalization for implementation in local

[3] Halegoua, G., *Smart Cities, The MIT Press Essential Knowledge Series,* The MIT Press, Cambridge Massachusetts, 2020, pp. 14 – 15

self-government organization. In this paper, how the application of the "Smart City" model and smart digitalization can help local government units in overcoming consequences conditioned by the influence of protective Covid measures on daily life in the local community will be analyzed.

## 2. METHODS

Methods used in this paper are deductive analysis and inductive presentation of contemporary "Smart City" models and their implementation in local self-government institutions. Basic elements and main aspects of the "Smart City" model and their implementation in local government institutions will be analyzed. Special attention will be dedicated to implementation of various aspects of "Smart Cites" in many elements of their application to citizens, business subjects and government and non-government institutions. After deductive analysis of e-government solutions and "Smart City" model application, the possibility of implementing the "Smart City" model true smart digitalization of local self-government units will be actualized. This implementation would describe the true inductive synthesis of basic elements which describe e-government models and the main aspects in the functioning of the "Smart City" model true implementation smart digitalization in local government units.

## 3. RESULTS

### 3.1. Basic elements of "Smart City" model in local self-government

Implementation of the "Smart City" model represents the application of information and communication technologies in local governance with the aim of interconnecting different public tasks and delivery of public goods to provide citizens a better quality of public services.[4] The Smart City model also needs to ensure easier possibility of participation of citizens in social, political and economic life of the local community.[5] In that sense, the Smart City model represents a type of e-government, with specific elements adopted for implementation on local government units.[6] The main difference between the e-government model implemented on central government administration and the "Smart City" model implemented on local government units is in the type of implementation. National e-government

[4] Buffat, A., *Street-Level Bureaucracy and E-Government*, Public Management Review, Vol. 17, No. 1, 2015, pp. 149 – 161

[5] Söderström, O.; Paasche, T.; Klauser, F., *Smart cities as corporate storytelling*, City: Analysis of Urban Change, Theory, Action, Vol. 18, No. 3, 2014, pp. 307 – 320

[6] Albino, V.; Bernardi, U.; Dangelico, R., M., *Smart Cities: Definitions, Dimensions, Performance, and Initiatives*, Journal of Urban Technology, Vol. 22, No. 1, 2015, pp. 3 – 21

services include digitalization of public services and availability of public tasks provided by central government and their institutions. These services have a global impact on the functioning of the state and life of citizens at a national level. Their effects have a national impact for the citizens no matter where they live. Local e-government services are oriented towards the local community and its local public needs.[7] In the local community, public needs have a local character, and they are mostly oriented towards local services important for daily life in the community. Those services are oriented towards delivering services and goods managed by local government bodies and institutions. Providing local digital services depends on the institutional capacity of local government units. If they have strong capacity because of large fiscal, administrative, and political autonomy, they can implement various digital services for the coordination of local public tasks and activities. The second aspect of digital services is a digitalized form of political participation of the citizens in the local community. This includes implementation of e-democracy services such as e-referendum or e-elections. Another element can be developing digital platforms for using local social networks to stimulate discussions on many ~~of~~ social and political matters in the community important for social, cultural and economic development. Local digital platforms can be a useful tool for acceleration and dynamization of social interactions in local community.[8]

Elements of "Smart City" government can be described with different dimensions of e-government implementation. Application of these dimensions defines the possibilities of the "Smart City" model and the possibility of using smart digital technologies at a local level.[9] There are four dimensions of e-government implementations: government to government, government to citizens, government to business and government to non-governmental organizations.[10] Implementation of e-government elements on local self-government units predicts some specific adjustment to local peculiarities. Application of the government-to-government dimension includes interaction between various parts of local government units and central government administration. These interactions mean that the "Smart City" digital platform must ensure a connection between different participants in digital communication. Platform must assure vertical and horizontal communication between various parts of central and local government bodies. Central government bodies ensure availability of public digital services which can be provided

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7 Ruano de la Fuente, J., M., *E-Government Strategies in Spanish Local Governments*, Local Government Studies, Vol. 40, No. 4, 2014, pp. 600 – 620

8 Hollander, R., G., *Will the real Smart City please stand up? Intelligent, progressive, or entrepreneurial? City: Analysis of Urban Change,* Theory, Action, Vol. 12, No. 3, 2008, pp. 303 – 320

9 Wang, D., *Foucault and the Smart City*, The Design Journal, Vol. 20, No. 1, pp. S4378 – 4386

10 Menash, I. C.; *Impact of Government Capacity and E-Government Performance on the Adoption of E-Government Services*, International Journal of Public Administration, Vol. 43, No. 4, 2020, pp. 303. – 311

from central government authorities.[11] These services are additional support to local government services managed by local government authorities and represent vertical communication between central and local government levels. Horizontal communications existing between various local government institutions and local subjects which participate in delivery of local government services. This interconnection needs to ensure an interactive approach in managing and using digital services, with additional tools which can facilitate access and using digital services available from the digital interface. Government to citizens' dimension represents the relation between local government bodies and other participants that provide local digital services on the one hand and citizens on the other, who are daily users, with feedback which can help in improving ~~of~~ local digital services. In this type of correlation, it is important to ensure two-sided communication between users and providers of local digital government services.[12] This is important in measuring the process of quality of local public service delivery and customer satisfaction with provided services. The main characteristics of public services are continuity in delivery of goods and services, availability to all citizens and other public consumers, responsiveness and efficiency in delivery to the consumers. They are also characterized by the existence of public interest, which is an additional constitutional element of their maintenance. Digitalization of these services aims to improve all constitutional elements and ensure better coordination in their managing and delivery. Government to business are the third dimension of e-government services. It represents implementation of communication and information technologies in improving public services important as an institutional and regulatory framework in development of utilities and other business entities in society.[13]

Local implementation of e-government services includes broad support to business entities in local community, especially local oriented economic subjects. This support is important for their efficiency and ability to perform services and goods to fulfill needs of citizens in the local community. Implementation of government to business in the "Smart City" model means creating of stimulating framework for development for start and development of local business solution. Usually, this type of service is connected with central government services for support of economic activities and maintaining business entity.[14] In that sense, "smart gov-

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11 Wyld, D. C.; *The 3Ps. The Essential Elements of a Definition of E-Government*, Journal of E-Government, Vol. 1, No. 1, 2004, pp. 17 – 22

12 Atkinson, R. D.; Leigh, A., *Customer-Oriented E-Government*, Journal of Political Marketing, Vol. 2, No. 3 – 4, 2003, pp 159 – 181

13 Awan, M. A., *Dubai e-Government: An Evaluation of G2B Websites*, Journal of Internet Commerce, Vol. 6, No. 3, 2007, pp 115. – 129

14 Yang, K.; Rho, S., *E-Government for Better Performance: Promises, Realities, and Challenges*, International Journal of Public Administration, Vol. 30, No. 11, 2007, pp. 1197 – 1217

ernment" platform can ensure unique and integral approach to the central and local public services and tasks which are needed for successful development of economic activities. The fourth dimension is government to the non-governmental organizations. That includes implementation of smart digitalization in promoting social, cultural, and political activities and participation of citizens and social institutions in community life. Implementation at local level means creation of regulatory framework for institutional engagement citizens and non-governmental institutions in daily life of local community. Non-governmental organizations can participate in provision of various public services and their provision can be improved by implementation of digital technologies important for their support to the local community. That means creation of a digital platform which can connect services provided by central and local government authorities, non-governmental institutions, and different utilities with various regimes of public and private partnership. The dimension "Government and non-governmental organization" also includes possibility for participation of different interest groups in the community. These groups can shape their interests in society, which depends on their current economic, social and cultural position in local community. This dimension promotes their possibility to participate in local public services, especially in some social, educational and cultural activities.

A special aspect of the Smart City concept is the possibility of local digital political participation or local e-democracy. This includes implementation of digital technologies in the democratic life of the local community. In that sense, the "Smart City" concept is a part of e-government doctrine with specific implementation at the local level. It can be also divided into two main elements: e-administration and e-democracy. E-administration as a component of "Smart City" is oriented towards promoting local digital public services provided by local government authorities. Local digital public services are usually integrated with the common interface with a unique quality of service to all users in the local community. E-democracy includes citizen's participation in the local community in daily political and social life. That means various forms of formal and informal citizen activities in political and social processes. The process of digital communication ensures better communication and visibility between citizens in the local community.

Formal citizen activities include using institutional channels on interaction between citizens, political institutions, and local administrative bodies. These channels can be useful tools as a support to formal citizen's initiatives such as public discussions and initiatives important in process of adoption and implementation of legal documents and regulations important for development and daily life of the local community such as general urbanistic planning and other urbanistic documents important for development of urban society, legal acts regarding com-

munal order and other regulations important for quality of life and environment protection in the local community. In that sense, public discussions and interaction of different ideas and opinions can be made much easier by using digital applications developed as a part of the "Smart City" digital platform. Digital tools for implementation of digital elections are developed as one of the possible elements of digital democracy. These tools need to provide formal participation of citizens in the local community by using digital application at "Smart City" platform, and secure increased opportunity for citizens' participation and their visibility in democratic processes, especially younger voters and people who already use new digital technologies in daily life.

Informal citizens' activities are connected with the possibility of participants in the local community to explore and present their ideas and opinions related with social, political and economic happenings and processes important for daily dynamic of life in local society. Those opinions are important for dynamics of political and social life in community. Application of digital channels by implementation of "Smart City" platform smart digitalization can improve local interaction and ensure better connection of people in local relations. Implementation of digital technologies ensures better possibility of communication between local community members and visibility of their ideas, plans and intentions. This can be helpful in support development of local civic society and better inclusion of community members.

Development of the "Smart City" model is important element of implementation e-government solutions in providing local public services and managing social and political processes in local community. These solutions always include implementation of tools needed for improving interaction of users and providers in public service delivery, but also tools for interaction of community participants in local collective actions.[15] Some of the facts show that modern cities use 75 % of global energy and produce 80 % of $CO_2$ emissions.[16] For sustainable development of urban areas, it is important to develop projects for integration of various organizational parts of contemporary cities such as transportation, energetic, wa-

[15] Komninos, N., *et al., Smart City Planning from an Evolutionary Perspective*, Journal of Urban Technology, Vol. 26, No. 2, 2019, pp. 3 – 20

[16] Development of smart cites model presents challenge for public administration and local government reform and their implementation on local communities because of requirement for energetic and ecological sustainability. Some of the EU programs are supporting development of smart cities model such as Intelligent Energy Europe Program, which includes trainings on new construction technics, that leads to energy savings, improving the effectiveness of support schemes for electricity generation from renewable energy sources across Europe and helping Europe's cities to develop energy-efficient and cleaner transport. Lazaroiu, G. C.; Roscia, M., *Definition technologies for the smart cities model*, Energy, Vol. 47, No. 1, 2012, pp. 326. – 332

ter supply management, waste management and communal services and services which provide democratic participation such as elections, referendums and public discussions.[17]

The Smart City model provides integration of different aspects of smart digitalization in local implementation of e-government models. In that sense, it can be facilitating digital integration of public services provided by city administration, corporate services provided by private enterprises or mixed public-private utilities, services provided from social and political institutions at regional and local level and public services created from citizens or private utilities and corporations incorporated in local digital platforms. The main goals in integration of this platform are quality of life, administrative efficiency, health and wellness, economic development, ecological and energetic sustainability, public safety and traffic mobility.[18] Achievements of the Smart City model usually are acceleration of innovation and economic progress, improving local governance, management and working operations in public authorities, open society with available data which leads to connectivity, accessibility and security.[19]

### 3.2. Key elements for development of "Smart City" platform

Development of the "Smart City" model depends on elements important for building a Smart City platform. These elements are values, innovation, governance, finances, information management, connectivity and accessibility and local infrastructure.

Values are elements which describe benefits from implementation of the "Smart City" platform to the local community.[20] These benefits can be described by the main aspects of "Smart City" implementation.[21] The first aspect is provision of "Smart City" services from private and public utilities and other organizations which create services and information with useful outcomes for their stakeholders. Those services are commercial services useful in the daily life of community such

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17 Lom, M.; Prybil, O., *Smart City evaluation framework (SMACEF): Is a Smart City solution beneficial for your city?*, Journal of Systemics, Cybernetics and Informatics, Vol. 15, No. 3, 2017, pp. 60 – 65

18 Wallis, J.; Zhao, F., *E-Government Development and Government Effectiveness: A Reciprocal Relationship*, International Journal of Public Administration, Vol. 47, No. 7, 2018, pp. 479 – 491

19 See more in: Lombardi, P., *et al., Modelling the Smart City performance*, Innovation: The European Journal of Social Science Research, Vol. 12, No. 2, 2012, pp. 137 – 149

20 Grimsley, M.; Meehan, A., *E-Government information systems: Evaluation-led design for public value and client trust*, European Journal of Information Systems, Vol. 16, No. 2, 2007, pp 134 – 148

21 Caragliu, A.; Del Bo, C.; Nijkamp, P., *Smart Cities in Europe*, Journal of Urban Technology, Vol. 18, No. 2, 2011, pp. 65 – 82

as traffic services, taxi services, supply services and delivery services.[22] The second aspect are smart communities as part of the "Smart City" platform such as local neighborhoods, university campuses, business districts etc., which function as unique micro digital units in providing "Smart City" digital services. They develop specific smart digital services to fulfill the needs of their users and stakeholders. The third aspect represents citizens and community residents who can also be Smart City providers in the local community and contribute to the development of the "Smart City" platform. These residents can participate in the "Smart City" platform with additional information which helps in daily living of the community.[23] That information is related to public security, daily events in neighborhoods and the dynamics of living in local organizational units such as parishes, city districts and other forms of sub-municipal units.

Innovation is another element to describe development of "Smart City" platform as a part of implementation of the e-government model in the local community. Local public needs are the main element which push forward innovations on the "Smart City" platform. Those needs induce many innovating applications to support daily activities in local communities such as training, various workshops, public discussions etc.[24] Innovations also contribute to developing cooperation between local community, business, and academic society in implementation of smart digital solutions on daily life of citizens.[25]

Governance is one of the elements important for the functioning of central and local government authorities. It presents application of contemporary administrative doctrines to improve functioning of central and local government administration.[26] Governance introduces good practices and principles important for the organization and functioning of public administration. It also defines relations and interactions with citizens and political institutions.[27] In that sense, gover-

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22 Example of those services are: Waze/Google Traffic for traffic services information, Uber or Bolt for personal mobility, Glovo or Wolt as food delivery services, etc.

23 Caird, S. P.; Hallett, S. H., *Towards evaluation design for Smart City development*, Journal of Urban Design, Vol. 24, No. 2, 2019, pp. 188 – 209

24 Holzer, M.; Manoharan, A., *Digital governance in municipalities worldwide (2011-12),* National Centre for Public Performance, Newark, 2012, pp. 81 – 89

25 How innovation can contribute to development of the "smart cities" model see more in: Deakin, M.; Al Waer, H., *From intelligent to smart cities*, Intelligent Buildings International, Vol. 3, No. 3, 2011, pp. 140. – 152

26 Ingrams, A., *et al., Stages and Determinants of E-Government Development: A Twelve-Year Longitudinal Study of Global Cities*, International Public Management Journal, Vol. 23, No. 6, 2020, pp. 731 – 769

27 Husar, M.; Ondrejička, V.; Varis Ceren, S., *Smart Cities and the Idea of Smartness in Urban Development – A Critical Review*, IOP Conference Series: Materials, Science and Engineering, Vol. 245, No. 8, 2017, pp. 1 – 6

nance describes the interaction and interplay between citizens and administrative institutions on one hand and political bodies on the other hand.[28] Digitalizing ~~of~~ public services and establishing a "Smart City" platform is also at the focus of governance, as a key element for implementation of good practices in modernization of public administration.[29] Digitalization of public services are an important part of governance reforms and improves implementation of principles and good practices characteristic for contemporary administrative doctrines such as "New Public Administration", "New Public Management" or "Good Governance". Implementation of governance in local community true smart digitalization and implementation of the "Smart City" platform opening up space for organizational and functional decentralization of local government administration and possibility for further development of local government units. This development, according to prevailing principles in administrative practice characteristic for "Good Governance" doctrine, leads to the strengthening of political, fiscal and administrative autonomy of local government units. Digitalization of local public services encourages and improves that process and helps in transformation of local government units.[30]

Finances are an important part of digital transformation of local government administration and local political authorities. Two moments are important in the application of this element. The first is the possibility of transparent control of financing local political institutions which can provide true digitalization of working processes and maintaining of fiscal activities of administrative bodies and other local public institutions.[31] The second is interaction between citizens, inhabitants, public and private utilities and various institutions in local community with local government bodies and other specializing institutions competent for collecting and spending of public funds.[32] This includes digitalizing of financial services and cash flow monitoring, which is helpful in preventing tax evasion.

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28 Viale Pereira, G. *et al., Increasing collaboration and participation in Smart City governance: a cross-case analysis of Smart City initiatives*, Information Technology for Development, Vol. 23, No. 3, 2017, pp. 526 – 553

29 Mulder, I., *Sociable Smart Cities: Rethinking Our Future through Co-creative Partnerships*, in Streitz, N; Markopoulos, P. (eds.), Distributed, Ambient, and Pervasive Interactions. Second International Conference 22. – 27- June 2014, Springer International Publishing, 2014, pp. 566 – 574

30 Tomor, Z., *et al., Smart Governance for Sustainable Cities: Findings from a Systematic Literature Review,* Journal of Urban Technology, Vol. 26, No. 4, 2019, pp. 3 – 27

31 Stortone, S.; De Cindio, F., *Hybrid Participatory Budgeting: Local Democratic Practices in the Digital Era*, in: Foth, M.; Brynskov, M.; Ojala, T. (eds.), Hybrid Participatory Budgeting: Local Democratic Practices in the Digital Era, Springer Science + Business Media, Singapur, 2015, pp. 177 – 178

32 Joshi, S.; Saxena, S.; Godbole, T.; *Shreya, Developing Smart Cities: An Integrated Framework*, Procedia Computer Science, Vol. 93, 2016, pp. 902 – 909

Information management is another element of the "Smart City" model important for the functioning of smart digitalization at the local level. High information flow is a crucial element in architectonic structure of "Smart City" model, especially in modern approach to organization of local digital services. For efficient implementation of this element, it is important to assure infrastructure possibilities and technologic prerequisites. Technological aspects include horizontal and vertical integration of digital services. Horizontal integration ensures an equal approach to all digitalizing services from a unique digital platform, designing to support various digital services providing from different private and public providers. A vertical approach ensures availability of different e-government services by implementing and using the "Smart City" platform.[33] That includes the integration and compatibility of central and local government digital services. Information management of "Smart City" model assures access to local oriented digital services, but also connection to the central government digital services. The main task in the implementation of this element is the prevention of collision and harmonization of application. Implementation of information management solutions need to ensure an interactive interface with integrated services and applicable possibilities of smart digitalization.[34]

Connectivity and accessibility of local infrastructure is another important element which follows information management. Local digital infrastructure is a limiting factor in developing the "Smart City" model, and development of digital technologies depends on technical possibilities. It can be predicted that implementation of 5G networks in mobile infrastructure with high digital flow can ensure application and services important for digital transition of local government services.[35] That also reduces the need for standard cable network in using daily digital services provided by the "Smart City" platform. Infrastructure also includes telecommunication utilities with people, technological processes, adequate technology and technological solutions which create elementary conditions for development of digital platforms and their applications in implementation of e-government.[36]

The Smart City platform must be adopted to the specific public needs and interests of the local units where it will be applied. Those needs are different and

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33 Al Sharif, R.; Pokharel, S., *Smart City Dimensions and Associated Risks: Review of literature*, Sustainable Cities and Society, Vol. 77, 2022, pp. 2 – 11

34 Tranos, E.; Gertner, D., *Smart networked cities?*, Innovation: The European Journal of Social Science Research, Vol. 25, No. 2, 2012, pp. 175 – 190

35 Wirtz, B., W.; Müller, W., M.; Schmidt, F., *Public Smart Service Provision in Smart Cities: A Case-Study-Based Approach*, International Journal of Public Administration, Vol. 43, No. 6, 2020, pp. 499 – 516

36 Halegoua, R. G.; *The Digital City. Media and Social Production of Place*, NYU Press, New York, 2020., pp. 25 – 28

depend on economic, social, political and other aspects of the city. It is important to build a Smart City network which will be adjusted according to the strategy of development of the city and execution of the plans of city administration. It is also important to identify current capabilities and gaps which lead to problems in implementation of smart digital technologies.[37]

### 3.3. Smart digitalization of local self-government units and new challenges in post-Covid era

Implementation of the "Smart City" platform solutions represents modernization of local government institutions and administrative bodies, and their transformation to modern and efficient tools for economic, political, and social interaction with the local community. This process characterizes some specific elements such as smart digitalization, territorial determination of applied applications, interactive digital interface with integrated digital services and development of digital governance true implementation of e-democracy solutions such as presentations and discussions on local digital networks, e-election, e-referendum, etc. These solutions open up opportunity for developing more transparent and efficient local government institutions, with more visibility in the daily life of the local community.[38]

Post-Covid era challenges can be described as social occasions caused by the Covid 19 pandemic with economic, social, and political consequences in civic society. These consequences strongly impact on the daily life of citizens in the local community as a part of national civic society. Post-Covid challenges are complex and need a specific approach that includes implementation of various solutions in economic, social, and administrative fields, which could be applied from local government institutions. Those measures represent a new regulatory framework for delivery of goods and various services to citizens from local government authorities, institutions, and public utilities. An additional aspect of this process is developing a democratic framework that includes implementation of democratic tools which increase participation of citizens and interaction between institutions and local community in strengthening social activities in the local community. In that sense, the Smart City model is a possible answer in strengthening local society and local self-government units, because it helps in three main directions:

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37 Angelidou, M., *The Role of Smart City Characteristics in the Plans of Fifteen Cities*, Journal of Urban Technology, Vol. 24, No. 4, 2017, pp. 3. – 28

38 Paulin, A., *Smart City Governance*, Elsevier, Amsterdam, 2019., pp. 39 – 58

- supporting communication activities in society, which is interrupted and limited with specific epidemiological measures such as isolation and avoiding of social contacts between individuals in the community.
- possibility for strengthening of social cohesion, which is achieved with communication solutions implemented via the Smart City platform, as a technological tool for integration of the community in times of reduced social contact.
- improving availability public services and delivery of various goods with strengthening other activities important for the citizens in local community, especially true implementation of regulatory framework for digitalization of local public institutions and local political bodies.

Communication activities in society were interrupted with the implementation of epidemiological measures adopted with the aim of protecting citizens from disease and prevent spreading of Covid-19 in population. This situation accelerated the implementation of modern technological solutions to support broken communications. That approach led to intensive development and implementation of interactive services and platforms such as Google Meet, Zoom or MS Teams, with application in various aspects of social communications such as learning and teaching processes, conferences, meetings, discussions, debates and other forms of public communications. In that sense, direct physical communication between citizens was replaced with interactive communication by digital platforms form communication support. Social cohesion in the community can be possibly improved by using smart digital technologies. In that sense, smart digitalization can be an effective technological tool to support community interaction, while in the situation of physical blockade of social communication amongcitizens, digital communication on communication platforms ensured support for social contact of people in the community. In that environment, implementation of the "Smart City" model was accelerated because of interests of citizens and other users and subjects in the local community for better availability of public services and possibility of interactive communication with local public authorities. The third aspect is oriented towards the possibility of the use and availability of public services and delivery of goods from public utilities and local administrative bodies. Regulatory framework regulates conditions for access and usage of different local public services. The Smart City platform ensures the possibility of an interactive approach to national or local oriented public services. Those services are oriented towards the citizens, but also to business users, central and local governmental institutions and other institutions of civic society. Implementation of smart digitalization and Smart City digital solutions contributes to efficiency and availability of local public services, but also can strength democratic control over functioning of

local government administration and local public authorities with transparency and openness in procedures of using and delivery. This approach can improve the functioning of local self-government units and support development of the local community. Smart digitalization and implementation of the Smart City concept, with development of other aspects of e-government services at the national level represents facilitation of post-Covid challenges by implementation of modern digital technologies.

Development of the "Smart City" model represents multi-stakeholder effort to create an interactive platform for services developed from various subjects in community[39]: services designed and created from the city (such as waste management, traffic, public transport, water supply etc.), corporations (various commercial services such as taxi and private transport services, traffic information, food delivery, additional services information with commercial elements, etc.) community (neighborhoods, city districts, universities and public schools, cultural and social institutions, primary and secondary health services, etc.) and citizens (discussions, forums, social networks for community interaction, petition lists, non-profit organizations). In the delivery of Smart City services, they are usually integrated with elements such as innovative creations and solutions for maintaining digital services, public governance and management, local public policies with different forms of application such as concessions, public - private partnership or other models of cooperation between the public and private sector, possibility of data sharing for improving local digital services and implementation of technologic infrastructure as a condition for applying Smart City platform solutions.[40] These elements are necessary to establish efficient and effective model of sustainable Smart City model which facilitates functioning of local government institutions in local community.

## 4. DISCUSSION

One of the main questions in the functioning of contemporary public administration is how to improve different levels of administrative activities, from central government to local self-government administration.[41] Modernization of public administration is always one of the current questions for discussion, which includes various measures of administrative policy. One of the approaches to modernization is smart digitalization, which includes implementation of digital

[39] Paulin, A. *op. cit*, note 39, pp. 81 – 82

[40] Mehra, S., *Stadtbauphysik. Grundlagen klima- und umweltgerechter Städte*, Springer Vieweg, Wiesbaden, 2021, pp. 337 – 343

[41] Gilbert, P.; Thoenig, J., *Assessing Public Management Reforms*, Palgrave Macmillan, Cham, 2022, p. 47

technologies true application of e-government solutions to central and local government levels. At the local level, smart digitalization depends on the capacity of local self-government units and their preparedness to implement the "Smart City" platform with various local digital services. The capacity of local self-government usually depends on the organizational aspect of local self-government and the ability of local units to manage local public services and fulfill local public needs. The possibility of organization of the "Smart City" platform can be limited by their organizational, personal and administrative capacity. On the other hand, big cities can delegate the organization of some digital local services on sub-municipal units, according to their organizational capacities. The implementation of smart digitalization at central government level depends on e-government public policy, which is conducted centrally from the government authorities.

The application of digital technologies to local self-government services depends on the initiative of self-government units and their wellbeing and preparedness to adopt "Smart City" models in their development projects. The possibility of the application of the "Smart City" platform and smart digital solutions is great to many local government services, but it is also limited by the interest and willingness of local self-government units for implementation. Digitalization of local government services can contribute to efficiency and effectiveness, which is important in the daily functioning of local self- government. The other thing is social interaction in digital networks and services, which stimulates citizen's participation and ensures democratic supervision of public institutions in the local community. These two aspects can be the possible answer to social, political and economic challenges, and help with the prevailing difficulties caused by the Covid-19 pandemic. These circumstances suggest that the "Smart City" model can be a tool for managing the social, economic and administrative challenges of the local community in a post-Covid society.

## 5. CONCLUSION

The Smart City model with smart digitalization represents a relatively new concept in the development of e-government solutions in public administration. Development of this type of digitalization of public services started as part of e-government solutions, to support implementation of digital technologies on central and local government administration activities. Smart digitalization of cities with development and application of the "Smart City" platform was part of the implementation of e-government, which includes two dimensions of application: e-democracy and e-administration. Differences between central and local level in the implementation of e-government technologies is in the circle of users of public

services. Central government administration provides services organized centrally, and local government administration is focused on services provided to citizens in local community. The possibility of application to public services is limited with the circle of possible users, where local government units provide services and delivery of goods to local community members. On the other hand, digital technology enables integration of central and local government platform and an interactive approach to all services at one place. The main division is in the circle of users and design of digital public services, where the digital approach to local public services depends on local self-government units and their preparedness to implement digital technologies in the daily functioning of the local community. In some big cities, with large urban areas, smart digitalization also can potentially depend on sub-municipal government, and its organizational and administrative capacity.

Implementation of e-government solutions and the "Smart City" platform in practice was increasingly significant in the Covid-19 Pandemic, where epidemiological measures prevented and limited physical personal contacts between individuals in society. Smart digitalization facilitated communication between citizens and ensured the possibility of direct interaction without direct physical contact, which assured efficient implementation of epidemiological measures and limited disease spreading.

The implementation of the "Smart City" platform in the post-Covid Era established an efficient canal of interactive communication between citizens in the local community and local government units. This communication helps to connect people in the local community, contribute to social cohesion and improve citizen participation and supervision regarding the functioning of local government institutions and local public authorities. Modernization of local government by the application of smart digitalization can improve efficiency and effectiveness of local self-government units and ensure better dynamics of economic and social development in the local community. Implementation of smart digital solutions in combination with returning to normal social activities can improve the necessary conditions for development, and that can be useful in overcoming consequences caused by Covid-19. Also, it can be one of appropriate answers to challenges in post-Covid times in prevailing economic and social disorders in the community. In that sense, the "Smart City" model cannot be the exclusive solution for all problems and dysfunctions in the local community, but it can contribute to solving complex social and economic challenges in the post pandemic era.

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UDK 353.8(4-67EU):338.246.07
Review article

# POST-COVID-19 RECOVERY AND RESILIENCE-BUILDING IN THE OUTERMOST REGIONS OF THE EUROPEAN UNION: TOWARDS A NEW EUROPEAN STRATEGY

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***ABSTRACT***

*The socio-economic environment of the outermost regions of the European Union was severely affected by the COVID-19 crisis. Due to their geographical and historical specificities, the outermost regions were significantly lagging behind the rest of the European Union in terms of economic indicators even in the pre-pandemic period. Expectedly, COVID-19-induced shocks additionally potentiated their development gap.*

*The purpose of this paper is to summarise the multiple impacts of the COVID-19 pandemic in Guadeloupe, French Guiana, Réunion, Martinique, Mayotte, and Saint Martin (France), the Azores and Madeira (Portugal), and the Canary Islands (Spain), and the related legislative responses of the European Union aiming at eliminating adverse effects of the crisis and building more resilient societies. The factual assessment is carried out primarily through the prism of the European Commission's 2021 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, which underlines the health, economic and social repercussions of the crisis as well as a recommended set of recovery and resilience-building measures in the outermost regions. The legal analysis focuses on the ongoing codification of the rules and measures regulating the governance of the outermost regions as integral parts of the European Union. Pursuant to Article 349 of the Treaty on the Functioning of the European Union (TFEU), the European Union shall adopt specific measures for laying down the conditions for the development of the outermost regions, such as those in the area of fiscal policy, European Structural and Investment Funds, State-aid, agriculture and fisheries policies, and others. In that regard, the paper looks into the recently adopted regulations facilitating the use of EU funds and particular benefits (e.g. tax exemptions) in the outermost regions. Special emphasis is put on the currently tabled initiatives for an updated regulatory framework enabling the outermost regions to improve and strengthen their overall socio-economic position. That mainly refers to the forthcoming European strategy for the outermost regions, to be adopted in 2022. The respective strategy shall lay the foundations for a new strategic approach of the European Union to shaping a sustain-*

*able and resilient future for the outermost regions apt to face the challenges of the 21st century, notably those related to green, digital, and demographic transition.*

***Keywords**: COVID-19 pandemic, European strategy for the outermost regions, green, digital, and demographic transition, outermost regions of the European Union*

## 1. INTRODUCTION

The COVID-19 crisis has profoundly reshaped the European Union's (hereinafter: EU) socio-economic landscape and is likely to have a prolonged impact on our lives in years to come.[1] It instigated the deepest recession since 1945, affecting particularly sectors in which human interaction is vital, *e.g.* tourism, culture, transport, and retail,[2] and widening already existent regional disparities throughout the EU.[3] Human losses were immense, with around 872,000 more deaths in the EU than in five previous years.[4] Although the entire EU experienced a number of drawbacks, the COVID-19-induced health, economic and social shocks were especially apparent in the outermost regions of the EU, where the pandemic significantly aggravated their already existing disadvantageous position.[5] Such a socio-economic regress went in hand with global trends, which confirmed that the COVID-19 emergency sharply increased poverty and reversed the economic growth of the population.[6]

The paper aims to provide a comprehensive outlook on the outermost regions' legal framework supporting their effective and swift post-COVID-19 recovery and resilience-building. It summarises four types of norms and measures. First, it outlines the key general EU provisions granting the outermost regions special protective measures or derogations thereof. Second, it analyses the targeted *lex specialis*, explicitly introduced for one or all the outermost regions to alleviate hardships derived from their territorial, social, and economic specificities. Third, it highlights the essential general emergency measures adopted at the EU level,

1 Eurostat Regional Yearbook 2021, Publications Office of the European Union, Luxembourg, 2021, p. 8

2 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), Publications Office of the European Union, Luxembourg, 2022, pp. 26-37

3 Eighth Report on Economic, Social and Territorial Cohesion – Cohesion in Europe Towards 2050, Publications Office of the European Union, Luxembourg, 2022, p. xiii

4 *Ibid.*

5 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, pp. 6, 17, See more: *infra*, Chapter 3 on the impact of the COVID-19 pandemic on the outermost regions

6 Van Treel, M.; Thapa, R., *Progress Undone by Pandemic*, Development and Cooperation, Vol. 48, No. 7-8, 2021, p. 34

directly impacting the outermost regions' well-being and recovery. Fourth, it provides examples of local "pandemic politics"[7] developed in every outermost region.

There is a growing body of literature examining various aspects of the COVID-19 crisis; however, very few pieces reflect on them from the perspective of the outermost regions. For that reason, the paper aims to fill the gap by offering a novel and overarching examination of the most recent provisions, measures, and initiatives put in place to support the outermost regions in their path to resilient post-COVID-19 recovery. Moreover, since "pre-COVID-19 society is dead",[8] the paper also offers an insight into the way forward in the form of a new European strategy for the outermost regions, which drafting is in the final phase.

Currently, there are nine outermost regions under the jurisdiction of three Member States with a total population of five million inhabitants,[9] *i.e.* Guadeloupe, French Guiana, Réunion, Martinique, Mayotte, and Saint Martin (France), the Azores and Madeira (Portugal) and the Canary Islands (Spain).[10] They comprise islands, archipelagos, and land territory.[11] Despite their peculiar geographical location thousands of kilometres away from the European continent – in the Caribbean, South America, the Indian Ocean, and the Atlantic Ocean,[12] they are an integral part of the EU, just as any other region of France, Portugal, and Spain or elsewhere in the EU.[13] Thus, the *acquis communautaire* is fully applicable to them. In addition, the EU pays particular attention to the adoption of special legal

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7 Tesche, T., *Pandemic Politics: The European Union in Times of the Coronavirus Emergency*, Journal of Common Market Studies, Vol. 60, No. 2, 2022, pp. 480-496

8 Tournay, V., *La société pré-Covid est morte. Et après?*, Futuribles, No. 444, 2021, pp. 25-40

9 Eighth Report on Economic, Social and Territorial Cohesion – Cohesion in Europe Towards 2050, *op. cit.*, note 3, p. 27

10 See: Arts. 349(1) and 355(1) of the Treaty on the European Union and the Treaty on the Functioning of the European Union. Consolidated Versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202 (hereinafter: TEU and TFEU). See also: Outermost Regions (ORs), [https://www.europarl.europa.eu/factsheets/en/sheet/100/outermost-regions-ors-], Accessed 11 March 2022

11 Martinique, Réunion, and Saint Martin are islands; the Azores, the Canary Islands, Guadeloupe, Madeira, and Mayotte are archipelagos, and a French Guiana is a land territory, EU and Outermost Regions [https://ec.europa.eu/regional_policy/en/policy/themes/outermost-regions/#1], Accessed 12 March 2022

12 Hammoud, P.; Masquelin, A.; Thomas, T., *The Outermost Regions – Challenges and Prospects*, Pour la solidarité, Bruxelles, 2018, p. 2

13 Methodological Manual on Territorial Typologies, 2018 Edition, Publications Office of the European Union, Luxembourg, 2019, p. 8.; Outermost Regions of the EU, Briefing Paper, European Parliament, Brussels, 2020, p. 3; Kochenov, D., *The Application of EU Law in the EU's Overseas Regions, Countries, and Territories After the Entry Into Force of the Treaty of Lisbon*, Michigan State International Law Review, Vol. 20, No. 3, 2012, p. 680. According to Valente, the fact that those faraway regions fall under the jurisdiction of the EU Member States is "proof of a political value such States ascribe to them in a

norms and measures, which address a number of challenges and restraints deriving from the outermost regions' remoteness, size, topography, and socio-economic specificities. Alongside such specific provisions, the outermost regions also profit from various derogations in EU legislation introduced to safeguard their particular needs and interests.

In the chapter following the introductory remarks, the paper provides an overview of general and particular legal provisions of utmost importance for preserving the peculiar identity and interests of the outermost regions. They were the backbone of the later introduced measures supporting the fight against the COVID-19 crisis. That primarily concerns Articles 349 and 355 of the Treaty on the Functioning of the European Union, and certain norms regulating the European Structural and Investment Funds responsible for a balanced economic, social, and territorial development of the outermost regions. The analysis of the regulatory framework encompasses the urgent EU legislation adopted specifically to mitigate the effects of the COVID-19 crisis (so-called CRII, CRII+, REACT-EU, and CARE) and the recently prolonged Council's Decision (EU) 2021/991 and Regulation (EU) 2021/2048 on legal exemptions in French and Spanish outermost regions. Chapter 3 examines the tangible impact of the COVID-19 pandemic on the outermost regions and builds on the in-depth data presented in the European Commission's Study on the Impact of the COVID-19 Pandemic on the Outermost Regions and the Eighth Report on Economic, Social and Territorial Cohesion. Chapter 4 puts emphasis on the new European strategy for outermost regions, currently under preparation. The focus is on the post-COVID-19 recovery and resilience-building; however, since the COVID-19 pandemic intertwines with the other multifaceted and overlapping transboundary threats and globally important issues,[14] such as climate change, energy crisis, Brexit, or a war in Ukraine,[15] they are also taken into consideration to a certain extent. That mainly concerns some aspects of climate change and environmental action, since the pandemic and climate change in the outermost regions are "natural realities" potentiating the similar feelings of

postcolonial world", Valente, I. M. F., *The Atlantic Outermost Regions, the Furthest Frontiers of Europe?*, Debater a Europa, No. 12, 2015, p. 76

14 Schomaker, R.; Hack, M.; Mandry, A.-K., *The EU's Reaction in the First Wave of the COVID-19 Pandemic Between Centralisation and Decentralisation, Formality and Informality*, Journal of European Public Policy, Vol. 28, No. 8, pp. 1278-1279; Exadaktylos, Th.; Guerrina, R.; Massetti, E., *A Year Like no Other: Hope Out of Despair?*, JCMS Annual Review of the European Union in 2020, Vol. 59, 2021, p. 5

15 Dembowski, H., *Towards an Equitable World (Interview with Svenja Schulze)*, Development and Cooperation, Vol. 49, No. 3-4, 2022, p. 14; Hantrais, L., *Social Perspective on Brexit, COVID-19 and European (Dis)Integration*, JCMS Annual Review of the European Union in 2020, Vol. 59, 2021, pp. 77-78

"widespread mutual vulnerability" and "trust and solidarity".[16] In addressing the objectives of the future European strategy for the outermost regions, the paper explicitly accentuates not only green but also digital transition, which is in line with the Mogherini's stance that recovery instruments introduced by the EU "blend in a very smart way the new urgency dictated by the pandemic with the political priorities set by the Green Deal and Digital Agenda".[17] Finally, the conclusion summarises the core findings of the research intending to foresee future special measures for turning the COVID-19 crisis into an opportunity[18] towards, as Ladi and Tsarouhas argue, "a fundamental change in the economic governance of the EU".[19]

## 2. LEGAL STATUS OF THE OUTERMOST REGIONS OF THE EUROPEAN UNION – FOCUS ON SPECIFIC SAFEGUARDING MEASURES

### 2.1. General Overview

The core provisions regulating the status of the outermost regions in the EU and the associated system of specific safeguarding measures are Article 349 and Article 355(1) of the Treaty on the Functioning of the European Union (TFEU).[20] They set a framework for the integrity of the outermost regions with the EU through two sets of norms – on the obligation of the principal EU institutions to adopt adequate special measures and on the territorial scope of the Treaties, respectively.

Pursuant to Article 355(1), the *acquis communautaire* applies to all the outermost regions in the same scope and manner as elsewhere in the EU.[21] In other words, there is a territorial but not a legal divide between the outermost regions and the EU. Notwithstanding the respective equality deriving from Article 355(1), the outermost regions are also granted special rights in line with their unique economic and social circumstances within the EU. Namely, Article 349 foresees the

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16 Van Zeben, J., *The European Green Deal: The Future of a Polycentric Europe?*, European Law Journal, Vol. 26, No. 5-6, 2020, pp. 301-302

17 Mogherini, F., *How 2020 Has Shaped the Future of the European Union: When a Crisis Turns into an Opportunity*, JCMS Annual Review of the European Union in 2020, Vol. 59, 2021, p. 17

18 *Ibid.*, p. 19

19 Ladi, S., Tsarouhas, D., *EU Economic Governance and COVID-19: Policy Learning and Windows of Opportunity*, Journal of European Integration, Vol. 42, No. 8, 2020, pp. 1041-1056

20 TEU and TFEU, *loc. cit.*, note 10. On Arts. 349 and 355 see more: Kochenov, D., *op. cit.*, note 13, pp. 693-717

21 "The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349." TEU and TFEU, *ibid.*

adoption of specific measures to support the outermost regions to overcome "their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development".[22] Specific measures are adopted by the Council, on a proposal from the European Commission and in prior close consultations with the European Parliament. They refer to several areas of particular relevance to the outermost regions, that is, "customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes".[23] Such targeted measures are fully aligned with the Union legal order, do not lead to discriminatory practices towards other EU regions, and contribute to even economic, social, and territorial development of the EU as a whole.

The dichotomy inherent to the legal status of the outermost regions, characterised by the full application of the *acquis communautaire*, on the one hand, and the introduction of special measures intended explicitly for the outermost regions, on the other hand, is best described, in Vitalien's words, as balancing between "assimilation and differentiation".[24] In his analysis of special measures stipulated by Article 349 of the TFEU, Kochenov explains that this "deviation from the *acquis* is justified only if it remedies the specific difficulties outlined in Article 349".[25] The common denominator for all those difficulties is their direct impact on the regional development of the outermost regions; thus, special measures are often introduced and implemented through the instruments of the Cohesion Policy, the primary EU investment policy effectively contributing to even economic, social, and territorial development of the European continent. That is particularly evident in the European Structural and Investment Funds (ESIF) domain, which has continuously helped the outermost regions reach their full economic and social potential in the pre- and post-COVID-19 period. According to Recital 4 of the umbrella legislative act for eight EU Funds – the 2021-2027 Common Provisions Regulation (CPR), "the outermost regions should benefit from specific measures and from additional funding to offset their structural social and economic situation together with the handicaps resulting from the factors referred to in Ar-

22 *Ibid.*, Art. 349(1)

23 *Ibid.*, Art. 349(2)

24 As cited in Kochenov, D., *The EU and the Overseas: Outermost Regions, Overseas Countries and Territories Associated with the Union, and Territories Sui Generis*, in: Kochenov, D., EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis, Kluwer Law International, The Hague, 2011, p. 26

25 *Ibid.*, p. 31

ticle 349 TFEU".[26] For example, 0,6% of the resources for the Investment for jobs and growth goal under the Multiannual Financial Framework, a long-term EU budget, is allocated to the outermost regions as additional funding,[27] and the co-financing rate applied to the outermost regions for the same goal is the highest one – 85%.[28] Similar differentiated provisions granting the outermost regions specific rights are also incorporated into the Fund-specific Regulations, *i.e.* those adopted separately for each fund covered by the CPR. For example, the special treatment of the outermost regions in EU law is best illustrated by Article 7 of the Regulation on the European Regional Development Fund (ERDF) and on the Cohesion Fund, which regulates the exclusion from the scope of those two Funds. The respective provision provides for the possibility of financing certain investments in the outermost regions, which cannot be financed elsewhere in the EU, either at all or under preferential conditions – investment in airport infrastructure, investment in the disposal of waste in landfills, and investment in increasing the capacity of facilities for the treatment of residual waste (the latter two in duly justified cases only). In addition, the rules on the thematic concentration of the ERDF support, that is, norms specifying and governing the targeted areas of investment, do not apply to the specific additional allocation for the outermost regions. This additional allocation is used "to offset the additional costs incurred in these regions as a result of one or several of the permanent restraints to their development referred to in Article 349 TFEU".[29] Analogous rules on thematic concentration are also

[26] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L 231. The latest CPR lays down financial rules and common provisions for the 2021-2027 financial period, applicable to eight funds listed in its title. The earlier CPR, which covered the 2014-2020 financial period, included the identical recital referring to the outermost regions. See: Recital 5, Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347

[27] *Ibid.*, Art. 110, par. 1(g) of the 2021-2027 CPR

[28] *Ibid.*, Art. 112, par. 3(1)

[29] Art. 14, par. 1., Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund [2013] OJ L 231. The principal aim of the ERDF is to reduce regional disparities in the economic development within the EU, particularly by supporting the regions lagging behind the more developed ones. See more: Schütze, R., *An Introduction to European Law*, Oxford University Press, Oxford, 2020, pp. 849-854

employed for the European Social Fund Plus.[30] Moreover, the outermost regions have a separate allocation for the European territorial cooperation goal (Interreg), amounting to 3,5% of the total Interreg allocation.[31]

The importance of *sui generis* arrangements for the outermost regions was particularly accentuated amid the global health and socio-economic crisis generated by the COVID-19 pandemic. In order to help the EU Member States cope with the extraordinary circumstances and build sustainable and resilient economies, in May 2020, the European Commission proposed a powerful recovery instrument embedded within the 2021-2027 EU budget – Next Generation EU (NGEU), worth 750 billion euros.[32] The three of its financial pillars are specifically important for the post-COVID-19 recovery, resilience, and sustainability of the outermost regions, namely the Recovery and Resiliency Facility (RRF), the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU), and the Just Transition Fund (JTF). Pursuant to Recital 3 of the RRF Regulation, the outermost regions should particularly benefit from EU efforts to reduce development gaps between various EU regions,[33] *inter alia*, through the introduction of special interventions

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30 Art. 7, par. 7., Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013 [2021] OJ L 231. The ESF+ supports measures aiming at higher employment levels, fair social protection, upskilling and reskilling of workforce, inclusive societies aligned with the principles of the European Pillar of Social Rights, equal opportunities, fair working conditions *etc.*

31 Art. 9 par. 2(d), Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments [2021] OJ L 231. Interreg supports programmes fostering a cross-border, transnational, interregional and outermost regions' cooperation

32 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe's Moment: Repair and Prepare for the Next Generation, COM (2020) 456 final, Brussels, 27 May 2020. On the scope, role, and importance of the NGEU with respect to tackling the consequences of the COVID-19 crisis, see more: Maitrot de la Motte, A., *Faire face à la crise de la Covid 19: quelles nouvelles ressources propres européennes*, Revue des Affaires Européennes, No. 4, 2020, pp. 823-839; De Witte, B., *The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, Common Market Law Review, Vol. 58, No. 3, 2021, pp. 635-682; Ladi, S.; Wolff, S., *The EU Institutional Architecture in the Covid-19 Response: Coordinative Europeanization in Times of Permanent Emergency*, JCMS Annual Review of the European Union in 2020, Vol. 59, 2021, p. 32-43; D'Erman, V.; Verdun, A., *An Introduction: Macroeconomic Policy Coordination and Domestic Politics: Policy Coordination in the EU from the European Semester to the Covid-19 Crisis*, Journal of Common Market Studies, Vol. 60, No. 1, 2022, pp. 3-21. According to Hinarejos, regardless of their limited scope and timeframe, the NGEU instruments addressing the economic consequences of the COVID-19 pandemic were expected to improve things more permanently. See: Hinarejos, A., *Economic Governance and the Pandemic: A Year On*, European Law Review, Volume 46, No. 2, 2021, p. 128

33 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57

aimed at mitigating the social and economic impact of the COVID-19 crisis on the outermost regions (*e.g.* specific actions to compensate additional costs due to size market factors, climate conditions or accessibility deficit).[34] Furthermore, the REACT-EU Regulation foresees a dedicated EU allocation for the outermost regions in the form of an aid intensity of 30 euros per inhabitant, added to the usual allocation distributed through the national budget.[35] Such a supplementary allocation is introduced to counterbalance "the specific vulnerability of their [outermost regions'] economies and societies"[36] during the unprecedented COVID-19 crisis. As emphasised in the full title of the REACT-EU Regulation, alongside tackling the crisis, the Member States are simultaneously obliged to invest in the green, digital, and resilient recovery of their economies. In that respect, the JTF Regulation sets out some of the pivotal rules for the outermost regions. Namely, Article 6 of the respective Regulation stipulates that the Member States having the outermost regions should allocate a specific JTF amount for their just transition towards the EU's 2030 targets for energy and climate and a climate-neutral economy of the EU by 2050, aligned with the specific challenges and needs of those territories.[37]

### 2.2. *Lex Specialis* with Special Emphasis on Recent Legislative Updates

The aftereffects of the COVID-19 crisis led to a redrafting of a number of existing EU legislative acts, either by way of introducing new provisions or extending their application beyond the initially set deadline. The most recent legislative updates adopted to help the outermost regions overcome multifaceted challenges, including the Covid-19 crisis, concern the extension of specific legal exemptions in French and Spanish outermost regions.

In mid-2021, the Council amended its 2014 Decision regulating the dock dues scheme for certain locally produced products in the French outermost regions by extending the initial deadline of its application, *i.e.* 30 June 2021, until 31 De-

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34 *Ibid.*, Annex VI

35 Recital 5 and Annex VIIa Point 3, Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU) [2020] OJ L 437

36 Recital 5 of Regulation (EU) 2021/241, *loc. cit.*, note 33

37 Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund [2021] OJ L 231. According to Art. 2 of the JTF Regulation, the JTF provides funds for addressing "the social, employment, economic and environmental impacts of the transition towards the EU's 2030 targets for energy and climate and a climate-neutral economy of the EU by 2050"

cember 2027.[38] Namely, the Decision introduces tax exemptions or reductions in Guadeloupe, French Guiana, Martinique, Mayotte, and Réunion for local products listed in Annex I of the Decision to strengthen local industry and make it more competitive. Given the disadvantageous environment of these outermost regions, characterised by significant imports of raw materials and energy, a low scale of exports, a small local market, and high production costs, the introduction of specific taxation arrangements was necessary to keep the price of local goods as competitive as the price of equivalent goods produced elsewhere, either in metropolitan France or the other Member States. The tax exemptions are limited in order not to exceed 10, 20, or 30 percentage points (depending on the product) between local products and those produced out of the outermost regions. In addition, tax exemptions and reductions are applied only to entrepreneurs with a minimum annual turnover of 550,000 euros. Since these special measures proved beneficial for the economy of the five French outermost regions, France requested their prolongation beyond 1 July 2021, emphasising they would contribute to the further socio-economic development of its outermost regions, especially in circumstances of the public health crisis.[39]

By the end of 2021, another legislative act with a comparable *ratio* came into force concerning the Spanish outermost region – Council Regulation temporarily suspending autonomous Common Customs Tariff duties on imports of certain industrial products into the Canary Islands.[40] Similar to France's request related to its five outermost regions, Spain also asked the European Commission to prolong specific measures, which positively contributed to the socio-economic development of its outermost region. They encompass the suspension of the autonomous Common Customs Tariff duties for certain capital goods for commercial or industrial use as well as raw materials, parts, and components used for agricultural purposes, industrial transformation or maintenance, listed in Annexes I and II of the Council's Regulation. The Regulation should have expired on 31 December 2021; yet, its undeniable importance for the progress of the Canary Islands, coupled with the need to recover the islands economically from the COVID-19 crisis, led to its prolongation until 31 December 2031. Recital 4 of the Council Regulation sheds light on the devastating effects of the COVID-19 pandemic on the economic indicators of the Canary Islands. In 2020, a halted tourism activity

[38] Council Decision (EU) 2021/991 of 7 June 2021 concerning the dock dues scheme in the French outermost regions and amending Decision No 940/2014/EU [2021] OJ L 221

[39] *Ibid.*, Recitals 1-8 and Arts. 1, 2 and 5

[40] Council Regulation (EU) 2021/2048 of 23 November 2021 temporarily suspending autonomous Common Customs Tariff duties on imports of certain industrial products into the Canary Islands [2021] OJ L 420

led to a decline of around 20% of the GDP, while the construction and industrial activity declined by 13% compared to 2019. Thus, the prolongation of the specific measures aims to stabilise the overall socio-economic conditions of the Canary Islands by diversifying the economy, ensuring growth in industry and construction, enhancing innovation, and reducing the reliance of the local industry on the service sector.[41]

The outline of the legislative updates that supported the outermost regions in their post-COVID-19 recovery and resilience-building would be incomplete without a broader picture of recently adopted legislative packages targeted to help all the Member States and their regions fight the pandemic's consequences as urgently and effectively as possible. They encompass five regulations adding to more flexibility, liquidity, and simplification in using EU resources to recover healthcare systems and other sectors of Member State's economies. The first three legislative acts are part of the Coronavirus Response Investment Initiative's packages, known as the CRII and the CRII+, negotiated and adopted during the Croatian Presidency of the Council of the European Union in early 2020. The CRII package comprises two Regulations: the CRII Regulation providing specific measures to mobilise investments in the healthcare systems of the Member States and other sectors of their economies in response to the COVID-19 outbreak,[42] and the Regulation expanding the scope of the EU Solidarity Fund (EUSF) to provide financial assistance to the Member States and to countries negotiating their accession to the EU that are seriously affected by a major public health emergency.[43] The latter amend-

41 *Ibid.*, Recitals 1, 2, 4, 5, 9 and Arts. 1 and 2

42 The key targeted measures include the financing of working capital in small and medium-sized enterprises (SMEs) from the ERDF resources and financial instruments as a temporary measure to provide an effective response to the COVID-19 crisis; more flexibility in the transfer of resources within programme priorities supported by the ERDF, the Cohesion Fund and the ESF; and the contribution of the European Maritime and Fisheries Fund (EMFF) to mutual funds and stock insurance to secure the income of fishermen and aquaculture farmers affected by the COVID-19 crisis. See: Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) [2020] OJ L 99. In the analysis of the environmental behaviour of SMEs in the Canary Islands, SMEs are recognised as one of the critical determinants in strengthening the outermost regions' competitiveness and sustainable development, including through environmental management. See more: Armas-Cruz, Y.; Gil-Soto, E.; Oreja-Rodríguez, J. R., *Environmental Management in SMEs: Organisational and Sectoral Determinants in the Context of an Outermost European Region*, Journal of Business Economics and Management, Vol. 18, No. 5, pp. 935-953

43 The EU Solidarity Fund was originally mobilised "at the request of a Member State or country involved in accession negotiations with the European Union (…) when a major natural disaster with serious repercussions on living conditions, the natural environment or the economy in one or more regions or one or more countries occurs on the territory of that State". Council Regulation (EC) No 2012/2002

ment of the EUSF proved to be vital for the outermost regions in the aggravating circumstances of the COVID-19 pandemic. Namely, after the Canary Island of La Palma was severely destroyed by eruptions of the volcano Cumbre Vieja from 19 September to 15 December 2021, the European Commission announced on 22 March 2022 that it would grant Spain 5.4 million euros from the EUSF to help repair the damage and handle the COVID-19 crisis simultaneously. While explaining the ratio behind granting Spain the EUSF support, the Commissioner for Cohesion and Reforms, Elisa Ferreira, underlined that "the damage caused by the volcano has exacerbated the negative effects of the Coronavirus crisis, which has particularly affected the outermost regions such as the Canary Islands".[44] The prolonged effects of the COVID-19 crisis called for further amendments to the CRII package, so, on the proposal of the European Commission, the European Parliament and the Council adopted a follow-up Regulation – the CRII+ providing unique exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak.[45] The exceptional flexibility of the CRII+ was additionally extended for one more year in the recently adopted CARE Regulation.[46] Finally, the fifth part of the overall legislative

of 11 November 2002 establishing the European Union Solidarity Fund [2002] OJ L 311, Art. 2, par. 1. The 2020 amendments expanded the Fund's scope to include human health, so nowadays, the Fund provides financial assistance not only concerning "a major or regional natural disaster having taken place on the territory of the (…) eligible State or of a neighbouring eligible State", but also "a major public health emergency having taken place on the territory of the (…) eligible State". Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency [2020] OJ L 99

44 See more: EU Solidarity: €5.4 Million of Advance Payments to Spain Following the Volcanic Eruption in La Palma, [https://ec.europa.eu/regional_policy/en/newsroom/news/2022/03/22-03-2022-eu-solidarity-eur5-4-million-of-advance-payments-to-spain-following-the-volcanic-eruption-in-la-palma], Accessed 22 March 2022

45 The exceptional flexibility foreseen by the CRII+ included the introduction of a co-financing rate of 100% applicable to expenditure declared in payment applications covering the period of 1 July 2020 – 30 June 2021 for programmes supported by the ERDF, the ESF, or the Cohesion Fund; flexible financial transfers between the respective three Funds as well as different categories of regions; and simplification of some procedural requirements related to programme implementation and audits. Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak [2020] OJ L 130

46 The CARE Regulation extends the application of a co-financing rate of 100 % for the period of 1 July 2021 – 30 June 2022 for programmes supported by the ERDF, the ESF, the Cohesion Fund, and the Fund for European Aid to the Most Deprived (FEAD). It is part of a broader package encompassing the support to the Member States in dealing with the substantial influx of arrivals from Ukraine following the recent military aggression by the Russian Federation against Ukraine. For that reason, the CARE+ Regulation is the best evidence of how the EU helps the Member States in circumstances of

package targeted at tackling the COVID-19 crisis in the Member States and their regions is the REACT-EU Regulation, addressed earlier in Chapter 2.1.[47]

The efficiency of the above-mentioned specific measures introduced to tackle the COVID-19 crisis should be seen in the light of the efficiency of national and regional responses on the ground, which varied considerably across the EU.[48] While reflecting on a close interrelatedness between the EU and national health and socio-economic responses to the pandemic, Genschel and Jachtenfuchs noted that the COVID-19 crisis "has shrunk functional scale to the (sub)national level in the name of security, while lifting expectations of community to the grand transnational scale in the name of solidarity".[49]

## 3. IMPACT OF THE COVID-19 PANDEMIC ON THE OUTERMOST REGIONS

Even in the years preceding the COVID-19 crisis, most outermost regions underperformed economically than the rest of the EU.[50] As a result, except for the Canary Islands and Madeira, all the other outermost regions were classified as 'less

a multidimensional crisis when they need to cope simultaneously with the COVID-19 pandemic and some other emergencies. Regulation (EU) 2022/562 of the European Parliament and of the Council of 6 April 2022 amending Regulations (EU) No 1303/2013 and (EU) No 223/2014 as regards Cohesion's Action for Refugees in Europe (CARE) [2022] OJ L 109

47 See: *supra*, Chapter 2.1. on the general overview of the legal status of the outermost regions

48 See more: McConnell, A.; Stark, A., *Understanding Policy Responses to COVID-19: the Stars Haven't Fallen from the Sky for Scholars of Public Policy*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1115-1130; Boin, A.; Lodge, M., *Responding to the COVID-19 Crisis: a Principled or Pragmatist Approach?*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1131-1152; Jennings, W. *et al.*, *How Trust, Mistrust and Distrust Shape the Governance of the COVID-19 Crisis*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1174-1196.1174-1196; Mintrom, M. *et al.*, *Policy Narratives, Localisation, and Public Justification: Responses to COVID-19*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1219-1237; Narlikar, A.; Sottilotta, C. E., *Pandemic Narratives and Policy Responses: West European Governments and COVID-19*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1238-1257; Boswell, J. *et al.*, *The Comparative 'Court Politics' of COVID-19: Explaining Government Responses to the Pandemic*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1258-1277; Forster, T.; Heinzel, M., *Reacting, Fast and Slow: How World Leaders Shaped Government Responses to the COVID-19 Pandemic*, Journal of European Public Policy, Vol. 28, No. 8, 2021, pp. 1299-1320; Rhodes, M., *'Failing Forward': A Critique in Light of Covid-19*, Journal of European Public Policy, Vol. 28, No. 10, 2021, pp. 1537-1554; Plümper, Th.; Neumayer, E., *Lockdown Policies and the Dynamics of the First Wave of the Sars-CoV-2 Pandemic in Europe*, Journal of European Public Policy, Vol. 29, No. 3, 2021, pp. 321-341

49 Genschel, Ph.; Jachtenfuchs, M., *Postfunctionalism Reversed: Solidarity and Rebordering During the COVID-19 Pandemic*, Journal of European Public Policy, Vol. 28, No. 3, 2021, p. 350

50 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, p. 17

developed regions' in 2018,[51] eligible for the highest proportion of EU Cohesion Policy funding to help them keep up with the rest of the EU.[52] Nevertheless, the GDP per capita levels in all the outermost regions were lower than the EU average or the national GDP of their respective Member States.[53] Moreover, in all the outermost regions the employment rates were below the EU average – the lowest in Mayotte (43% of the EU average) and the highest in the Azores (71% of the EU average).[54] The outermost regions also recorded the highest rates of young people neither in employment nor in education or training (NEET), esp. in French Guiana and Réunion, where more than one-third of young people comprised the NEET category in 2017.[55] In 2015, the R&D intensity (investments in research and development) was less than 0.5% in the Azores, the Canary Islands, and Madeira, while the EU-28 average was 2.04%.[56]

Geographic, demographic, economic, and other specificities of the outermost regions were essential in creating different infection patterns than in the mainland EU. Due to the remoteness of the outermost regions, infection waves were delayed compared to the rest of the EU, so they had sufficient time to impose early restrictions and other protective measures. In addition, the demographic structure, characterised by the prevalence of young people, contributed to mitigating the incidence of severe cases of COVID-19. Moreover, earlier experience in health-crisis management (*e.g.* at the time of the outbreak of the Chikungunya virus in Réunion or the dengue fever in Martinique) increased the efficiency of their response to the COVID-19 pandemic.[57]

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51 The category of 'less developed regions' encompasses the EU regions where the GDP per capita is at least 75% lower than the EU-27 average. See: Eurostat Regional Yearbook 2018, Publications Office of the European Union, Luxembourg, 2018, p. 17; Eighth Report on Economic, Social and Territorial Cohesion, *op. cit.*, note 3, p. 20

52 See: Eurostat Regional Yearbook 2018, *ibid.*, pp. 17-18

53 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *loc. cit.*, note 5. Even the economically more developed Canary Islands example shows discrepancies between Spain and the Islands' economy, labour market, and relative poverty indicators. Betancort, M. *et al.*, *Inequality of Opportunity in an Outermost Region: the Case of the Canary Islands*, Island Studies Journal, Vol. 14, No. 2, 2019, pp. 23-42

54 Eighth Report on Economic, Social and Territorial Cohesion, *op. cit.*, note 3, p. 149; Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *ibid.*, p. 18

55 See: Eurostat Regional Yearbook 2018, *op. cit.*, note. 51, pp. 62-63; Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *ibid.*, pp. 18-19

56 See: Eurostat Regional Yearbook 2018, *ibid.*, pp. 117-118

57 The description of other factors affecting the health, economic and social impact of the pandemic in the outermost regions see in: Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, pp. 45-49

In October 2021, the European Commission published the Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (hereinafter: the Study), the first comprehensive report with a preliminary analysis of the socio-economic repercussions of the COVID-19 crisis in the outermost regions.[58] It encompassed the period between December 2020 and September 2021. Apart from addressing the pandemic's health, economic and social impacts, the Study also provided recommendations for targeted measures to support future sustainable recovery, growth, and resilience-building.[59] Although exhaustive, the Study was soon supplemented by nine separate in-depth analyses on the impact of the pandemic on each outermost region, published by the European Commission in January 2022.[60] These documents offer an array of statistical data on each of the three impacted areas – healthcare, economy, and society.

First, the health-related impacts of the COVID-19 pandemic were diverse across the outermost regions. The data confirmed the fragility of the healthcare systems of the outermost regions, which suffered greatly under the pressure of high COVID-19 cases. That was especially evident in Guadeloupe, Martinique, Mayotte, French Guiana, and Saint Martin, which recorded the highest incidence of cases, alongside the concurrent outbreaks of dengue fever. At the same time, they also lagged behind mainland France regarding vaccination rollout. Indeed, the only outermost regions with sufficiently high vaccination rates and, consequently, lower infection rates were the Azores, the Canary Islands, and Madeira.[61] Secondly, the economies of the outermost regions experienced multi-layered shocks, which

58 *Ibid.*, *loc. cit.*, note 2

59 *Ibid.*, pp. 6, 14, 16

60 Outermost Region Fiche Azores – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Canary Islands – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche French Guiana – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Guadeloupe – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Madeira – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Martinique – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Mayotte – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Réunion – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022; Outermost Region Fiche Saint Martin – Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, Publications Office of the European Union, Luxembourg, 2022

61 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, pp. 6-7, 21-23

impacted tourism, transport, construction, creative, and agricultural sectors and, as a result, led to an overall recession. In 2020, the GDP per capita of the Canary Islands decreased double in comparison to mainland Spain (20% vs. 10.8%), and the ratio was similar for the French outermost regions and mainland France (up to 28% vs. 18.6%). Therefore, it is not surprising that the projections suggest that the post-COVID-19 recovery process in the outermost regions would be slower than on the national level of their respective Member States. The downfall of the outermost regions' economies was closely intertwined with the deep crisis in the tourism sector, affected by a sharp decrease in tourist numbers in 2019-2020 by an alarming 70%. The outermost regions heavily relying on tourism include the Azores, the Canary Islands, French Guiana, Guadeloupe, Madeira, Martinique, and Saint Martin. Perturbations in the tourism sector provoked a chain reaction leading to disruptions in other sectors, mainly in the air and sea transport, culture, and retail.[62] Thirdly, as anticipated, negative trends in the healthcare and economic sectors consequently had adverse effects on the social sphere. The Canary Islands and Madeira documented the highest increase in unemployment rates during 2019-2020 (the Canary Islands from 18.8% to 25.2%, and Madeira from 7.1% to 8.1%).[63]

In order to mitigate the distressing effects of the pandemic in the outermost regions and to eliminate further threats to their societies and economies, the EU introduced 345 targeted policy measures by October 2021, primarily related to various support schemes financed by strategic allocations of the European and national funds.[64] Those specific measures are thoroughly elaborated in earlier chapters of the paper on the applicable legislative framework to the outermost regions, especially in the event of extraordinary circumstances of the COVID-19 pandemic.[65] As the Study pointed out, the statistical data on the crisis' health, economic and social impact varies considerably between the outermost regions, confirming the need for a tailored approach to implementing targeted legislative acts and measures on the ground.[66] Some of the most critical actions that call for a diversified approach include support to SMEs; skills development for digitalisation; reinforcing the long-term performance of health systems; flexibility in State-aid rules; social measures targeting youth, employment, and poverty alleviation; keeping vital transport corridors open; and addressing energy risks and promoting

62 *Ibid.*, pp. 7-8, 24-37, 50-52

63 *Ibid.*, pp. 8-9, 38-44

64 *Ibid.*, pp. 9-10, 64-67

65 See: *supra*, Chapter 2 on the legal status of the outermost regions

66 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, p. 17

energy independence, with particular emphasis on the investment in reliable and renewable energy sources.[67]

The year 2022 was marked by the adoption of one of the most critical and exhaustive analyses of the EU economic and social landscape, published by the European Commission – the Eighth Report on Economic, Social and Territorial Cohesion.[68] The importance of the document goes much beyond the actual presentation of the chronology of the economic, social, and territorial development of the EU. Specifically, it also sets a solid basis for further legislative actions aimed at improving the overall well-being of the EU in a post-COVID-19 period. Some of them were already indicated in the accompanying Communication of the European Commission, which emphasised the most critical steps the EU needs to take in the next 30 years to stimulate growth and overcome drawbacks presented in the Eighth Report.[69] Similarly, the Council of the European Union prepared conclusions that summarise its political position on the Report's findings and called on the Commission and the Member States to take appropriate actions to tackle future socio-economic challenges more effectively.[70] The distinctive element and added value of the Eighth Report on Economic, Social and Territorial Cohesion are that, for the first time, this comprehensive publication included a chapter on the regional dimension of the COVID-19 pandemic outlining both the health and economic impact of the unprecedented crisis. Similar to the Study, it disclosed some worrying numbers related to the coronavirus death toll in the EU,[71]

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67 *Ibid.*, pp. 10-11

68 Eighth Report on Economic, Social and Territorial Cohesion, *loc. cit.*, note 3

69 According to the Communication, future legislative efforts should streamline actions in the domain of green, digital and demographic transitions, technological transformations, democracy and its values, implementation of the European Pillar of Social Rights, strengthening resilience and responsiveness to asymmetric shocks such as the COVID-19 pandemic and others. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the 8th Cohesion Report: Cohesion in Europe towards 2050, COM (2022) 34 final, Brussels, 4 February 2022

70 In the Council, the Eighth Report on Economic, Social and Territorial Cohesion was thoroughly presented by the European Commission and examined by the Member States at the meetings of the Working Party on Structural Measures and Outermost Regions (SMOR) throughout February and March (CM 1517/22, Brussels, 2 February 2022; CM 1657/22, Brussels, 9 February 2022; CM 1779/22, Brussels, 16 February 2022; CM 1962/22, Brussels, 1 March 2022; CM 2229/22, Brussels, 15 March 2022; CM 2396/22, Brussels, 25 March 2022). Particular attention was paid to the in-depth examination of the impact of the pandemic at a regional level, including the outermost regions. The Council conclusions will be drafted in April and May 2022, and the final adoption is foreseen at the meeting of the General Affairs Council (Cohesion) on 2 June 2022. These are the internal information of the Working Party on Structural Measures and Outermost Regions (SMOR), of which the author is a member

71 See: *supra*, introductory remarks

drawing attention to the fact that the less developed regions recorded the highest increase in mortality – by 17%. Guadeloupe, French Guiana, and Mayotte were one of those hard-hit regions, but the upsurge was also significant in Martinique.[72] On the other hand, statistics in the Azores, the Canary Islands, and Madeira were noticeably better because of the much higher rates of fully vaccinated people.[73] As for other drawbacks, the Eighth Report confirmed that the imposed travel, socialising, vaccination, and distancing restrictions sharply affected the tourism sector on which the outermost regions are heavily dependent, especially in the Azores, the Canary Islands, and Madeira.[74]

## 4. POST-COVID-19 RECOVERY AND RESILIENCE-BUILDING – TOWARDS A NEW EUROPEAN STRATEGY

The European strategy for the outermost regions comprises strategic orientations set in the Communication of the European Commission, the purpose of which is to address the challenges and acknowledge the potentials and assets of the outermost regions. Thus far, the Commission published four such Communications – in 2004, 2008, 2012, and 2017.[75] At the core of the strategy's implementation is the principle of partnership between the European Commission, the outermost regions, and their respective Member States – France, Portugal, and Spain. Moreover, the European Parliament and the Council are closely intertwined with the partnership trio by nine Members of the Parliament representing nine outermost regions, on the one hand, and the Council's Working Group on Structural Measures and Outermost Regions (SMOR), on the other hand.[76]

The latest 2017 strategy was adopted at a radically different time from nowadays. However, by encouraging the implementation of four sets of specific measures, it contributed to building more sustainable and resilient outermost regions' societies and economies, more ready to adapt to the changing circumstances of the

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72 Eighth Report on Economic, Social and Territorial Cohesion, *op. cit.*, note 3, pp. xiii-xiv

73 *Ibid.*, pp. 5-6

74 *Ibid.*, pp. 1, 9, 10, 11, 16

75 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – A Stronger and Renewed Strategic Partnership with the EU's Outermost Regions, COM (2017) 623, 24 October 2017; Communication from the Commission – The Outermost Regions of the European Union: Towards a Partnership for Smart, Sustainable and Inclusive Growth, COM (2012)287, 20 June 2012; Communication from the Commission – The Outermost Regions: an Asset for Europe, COM (2008)642, 17 October 2008; Communication from the Commission on a Stronger Partnership Strengthened for the Outermost Regions – Assessment and Prospects, COM (2004) 343, 26 May 2004

76 EU and Outermost Regions, *loc. cit.*, note 11

COVID-19 pandemic. First, it foresaw a close dialogue between the European Commission, the outermost regions, and their Member States. Second, it encouraged investment in key growth-enhancing sectors, notably tourism, fisheries, forestry, agriculture, natural bioproducts, biomedicine, blue economy, space science, circular economy, renewable energy, and others. Third, it backed up measures enabling growth and job creation, such as investments in research and innovation, education and training, competitiveness and entrepreneurship, digital accessibility, transport, and others. Fourth, through joint projects and programmes, it supported the cooperation and synergy between the outermost regions and neighbouring countries,[77] the so-called beneficial "interdependencies".[78] Due to the enormous socio-economic shocks provoked by the COVID-19 pandemic from 2019 onwards, the outermost regions and the EU as a whole impatiently await the introduction of the new European strategy for the outermost regions, which would define a novel strategic approach adapted to 2021-2027 EU priorities, related to the green, digital, and demographic transition as well as complete and resilient recovery from the COVID-19 pandemic. The initial phase of its adoption started in November 2021, when the European Commission launched the public consultation.[79] Furthermore, in December 2021, the French Presidency of the Council announced it would prepare the appertaining conclusions,[80] following the European Commission's presentation of the new strategy on 5 May 2022, with a view to their final adoption at the meeting of the General Affairs Council (GAC) on 21 June 2022.[81]

Although the content of the new 2022 Communication of the European Commission on the strategic approach to the outermost regions is not yet known, it is expectable that the part on the impact of the COVID-19 crisis would reflect some of the most critical objectives of the 2021-2027 financial period calling for a resilient recovery by way of green, digital, and demographic transitions. Some valuable

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77 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – A Stronger and Renewed Strategic Partnership with the EU's Outermost Regions, *op. cit.*, note 75, pp. 2-16

78 Ciot, M.-G.; Sferlic, R., *EU's Interdependencies in the COVID-19 Crisis*, Romanian Journal of European Affairs, Vol. 21, No. 1, 2021, pp. 119-134

79 EU Cohesion Policy: Commission Launches Public Consultation for a New Strategic Approach for the Outermost Regions [https://ec.europa.eu/regional_policy/en/newsroom/news/2021/07/07-08-2021-eu-cohesion-policy-commission-launches-public-consultation-for-a-new-strategic-approach-for-the-outermost-regions], Accessed 2 April 2022

80 Le programme de la présidence française du Conseil de l'Union européenne – Relance, puissance, appartenance, 1er janvier-30 juin 2022, PFUE, Paris, p. 12

81 For the chronology of the adoption of the Council conclusions on the 2022 European strategy for the outermost regions see: Working Paper, WK 15736/2021, Brussels, 22 December 2021

insights into those objectives can be already found in the recommendations and guidelines of the Eighth Report on Economic, Social and Territorial Cohesion and the Study on the Impact of the COVID-19 Pandemic on the Outermost Regions, illustrated further in the text.

First, the objectives of the future 2022 strategy should be perceived and evaluated through the prism of recommendations of the European Commission underlined in the Study on the Impact of the COVID-19 Pandemic on the Outermost Regions because the Study precisely demonstrated that the global crisis considerably changed the course of the socio-economic approach to the European future. Similar to the rest of the EU, the effects of the crisis were not evenly manifested in all the outermost regions. On the contrary, the scale and nature of the impact varied considerably between the outermost regions. For that reason, future measures for the medium- and long-term recovery, growth, and resilience-building should be adequately adapted to their unique needs and reflect the existing discrepancies generated and accentuated by the pandemic.

The transition recovery pathways of the outermost regions will be primarily determined by the general rules on thematic concentration in using EU funds, requiring substantial investments in green and digital transition during the new financial period 2021-2027.[82] One of the first steps the outermost regions and their respective Member States should take is to reform the public governance to adjust it to future socio-economic challenges and shocks. The Study highlighted that such advancement is needed, for example, in the area of public financial management in Guadeloupe, reducing the administrative burden on applicants for financial support in Saint Martin, and digitalising the public sector in the Azores and Madeira.[83] During the pandemic, the fragility of the outermost regions' labour market confirmed the demand for further investments in employment support schemes and apprenticeship programmes, with a stronger emphasis on long-term and sustainable needs. The respective demand is especially apparent in the case of the youth labour market, which should be further strengthened and advanced with respect to job retention and hiring schemes as well as the development of specific skills in digitalisation, entrepreneurship, and various sectoral areas. Concrete examples include improving hiring and retention support schemes in the Canary Islands and French Guiana, expanding the range of existing training programmes in Saint Martin, and creating vocational training offers in Martinique. Given the immense impact of the COVID-19 crisis on the outermost regions' economies, a number

82 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, p. 11

83 *Ibid.*, p. 11, 78-79

of safeguarding measures should be introduced to improve the future regional business resilience. Adopting targeted sectoral strategies is a necessary initial step to upgrading the business environment through a medium- and long-lasting integrated approach. Some of the recommended strategies refer to marine technology and bioeconomy research and development in Madeira, the dairy production in the Azores, and diversifying the tourism sector in the Azores, the Canary Islands, Madeira, Martinique, and Réunion. Furthermore, it is fundamental to support future-proof business models of SMEs, such as facilitating credit accessibility for entrepreneurs in Martinique, promoting EU funding opportunities in Saint Martin, and supporting informal businesses in Mayotte.[84] Finally, the outermost regions need to keep pace with the rest of the EU in digital and green transitions, which is necessary to create new socio-economic opportunities and boost the overall recovery and resilience-building. For the outermost regions, investing in digitalisation primarily means investing in tackling remoteness. For example, investments in digitalisation would enhance home access to digital tools in Guadeloupe and Martinique, business digitalisation in French Guiana, Mayotte, Réunion, and Saint Martin, and public sector digitalisation in the Azores. As noted by Renda, digital transformation in the European environment is seen as "a salvific tool for sustainable post-pandemic recovery".[85] When it comes to the green transition, adopting appropriate circular and blue economy strategies is the starting point for defining and strengthening local infrastructure and renewable energy options. In that context, investments in projects supporting climate change adaptation should be one of the medium- and long-term priorities.[86] Examples of specific measures include launching an energy-neutral project in the Canary Islands and supporting regional connectivity and renewable energy projects in Réunion.[87] Investing in the green transition of the outermost regions is not only investing in environmental but also economic and social sustainability.[88] Bongardt and Torres explicitly emphasised that the COVID-19 crisis needed to be addressed through the European Green Deal framework because "it is more than just another initiative for green growth", but "a building block of a sustainable European economic model".[89]

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84 *Ibid.*, pp. 11-12, 73, 76-77, 80-84

85 Renda, A., *Making the Digital Economy "Fit for Europe"*, European Law Journal, Volume 26, No. 5-6, 2020, p. 349

86 Ribalaygua, C.; García, F.; García Sánchez, H., *European Island Outermost Regions and Climate Change Adaptation: A New Role for Regional Planning*, Island Studies Journal, Vol. 14, No. 1, 2019, pp. 21-40

87 Study on the Impact of the COVID-19 Pandemic on the Outermost Regions (OR), *op. cit.*, note 2, pp. 12-13, 73, 84-85

88 Van Zeben, J., *op. cit.*, note 16, p. 300

89 Bongardt, A.; Torres, F., *The European Green Deal: More than an Exit Strategy to the Pandemic Crisis, a Building Block of a Sustainable Economic Model*, Journal of Common Market Studies, Vol. 60, No. 1, 2022, p. 170

Secondly, the Eighth Report on Economic, Social and Territorial Cohesion provided for detailed data on demographic trends necessary for defining future demographic policies of the outermost regions within the new 2022 strategy. The Report's analysis highlights that most outermost regions are faced with the demographic challenge of moderately to sharply declining population. In general, they can be grouped in three categories, depending on the nature and impact of demographic trends over the past decade: (1) those with a population reduction; (2) those with a growing population and net outward migration, and (3) those with a growing population and net inward migration. The decline was most evident in Martinique, Guadeloupe, and Saint Martin and moderate in the Azores and Madeira. The outward migration characterised both sub-categories; however, it was notably higher in the French outermost regions, to the extent that it balanced out usually positive natural change. The demographic picture was the opposite in the Portuguese outermost regions; namely, the outward migration was fairly lower, but the natural change was also low or negative. It is estimated that reductions in the population size will continue in the 2020-2030 decade because the current age structure of the population is conducive to its decline and overall ageing. Namely, the share of the young (0-19 years) and working-age population (20-65) is declining, while the older population (65 years and more) is increasing. French Guiana and Réunion are in the second category of the outermost regions with a growing population, especially French Guiana, where natural change is high, and net outward migration is relatively limited compared with French Guiana. In other words, Réunion also has high natural change, but its net outward migration is substantial. According to projections, the population in these two French outermost regions will continue growing by 2030, however, at a somewhat slower pace, especially in Réunion, where the share of the young and working-age population, which is now high, is projected to decrease. As for the third category of the outermost regions, now comprised of the Canary Islands and Mayotte, they owe their increase in the population number primarily to a high net inward migration (the Canary Islands) or a high natural population change (Mayotte). The age structure of their population is different, with the Canary Islands having a much lower share of young people compared to Mayotte, where more than 50% of the population is 0-19 years old. The estimations project that the population size in both outermost regions will continue increasing – in Mayotte in all age groups, while in the Canary Islands, just in working-age and older population groups. What is particularly important from the perspective of defining effective future demographic policies in the outermost regions is that all of them, no matter to which of the three categories mentioned above they belong, will face a considerable increase in the older population. It is projected that this will be especially

noticeable in French Guiana, Mayotte, and Réunion, where the share of the older population is expected to double by 2030.[90]

## 5. CONCLUSION

Assessed in a two-year retrospective, the health and socio-economic effects of the COVID-19 pandemic on the outermost regions of the European Union can be depicted as particularly detrimental, burdensome, and challenging. Both human toll and recession were more prominent in the outermost regions than elsewhere in the EU, including in their respective Member States – France, Portugal, and Spain. Which determinants generated or potentiated such emergency-invoked hardships, and what can be done to prevent them in the future?

The underlying factor determining the effectiveness of the outermost regions' response to socio-economic shocks is not monodimensional. It is a combination of mutually interwoven elements, which include handicaps listed in Article 349 of the TFEU, a disadvantageous position of less developed regions of the EU (except for the Canary Islands and Madeira), and fragilities of specific growth-enhancing sectors, such as tourism and transport. An array of special measures introduced at the EU level to boost the outermost regions' potential and resilience contribute significantly to strengthening their societies and economies; yet, even in a pre-pandemic period, they could not entirely eliminate the development gap. As expected, COVID-19-induced difficulties additionally potentiated economic discrepancies. Even if the pandemic subsides or disappears in due course, it is assumed that the outermost regions and the EU as a whole will continue to experience the prolonged effects of the protracted crisis for some time to come. In such circumstances, adopting a new strategy and accompanying legislation that would foresee measures targeting the repercussions of the unprecedented (health) crisis is critical.

The drafting process of the new 2022 European strategy for the outermost regions is in full swing. For the first time, the strategy will address the impact of the COVID-19 crisis on the outermost regions and set strategic orientations for the transition recovery pathways. Every crisis is a breeding ground for new beginnings with new opportunities. For the outermost regions, that would mean incorporating their peculiar needs and interests into broader political objectives of the EU, calling for the ambitious green, digital, and demographic transition. The 2021-2027 financial perspective is better equipped with resources and funding channels than the previous 2014-2020 financial envelope, so the European regions will be

[90] Eighth Report on Economic, Social and Territorial Cohesion, *op. cit.*, note 3, p. 201

able to invest in targeted effective recovery while simultaneously building sustainable societies. The outermost regions will have the opportunity to bounce back and become more competitive and resilient to future multi-layered crises.

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UDK 342.7-054.7(497.6)
Professional paper

# PROTECTION OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA- MIGRATION MANAGEMENT CHALLENGES IN SOCIETY RECOVERING FROM THE COVID-19 PANDEMIC

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***ABSTRACT***

*Migration management, among others, is one of the challenges Bosnia and Herzegovina and the Western Balkan countries have faced in recent years. The uncertain and complex situation has been exacerbated by the corona virus pandemic, and existing material and human resources are now focused on repairing its consequences. The end of the pandemic remains uncertain, social problems are becoming more complex, and systemic support is needed for a growing number of different vulnerable categories in the country. The protection of human rights and fundamental freedoms is imperative, especially in times of crisis. Although significant activities have been implemented, they are still insufficient to adequately respond to migration management. The support of the international community remains necessary. Multisectoral action, coordination and sharing of experiences should be intensified.*

*The European Commission's 2021 Report for Bosnia and Herzegovina pointed to very limited progress in migration and asylum management and the need to significantly improve this area, ensure effective coordination and provide sufficient and adequate accommodation capacity. The response to the crisis during the outbreak of COVID-19 was assessed as satisfactory by the European community, and greater spread and more severe consequences for the migrant population were prevented. According to some reports, the rights of minorities and asylum seekers continue to be a serious concern for human rights in Bosnia and Herzegovina. Unaccompa-*

*nied children face specific challenges and vulnerabilities, and their protection and adequate response to their needs is one of the priorities for future action.*

*Media coverage of migrants needs to be reviewed and directed in a way that is in line with the human rights of vulnerable categories and advocating the necessity of their protection. The media is one of the key links in monitoring the protection of human rights, but also in focusing on areas that require urgent action. Preventive activities should become an integral part of the strategic directions of local and national governments, and the support of the international community, cooperation, adequate assessment and protection of the best interests of all citizens are a prerequisite for social security in Bosnia and Herzegovina.*

***Keywords**: Bosnia and Herzegovina, migration management, COVID-19, future, human rights, recovery*

## 1. INTRODUCTION

Most of the refugees and migrants identified in Bosnia and Herzegovina entered the country from the southeast or east by crossing the border with Serbia or Montenegro irregularly. Despite the reduced number of newcomers and the continuation of movement through the region and towards Western and Central Europe, at the end of 2020, there were about 140,000 refugees and migrants in the countries along the route. Children make up approximately one third of all refugees and migrants passing through the Balkans, and most of them are unaccompanied and separated children. Among other events, the COVID-19 pandemic had a significant impact on the dynamics of migration in Europe.[1]

Bosnia and Herzegovina, as a country in transition, with existing economic problems and inability to respond to the needs of its citizens, is facing the situation that there are individuals and families on its territory who also need to provide all possible assistance and support in exercising basic human rights. The large number of competencies, unclear procedures and lack of resources pose a major challenge for the future, especially at a time of recovery from the COVID-19 pandemic, whose real consequences are not yet visible.

The Ministry of Security of Bosnia and Herzegovina is responsible for the protection of international borders, internal border crossings and traffic regulation at border crossings of Bosnia and Herzegovina, regulates procedures and organization of services related to the movement and stay of foreigners in Bosnia and Herzegovina creating and implementing immigration and asylum policy in country. The Ministry of Human Rights and Refugees of Bosnia and Herzegovina is responsible for the care (provides accommodation, the right to health and social

[1] Save the Children, *Refugees and Migrants at the Western Balkans Route*, Regional Overview, Serbia, 2020. p.2

protection, education...) of foreign nationals to whom the Ministry of Security of Bosnia and Herzegovina recognizes refugee status or subsidiary protection.[2]

## 2. MIGRATION CHALLENGES AND HUMAN RIGHTS

According to the latest World Migration Report, some 4.1 million people have sought international protection and are awaiting refugee status asylum seekers. In 2020, the global number of first-instance asylum applications was 1.1 million. At the end of 2020, under-18s made up about 38 percent of the refugee population (8 million of the 20.7 million refugees under the UNHCR mandate). Unaccompanied and separated children submitted about 21,000 individual asylum applications in 2020, down from 25,000 the previous year. Most of the migrants arriving in Bosnia and Herzegovina were single, although they included unaccompanied and separated children and families with children.[3]

Key indicators in the field of migration in Bosnia and Herzegovina[4] at the end of January 2022 indicate that 5,160 migrants and asylum seekers entered the country illegally in January 2022, an increase of 54% compared to December 2021, and an increase of 23 % compared to January 2021. A total of 383 people (74%) who entered the country in January expressed their intention to seek asylum, with the majority saying they came from Afghanistan (30%), Pakistan (13%) and Cuba (8%). A total of 153 registered asylum seekers are awaiting processing and a decision, 41 are awaiting registration of their asylum application with UNHCR / Vaša prava BiH, 69 are under subsidiary protection in BiH, and UNHCR and partners are assisting 98 stateless and stateless persons.

In the field of migration, the support of international organizations is especially important, as well as local civil society organizations that provide social services to the vulnerable. The International Organization for Migration in Bosnia and Herzegovina provides great support to the migration management process, and the term migrant is defined as any person who moves or crosses an international border, or leaves his usual place of residence within his country, regardless of legal status, whether the movement is voluntary or forced, the causes of the movement and the length of stay.[5] Based on the signed Protocol with the Ministry of Security of Bosnia and Herzegovina, the Association Vaša prava BiH, based in Sarajevo,

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2 Official website of the Ministry of Human Rights and Refugees of Bosnia and Herzegovina [http://mhrr.gov.ba/], Accessed 3 March 2022

3 IOM UN Migration, *World Migration Report 2022,* p. 96

4 UNHCR Bosnia and Herzegovina, *Operational update - January 2022*

5 UNHCR, IOM., *Migration and refugee reporting*, 2021, p. 2

provides free legal aid to victims of trafficking, asylum seekers and other persons under international protection in the country.[6]

Centers for Social Work have a key role in the official plan of assistance to migrants, refugees, asylum seekers and unaccompanied children or children separated from parents or guardians, as they are responsible for providing family law protection, child protection, social protection and protection of families from violence and juvenile delinquency, as regulated by the relevant social protection laws. The lack of clear protocols or standard operating procedures to help vulnerable migrants and refugees means that Centers for Social Work cannot provide effective assistance to this population. The Centers for Social Work in Bosnia and Herzegovina did not have enough human and financial resources even before the influx of migrants and refugees into the country, and now they especially do not have them to address efficiently the issues of this population group. NGOs are currently the main providers of direct humanitarian assistance to migrants and refugees across the country. This has been recognized by all actors such as the Service for Foreigners, police bodies and international organizations, which consistently refer migrants to NGOs which are engaged throughout the country, in reception centers, as well as in places with the highest number of migrants and refugees.[7]

Since the beginning of 2018, the number of migrants and refugees entering BiH has increased dramatically, which poses a challenge to the human and financial resources of responsible institutions and has led to rising tensions in society and growing discrimination against migrants. A survey conducted in 2019 among 1001 people from Bosnia and Herzegovina, with the aim of collecting data on the extent of discrimination in the country and personal exposure to discrimination, showed that 72.9% of respondents confirmed that discrimination against migrants is widespread in the country, 78.1% respondents said they did not want migrants to settle in Bosnia and Herzegovina, which showed a discrepancy between the perception of discrimination against respondents and their personal attitude towards the group.[8] According to some reports, the rights of minorities and asylum seekers remain a serious concern for human rights in Bosnia and Herzegovina.[9] In November 2021, the temporary reception center Lipa near Bihać was opened, in cooperation with the Ministry of Security, the Service for Foreigners and the IOM of Bosnia and Herzegovina, with the financial support of the European Union in

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6 Official page of Organization Vaša prava BiH, [https://pravnapomoc.app/ba], Accessed 3 March 2022

7 OSCE Mission to Bosnia and Herzegovina, *Assessment of the Situation of Migrants and Refugees in Bosnia and Herzegovina - Review of the Activities of Key Actors in the Field*, 2018, p. 29

8 OSCE Mission to BiH, *Discrimination in Bosnia and Herzegovina: Perceptions, Attitudes and Experiences of the Public*, 2019, p. 43

9 Human Rights Watch, *World Report 2021,* New York, p. 100

Bosnia and Herzegovina and other partners, as an important step in establishing an efficient migration management system. The accommodation capacity of the temporary reception center Lipa is up to 1,500 migrants, including families with children, unaccompanied children and single people.[10]

As stated in the European Commission's 2021 Report on Bosnia and Herzegovina[11], Chapter 23 - Justice and Fundamental Rights, unaccompanied migrant children face specific challenges, such as access to safe accommodation and asylum procedures. In 2020, 351 unaccompanied migrant children were identified (533 in 2019, 324 in 2018). The law appointed 987 guardians (304 in 2019, 29 in 2018). It was stated that it is necessary to find alternatives to the detention of families of irregular migrants with children, and to ensure the registration of the birth of undocumented migrant children. It was also pointed out that the state should provide adequate humanitarian aid and protection (including shelter, food and medical aid) and an efficient approach to the asylum procedure for asylum seekers and migrants who have been present on its territory since 2018. Regarding Chapter 24: Justice, Freedom and Security, the Report states that Bosnia and Herzegovina has a certain level of preparedness for the implementation of the EU acquis in this area, that very limited progress has been made in the management of migration and asylum, and that is needed in next year to significantly improve migration management and the asylum system, ensure effective coordination, ensure sufficient and adequate accommodation capacity, equitably distributed among all entities and cantons, ensure access to asylum procedures, increase border controls, including human resources and equipment, and improve the legal framework and capacity for voluntary and forced return. The report also pointed to the need to adopt a new Strategy and Action Plan on Migration and Asylum 2021-2025, which is under development, insufficient reception centers that would provide shelter and protection to all who need it, insufficient staff and operational capacity of relevant agencies, institutional and coordination weaknesses in the management of migration and asylum, the need to improve the protection of human rights, the need to adopt contingency plans, and the fact that the rights of asylum seekers are not guaranteed evenly throughout the country, because their access to services varies depending on the location of reception centers. The response to the crisis during the outbreak of COVID-19 was assessed as satisfactory, preventing greater spread and more severe consequences for the migrant population, and great assistance was provided by humanitarian partners. The Ministry of Security has stepped up efforts to improve coordination between the state and local levels

[10] Press release of the Ministry of Security of Bosnia and Herzegovina dated 19 November 2021, [http://www.msb.gov.ba/vijesti/saopstenja/default.aspx?id=21052&langTag=bs-BA], Accessed 5 March 2022

[11] European Commission, *Bosnia and Herzegovina 2010 Report*, Strasbourg, 19 October 2021, p. 15, 33

and take responsibility for migration management, which should be supported by all levels of government. Mechanisms for the collection, exchange and analysis of migration statistics in the Migration Information System have been improved. [12]

In November 2021, a regional conference "Sarajevo Migration Dialogue" was held in Sarajevo, where ministers of the region, representatives of the EU and international organizations exchanged information and experiences, which are crucial for effective migration management, and the discussion was conducted through three panels: migration management, border control and management and future trends and challenges in migration. It was pointed out that Bosnia and Herzegovina has launched activities to strengthen the country's capacity to respond to the pressure of the migrant crisis through more efficient management of migrant flows, strengthening coordination of institutions at all levels of government, increased state border control and improved cooperation with international partners and civil society which resulted in a calmer migration situation.[13] The key challenges in migration management in Bosnia and Herzegovina relate to the necessary political consensus on the management of illegal migration in Bosnia and Herzegovina, coordination of different levels of government and lack of financial, human and technical capacity in all institutions and agencies. [14]

In accordance with the prepared Strategy in the field of migration and asylum and the action plan for the period 2021-2025. the construction of the migration and asylum management system in Bosnia and Herzegovina represents a long - term development process, within which the existing legal, institutional and other necessary capacities are continuously upgraded and new structures are established as part of that system. There are very good assumptions that in the coming period all necessary mechanisms will be further strengthened and special attention will be paid to building stable and sustainable mechanisms of coordination and inter-institutional cooperation of competent institutions at all levels of government, especially in circumstances of intensified and unusual migration the result of broader regional and pan-European trends in human migration.[15]

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12 *Ibid.*

13 Press release of the Ministry of Security of Bosnia and Herzegovina dated 19 November 2021, *op. cit.*, note 10

14 Ministry of Security of Bosnia and Herzegovina, Migration Profile of Bosnia and Herzegovina for 2020, p. 84

15 Ministry of Security of Bosnia and Herzegovina. Migration and Asylum Strategy and Action Plan (2021-2025), p. 8

## 3. COVID- 19 PANDEMIC AND SOCIAL PROCESSES

According to the assessment of the impact of COVID-19 on society in Bosnia and Herzegovina, the relaxation of administrative measures taken in response to the pandemic meant greater access to institutions, public services and everyday life structures, but access to institutions is still limited. The results of the survey showed that, according to respondents experience, access to schools (18%), primary health care (general practitioners) (14%) and hospitals (10%) was most often limited. The results of the research showed that 13.5% of the respondents were faced with limitations in achieving access to health care at the primary level. The younger population (15%) was more often unable to access primary health care (general practitioners).[16]

The COVID-19 pandemic has had a significant impact on the health and well-being of migrants in Bosnia and Herzegovina, who are particularly affected by poor access to health services and limited access to adequate sanitation, hygiene facilities and personal protective equipment. Accommodation in reception centers is further complicated by the need to ensure compliance with COVID-19 mitigation and prevention measures such as maintaining physical distance and providing quarantine space, due to concerns about the health implications of increasing center overcrowding. [17] Generally speaking, vulnerable categories in Bosnia and Herzegovina often face the impossibility of providing certain social services, often because they are not available to them, are not adequate or do not even exist in accordance with their needs. The provision of social services implies strong capacities of the providers of these services who are often unable to provide support to everyone who needs it due to limited financial resources and the lack of mutual coordination with public institutions.

The European Union has allocated another 2.5m euros in humanitarian aid to support vulnerable refugees and migrants in Bosnia and Herzegovina, focusing on basic needs, such as primary and secondary health care, limiting the spread of the coronavirus pandemic and providing mental health assistance and psychosocial support. Assistance is also provided in the form of protection, such as identification, case management and referral, support for unaccompanied children and

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16 UNICEF, UNDP. *Assessment of the Consequences of COVID-19 on Society in Bosnia and Herzegovina, Second Household Survey*, 2021, p. 27

17 IOM Bosnia and Herzegovina Crisis Response plan 2021, p. 4, [https://crisisresponse.iom.int/sites/default/files/appeal/pdf/2021_Bosnia_and_Herzegovina_Crisis_Response_Plan_2021.pdf], Accessed 9 March 2022

survival assistance for people outdoors, including warm clothing, sleeping bags and food.[18]

## 4. CHILDREN ON THE MOVE - SAFETY AND RISKS

Widespread unemployment and lack of sustainable economic opportunities leave large numbers of people without a job or a sustainable livelihood. At the same time, the growing demand for cheap labor, combined with the often ubiquitous corrupt practices, has led to increasing tolerance for the exploitation of economically disadvantaged people in the form of dangerous and degrading work. This demand, in the context of the evolving crisis, is actually contributing to migratory flows, increasing the vulnerability of vulnerable populations, providing new, lucrative opportunities for criminal networks and ensuring a continuous cycle of exploitation.[19]

A major problem is the fact that migrants, especially children, are at risk of being trafficked or abused in any other way that puts them at risk. Also, they are often invisible to the system due to the inability to identify and navigate inaccessible routes. An investigation[20] conducted by the Guardian and the cross-border journalist collective Lost in Europe revealed that 18,292 unaccompanied migrant children went missing in Europe between January 2018 and December 2020, equivalent to almost 17 children a day. In 2020 alone, 5,768 children went missing in 13 European countries.

With the support of UNICEF Bosnia and Herzegovina, the Ministry of Security has developed a Manual for the Involvement of Refugee, Asylum Seeker and Migrant Children in the Education Process, as the first institutional response of the education authorities to the needs of children in asylum seekers and migrants. The handbook provides guidelines and suggestions for concrete steps to include children of asylum seekers / refugees and migrants in the educational process in

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18 Aljazeera, The EU is allocating another 2.5m euros to support refugees and migrants in BiH [https://balkans.aljazeera.net/news/balkan/2021/12/3/eu-izdvaja-jos-25-miliona-eura-za-podrsku-izbjeglicama-i-migrantima-u-bih], Accessed 9 March 2022

19 Office of the OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings, *From Reception to Recognition: Identifying and Protecting Victims of Trafficking in Mixed Migration Flows Focus on facilities for the first identification and reception of refugees and migrants in the OSCE region*, 2017, p. 15

20 Einashe, I.; Homolova, A., *Nearly 17 child migrants a day vanished in Europe since 2018,* The Guardian, [https://www.theguardian.com/global-development/2021/apr/21/nearly-17-child-migrants-a-day-vanished-in-europe-since-2018], Accessed 10 March 2022

Bosnia and Herzegovina. [21] In accordance with the Strategy of Integrated Border Management in Bosnia and Herzegovina for the period 2019-2023, protection and respect for human rights of all persons crossing the state border or caught illegally crossing the state border is a priority of the Border Police of Bosnia and Herzegovina with special attention to vulnerable categories, especially unaccompanied minors, persons suspected of being victims of violence and sexual abuse or trafficking. Accordingly, it is necessary to strengthen the capacity of Bosnia and Herzegovina in the field of recognizing persons entitled to international protection, the necessary legal assistance, speeding up legal processes, as well as the effective return of persons who do not meet the requirements for international protection.[22]

During 2020, the Human Rights Ombudsmen in Bosnia and Herzegovina registered a total of 20 cases related to asylum and migration. The submitted complaints referred to the legal status of migrants, the conditions of their accommodation, the dissatisfaction of citizens with the accommodation of migrants in their environment and the procedure for asylum applications. The Ombudsmen received a submission regarding the protection of unaccompanied minors from international and domestic NGOs and competent authorities, indicating the stay of 352 unaccompanied minors in the temporary reception center Bira in Bihać and pointing out the problem of false families, which represents exposure and increased risk of various abuses.[23] Individual complaints received by the Ombudsmen of Bosnia and Herzegovina in the past indicate that there are categories of children with parents or guardians, but in practice they are placed in an immigration center because the identity of the guardian cannot be established, especially if it is a person who is an irregular migrant who does not carry an identification document. The second group are children who are on the move in the territory of Bosnia and Herzegovina, without parents or guardians.[24]

The Ombudsman for Children of South East Europe believe that it is necessary to establish a comprehensive and effective system of protection for children on the move in each Member State, which will guarantee their protection and full

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21 Ministry of Civil Affairs of Bosnia and Herzegovina and UNICEF in Bosnia and Herzegovina, *Handbook for the Inclusion of Refugee Children, Asylum Seekers and Migrants in the Educational Process in Bosnia and Herzegovina,* 2020

22 Council of Ministers of Bosnia and Herzegovina, *Strategy for Integrated Border Management in Bosnia and Herzegovina for the period 2019-2023*, p. 18

23 Institution of the Human Rights Ombudsman of Bosnia and Herzegovina. *Annual Report on the results of activities for 2020*, p. 120

24 Institution of the Human Rights Ombudsman of Bosnia and Herzegovina. *Special Report on the Situation in the Field of Migration in Bosnia and Herzegovina*, 2018, p. 57

enjoyment of their rights guaranteed by the Convention on the Rights of the Child, that it is needed to create mechanisms for cross-sectoral cooperation and to adopt protocols of action of competent authorities for "child friendly" reception of "children on the move", that it is necessary to establish effective national systems for collecting and exchanging data on "children on the move", ensure continuous and comprehensive training of professionals involved in the adoption and implementation of measures for the protection of "children on the move", that in each Member State criteria for appointing a guardian for "children on the move" should be established and that guardianship should be organized appointed to the child as soon as possible.[25] The Institution of the Ombudsman for Children of the Republic of Srpska, based on research on sexual exploitation of children and child begging, pointed out, among other things, the lack of real indicators of the presence of vulnerable children on this basis, the lack of systematic measures and activities, both in prevention and psychosocial support, and insufficient cooperation of competent services and institutions, which results in inadequate access to child support, because a multidisciplinary approach in child protection is not provided. [26]

Children on the move in Bosnia and Herzegovina are not recognized as a special category in the legislative and institutional legal framework, but certain legal and strategic documents address issues of certain groups of children who are considered "children on the move" and affect their protection and rights. What is common to all groups of children on the move is the fact that their current living conditions and the causes that led to migration were unfavorable for their optimal psychophysical development, whether it was poverty, life-threatening armed conflict, marginalization and discrimination, violence or other forms of exploitation. Migrations further aggravate their situation and increase the degree of vulnerability. Given that children on the move belong to different social, cultural and social categories, they are often victims of inhuman treatment due to the specific circumstances in which they move and live, which requires special access and care, and the establishment of an independent monitoring and evaluation mechanism.[27]

Research on the phenomenon of child trafficking in Bosnia and Herzegovina has found that Roma and migrant children, especially unaccompanied migrant children, are the most vulnerable to human trafficking. It is estimated that there

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25 Save the Children, Republic of Croatia, Ombudsman for Children, *Children on the Move: Proceedings of the thematic meeting of the Network of Ombudsmen for Children of Southeast Europe*. 2014, p. 43

26 *Ibid.*

27 Project "Protection of children on the move in Bosnia and Herzegovina", *Report on the position of children on the move in Bosnia and Herzegovina "I want to be like other children",* Zdravo da ste, Banja Luka, 2016, p. 10

are about 500 to 600 refugee children and unaccompanied or separated migrant children in Bosnia and Herzegovina. A large number of these children live in overcrowded reception facilities, some sleep in places with poor conditions and with little or no access to support. Civil services are overburdened and unable to adequately respond to growing needs. The structure of the migrant population has changed in favor of a significant increase in the share of vulnerable groups in the migrant population, especially unaccompanied asylum seekers, children victims of sexual, domestic and other forms of violence, as well as children victims of trafficking.[28]

## 5. MIGRATION AND MEDIA

In recent years, Bosnia and Herzegovina has seen a significant increase in mixed migration movements, with more than 70,000 people entering the country since 2017, with over 4,000 people currently housed in official reception centers and about 1,700 people living outside these facilities. In violation of the ban on collective expulsions, rejections of migrants leaving Bosnia and Herzegovina, including families with children, are regularly reported. In 2020, the UN Special Rapporteur on the Human Rights of Migrants expressed deep concern over the 'repeated and persistent disproportionate use of force against migrants in repulsion operations'.[29] In February 2022, the tenth joint data collection exercise was held by the IOM of Bosnia and Herzegovina, together with the Service for Foreigners and Support of the Red Cross of the Federation of BiH and Republic of Srpska to collect data on the number of migrants and asylum seekers present in the country and who were not housed or registered in temporary reception centers. The total number of migrants observed at the covered locations is 386. Gender and age data show that the majority of migrants outside the reception centers are adult men (319), representing 83% of the total identified migrant population, followed by boys (28), adult women (22) and girls (16).[30]

With the introduction of protection measures against the COVID-19 virus, almost 6,000 people have been forcibly imprisoned in unsanitary centers where they do not have enough food, where access to water is limited and they cannot

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[28] Dottridge, M., *et al.*, *The Phenomenon of Child Trafficking in Bosnia and Herzegovina*, Council of Europe 2021, p. 19

[29] Official website of the United Nations for Bosnia and Herzegovina, *UN in Bosnia and Herzegovina concerned about forced return of migrants, asylum seekers and refugees at borders*, [https://bosniaherzegovina.un.org/bhs/123914-un-u-bosni-i-hercegovini-zabrinute-zbog-nasilnog-vracanja-migranata-trazilaca-azila-i] Accessed 13 March 2022

[30] IOM. *Migrant Presence Outside Temporary Reception Centres in Bosnia and Herzegovina - Round 10*, February 2022

maintain personal hygiene, and health care is only basic. In some of these centers, such as Borići, Sedra and Salakovac, only families and vulnerable categories live, including victims of violence, torture and even human trafficking. Where there are no families, there are often minors, boys who travel alone and who are easy targets and often victims of smugglers, but also other people.[31] Certain reports point out that tensions with migrants are rising in Bosnia and Herzegovina, and the situation is further aggravated by the media, which sensationally report on migrants' attacks on people. The situation is very bad, because the migrant group is placed in a context in which antagonism, fear, danger among citizens and prejudice develop, and this further contributes to the spread of panic and hatred. It emphasizes the need to end the myth of the criminalization of the migrant population and points to respect for the human rights of all people. [32]

Analyzes were made of the way migrants are described in the media in Bosnia and Herzegovina and the extent to which their reporting affects the public perception and actual tolerance of refugees and migrants. Analyzing media announcements in the last three years, it was concluded that the largest number of announcements refer to the behavior of migrants to the detriment of individual and social values. Negative contents of the publications were recorded in slightly more than a third of the analyzed publications, and included deviant behaviors of migrants in Bosnia and Herzegovina, but also accompanying socially harmful phenomena, such as organized crime, human trafficking and disturbing public order.[33]

A survey conducted in 2019, which analyzed hundreds of texts from 14 media from all over Bosnia and Herzegovina (three print media, five electronic and six online media), showed that migrants and refugees were reported in a very unprofessional way, out of half of the analyzed texts, migrants and refugees were mentioned as dangerous to the citizens, and already in the titles there was an attempt to spread panic, while in the contents the authors used assumptions and unverified information. Reports of migrants are divided into five categories: stigmatization of migrants and refugees, migrants and refugees as criminals, migrants and refugees are dangerous to citizens, empathetic reporting in which these people are presented as victims and sensationalist reporting. [34]

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31 Ahmetašević, N., *People in the movement without human rights - refugees and migrants in Bosnia and Herzegovina without human rights.* Friedrich Ebert Stiftung, 2020, p. 2

32 Kolašinac, A., *Hate speech towards migrants,* Global Analitika, [https://globalanalitika.com/govor-mrznje-prema-migrantima/], Accessed 14 March 2022

33 Kržalić, A.; Kobajica, S.: *Migrants in the public discourse of the media in Bosnia and Herzegovina*. Police security, Zagreb, Vol. 30., No. 2, 2021, p. 233 - 244

34 Adilagić, R., *Reporting on the Migrant and Refugee Crisis in BiH: Insinuations, Racism and Xenophobia,* Association of Journalists of BiH Journalists, [https://www.diskriminacija.ba/teme/izvje%C5%A1t-

## 6. CONCLUSION REMARKS

Given the time we live in and changes that happen every day, it is certain that the society of Bosnia and Herzegovina will have to adapt in the future and face many challenges in various fields. The COVID-19 virus pandemic has affected society in a variety of ways, most notably vulnerable categories. It is necessary to make additional efforts to protect all those who need support, especially children and adults, who due to various causes are in the territory of Bosnia and Herzegovina and face uncertainty. It is necessary for policy makers to point out the need to define clear mechanisms for responding to migration. Unaccompanied children are a priority, and their identification for the purpose of monitoring and protection is necessary in order to avoid abuse of their position.

The role of the media is of great importance in directing public opinion on the needs of the vulnerable, especially migrants, who are often presented in the media as a danger to the local population. In this context, additional training of journalists is needed in order to adequately report on this topic and to provide the public with quality, realistic and detailed information. In this context, it is necessary to work on cooperation between policy makers and journalists, not only in the field of migration reporting, but in all areas of social life and action.

On the path of European integration, Bosnia and Herzegovina faces numerous tasks, and guaranteeing basic human rights to citizens and all those who are on its territory is imperative.

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UDK 349.44(4-67EU:497.5)
71(4-67EU:497.5):616.98
Review article

# SPATIAL PLANNING IN THE EU AND CROATIA UNDER THE INFLUENCE OF COVID-19 PANDEMIC

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***ABSTRACT***

*Spatial planning is an interdisciplinary process dealing with practices of regulating and transforming the space, including experts from various fields such as lawyers, spatial and urban planners, geographers, civil engineers, economists, sociologists, etc. Spatial plans are general acts that arise due to the complex spatial planning process in which public participation is a necessary tool for transparent and legal procedure. They impact human rights due to their influence on a healthy environment, organization of life, quality of public services, green areas in the cities, etc. Spatial plans also deal with the economic aspect of investments, urban planning, and development of a particular territory.*

*Cities are rapidly evolving and are characterized by density and overcrowded population, so the EU has a special interest in the adequate organization of the space. Consequences of the COVID-19 pandemic have produced a need for a different land use regulation from the established one. New challenges for the Member State's governments include regulation for the organization of life and everyday needs in 15 minutes' walk areas (work, market, health care, school, kindergartens, public services, parks, etc.). Although the European Union does not have direct competence in spatial planning of each Member State, it has a strong influence on the Member States through regulations (for example, European Spatial Development Perspective, The New Leipzig Charter, etc. which provide a strong framework for good and sustainable urban governance) and practice, as well as through the financial support to the Member States. This paper has two main goals. The first aim of this paper is to analyse how the EU tries to overcome the consequences of the pandemic in the physical planning system (recommendations, guidelines, financial support, consulting, or others). We also aim to discover how the pandemic affected the process of adopting the spatial plans in the Member States on the example of Croatia in one case study.*

*The paper is divided into several parts. After the introduction, the first part of the paper brings an overview of the spatial planning process in the EU and Croatia based on the analyses of the relevant EU and domestic regulations. Next part of the paper deals with the influence of the COVID-19 pandemic on the spatial planning at the EU level, and on the development and adoption of spatial plans in Croatia. This includes the duration of the process, restrictions, and new ways of public participation in the process of the development and adoption of spatial plans (for example online public presentations), the influence on economic development (investments in a building), social distancing, etc. Last part of the paper will contain a research of development and adoption of spatial plans under the influence of the COVID-19 pandemic. The paper concludes with particular suggestions for improving the Croatian situation based on the good practices of the EU.*

***Keywords**: Croatia, COVID-19 pandemic, European Union, public participation, spatial planning*

## 1. INTRODUCTION

*Spatial planning*[1] is an interdisciplinary process dealing with practices of regulating and transforming the space,[2] including experts from various fields such as architects, lawyers, spatial and urban planners, geographers, civil engineers, economists, sociologists, etc. Spatial planning is area of high social and economic importance.[3] Spatial planning is an activity that directs the spatial distribution of people, goods, and activities with the aim of optimal use of space. In a narrower sense, it is the process of making spatial plans.[4]

Spatial plans direct the use of space. Spatial plans provide guidelines, propose goals and determine the conditions for the use of space. As legal documents, they are particularly important in implementing decisions on spatial planning and protection.[5] Spatial plans are general acts that arise due to the complex spatial planning process in which public participation is a necessary tool for transparent and legal

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1 „Spatial planning differs significantly from urban planning, and differences in the subject, objectives, and methods of planning and content are integral parts of these plans. The urban plan deals with the internal spatial planning of settlements and cities and depending on the type (scale) of the urban plan, the manner and method of preparation change." (Pegan S.*, Prostorno planiranje 1,* Arhitektonski fakultet*,* Zagreb, 2009, p. 7)

2 „Spatial planning refers to the methods used largely by the public sector to influence the future distribution of activities in space. It is undertaken with the aims of creating a more rational territorial organisation of land uses and the linkages between them, to balance demands for development with the need to protect the environment, and to achieve social economic objectives." (European Commission, *Regional Development Studies - The EU Compendium on Spatial Planning System and Policies*, 1997, p. 24.)

3 Krtalić, V., *Planiranje korištenja zemljišta - Usporedba načina i sustava planiranja u nekim državama članicama EU i Republike Hrvatske*, Novi informator, Zagreb, 2009, p. 35.

4 Marinović-Uzelac, A., *Prostorno planiranje*, Dom i svijet, Zagreb, 2001, p. 1-50

5 Pegan S., *op. cit.,* note 1, p. 10

procedure. They impact human rights due to their influence on a healthy environment, organization of life, quality of public services, green areas in the cities, etc. Spatial plans also deal with the economic aspect of investments, urban planning, and development of a particular territory.[6] They make it possible to reconcile different and sometimes conflicting interests in the use of space in order to make the whole work better and avoid chaos. It strives for the appropriate use of space, and thus to reduce the cost of living, the correct choice of accommodation activities, reducing traffic, and reducing damage to society and individuals. [7]

Primary spatial planning goals are numerous, which affirms the importance of the adequate spatial planning. Some of them include achieving balanced spatial development in line with economic, social and environmental starting points, balancing regional development processes and related spatial interventions and different needs and interests of spatial users in a way that ensures spatial sustainability in relation to rational use and preservation capacity of land, sea and seabed[8] for effective protection of space, connecting the territory of the State with European spatial systems, nurturing and developing regional spatial features, mutually harmonized and complementary distribution of various human and spatial activities for functional and biodiversity conservation, environmental protection and prevention of pollution risk, protection of cultural property and values, well-organized distribution and arrangement of building land, quality and humane development of urban and rural settlements, etc.[9]

The importance of spatial planning leads us to the EU, which has a special interest in utilizing crucial resources such as land, water, etc., and their equal distribution throughout the European Union. Although the EU does not have a direct impact on the spatial planning of the Member States, it influences spatial planning through various regulations, documents, funds, and lately, during and after the COVID-19 crisis – recommendations and guidelines with the aim of successful prevailing cultural, economic, social and other consequences which pandemic left behind.

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6 Ministry of Physical Planning, Construction and State Assets, *Spatial plans*, [https://mpgi.gov.hr/about-the-ministry-139/scope-of-the-ministry/physical-planning-143/spatial-plans-8708/8708], Accessed 7 April 2022

7 Pegan S., *op. cit.,* note 1, pp. 10-11

8 Spatial planning beside land area covers sea area and underground territory (Chistobaev, A. I.; Fedulova, S. I., *Spatial Planning in the European Union: Practices to Draw on in Russia*, Baltic Region, Vol. 10, No. 2, 2018, pp. 86-99, p. 90 [https://doi.org/10.5922/2079-8555-2018-2-62018]

9 Final proposition of PPA, P. Z. 466, from 28th of November 2013, (Final proposition PPA), Available at: [https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080615/PZ_466.pdf], Accessed 6 April 2022 p. 76

The paper is divided into several parts. After the introduction with basic information on spatial planning and its importance, the paper gives short introduction to the legal development of spatial plans in the European continent and discusses the legislative framework at European Union and domestic (Croatian) level. The next chapter deals with the COVID-19 pandemic and its influence and consequences on spatial planning in the EU and Croatia. The EU mainly reacted through guidelines and recommendations, and our focus was on three of them – *Regional Policy brief*, *Spatial Planning Guidelines during COVID 19,* and *Report on the challenges for urban areas in the post-COVID-19 era*. COVID-19 affected the process of the adoption of spatial plans on the Croatian level, which can be seen as a result of a research. In the last part, the paper concludes with some remarks and propositions to better understand the spatial planning process and lessons learned from the pandemic.

## 2. LEGISLATIVE FRAMEWORK

The beginning of the spatial planning regulation[10] appeared in several European countries, Germany, Denmark, Sweden, and the Netherlands at the beginning of the 20th century. Nevertheless, in most countries spatial planning was regulated only after the Second World War, with a general trend – decentralization.[11] Lukkonen mentions that interest in space and spatial planning reaches back to the 1940-ies, when the Council of Europe was established,[12] but important period for spatial planning starts with the establishment of various European planning organizations, journals, research institutions and networks, and policy documents and agendas which will be mentioned later in the paper.[13]

### 2.1. European Union Level

Spatial planning influence on utilization of space, water and air, so European Union has special interest on its regulation. It is important to mention that European Union has no explicit competence in spatial planning of the Member States

[10] For the development of spatial planning regulation in Croatia see for example: Poropat A.; Bršić, K.; Velčić, E., *The Hierarchy of Plans of Physical Planning in the Republic of Croatia and EU,* in: Franković, B. (ed.), International Congress Energy and the environment. Rijeka, Croatian Solar Energy Association, 2006. pp. 139-152

[11] Larsson, G., *Spatial Planning Systems Western in Europe – An Overview*, IOS Press, Amsterdam, Berlin, Oxford, Tokyo, Washington, DC, 2006, p. 17

[12] Council of Europe was established in 1949, see: Council of Europe Office in Yerevan, About the Council of Europe, [https://www.coe.int/en/web/yerevan/the-coe/about-coe], Accessed 7 April 2022

[13] Lukkonen, J., *Planning in Europe for 'EU'rope: Spatial planning as a political technology of territory***,** Planning Theory, 2015, Vol. 14, No. 2, p. 175

of the European Union.[14] However, it has strong influence on the Member States through EU legislation (most significantly through sectoral legislation in the period 2000-2016 in the field of environment and energy),[15] EU incentives[16] and through informal influence.[17] Most European Union countries have three levels of spatial planning systems – national, sub-national (regional) and local. Spatial Planning Process is mostly defined as top-down process, but in certain situations can have bottom-up influence, such as domestic discourses and domestic practices.[18] Sometimes spatial planning is horizontal process when Member States exchange interactive knowledge.[19]

Legislation of spatial planning[20] on the EU level concerns mostly directives[21] in each sector connected to spatial planning, such as environmental legislation,[22] legislation in regard to energy,[23] legislation on competition[24] and maritime spatial

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14 Dallhammer, E., *et. al., Spatial planning and governance within EU policies and legislation and their relevance to the New Urban Agenda,* (New Urban Agenda), Commission for Territorial Cohesion Policy and EU Budget, European Committee of the Regions, 2018, [https://cor.europa.eu/en/engage/studies/Documents/Spatial-planning-new-urban-agenda.pdf,], Accessed 7 April 2022, p. 2.; Nadin, V., *et. al.*, *COMPASS – Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe*, (COMPASS), final report, 2018, p. 41, [https://www.espon.eu/sites/default/files/attachments/1.%20COMPASS_Final_Report.pdf], Accessed 7 April 2022

15 *Ibid.* COMPASS, 2018, p. ix.

16 European Spatial Development Perspective (ESDP) defines EU policies with Spatial Impact – those are: Community Competition Policy such as TEN (more on TEN see in Marshall T.*, The European Union and Major Infrastructure Policies: The Reforms of the Trans-European Networks Programmes and the Implications for Spatial Planning*, European Planning Studies, Vol. 22, No. 7, 2014, pp. 1484-1506, [DOI: 10.1080/09654313.2013.791968], Structural Funds such as ERDF, Common Agricultural policy such as CAP, Environmental policy and Research and Technological Development (ESDP, 1999, p. 14-18)

17 New Urban Agenda, *op. cit,* note 14, p. 2

18 More on topic see in COMPASS, 2018, pp. 41, 49

19 *Ibid.*, pp. 42- 43, p. 52

20 More on sectoral legislation regarding spatial planning see in COMPASS, 2018, p. 43-44

21 Some exceptions exist, for example in the field of energy – The Regulation (EU) 347/2013 on Guidelines for trans-European energy infrastructure

22 The Strategic Environmental Assessment (SEA) directive 2001/42/EC, The Environmental Impact Assessment (EIA) directive 2011/92/EU, The Birds Directive 2009/147/EC, The Habitat Directive 92/43/EEC, The Water Framework Directive (WFD) 2000/60/EC, The Floods Directive (FD) 2007/60/EC, The Environmental Noise Directive (END) 2002/49/EC, The SEVESO III Directive 2012/18/EU, The Waste Framework Directive (WaFD) 2008/98/EC, the Landfill Directive (LD) 1999/31/EC

23 The Renewable Energy Directive 2009/28/EC, The Energy Efficiency Directive 2012/27/EU,

24 The Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

planning.[25],[26] Legislation from the one hand is restrictive, but on the other it can stimulate development in spatial planning area,[27] and is uniform in all Member States with some variations in their application.[28]

The most important role of the incentives connected to spatial planning is funding with an aim of creation of sustainable urban development which is "an explicit objective within the European Regional Development funds (ERDF) regulation No. 1301/2013 and subsequently, the operational programmes of the Member States derived thereof".[29] Generally speaking, the biggest role in this area has Cohesion Policy[30] which goal is uniform development of the Member States, and „which stands out as the most significant driver of change"[31] through European Structural Investment Funds (ESI) for Cohesion, Rural Development and Territorial Cooperation.[32] Other important policies, incentives and funds with an influence on spatial planning are Territorial Cooperation policy funding, The European Agricultural Fund for Rural Development (EAFRD) regulation No. 1698/2005, LEADER/CLLD approach, European Social Fund (ESF) regulation No. 1304/2013, the European Maritime and Fisheries Fund (EMFF) regulation 508/2014 and the Cohesion Fund (CF) regulation No. 1300/2013, and Transport policy[33].[34]

Intergovernmental cooperation consists of documents which are developed as a dialogue between Member States and European Commission, or between member States. [35] The results are non-binding, but due to their importance, they became guiding documents for European and national policies. Those documents are The European Spatial Development Perspective (ESDP), Territorial Agenda of the European Union, Leipzig Charter for a Sustainable European Cities (Leipzig Charter), New Leipzig Charter, and Urban Agenda for the European Union.[36]

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25 The Directive 2014/89/EU, The Marine Strategy Framework Directive 2008/56/EC

26 New Urban Agenda, *op. cit.,* note 14, p. 4

27 *Ibid.*

28 COMPASS, *op. cit.,* note 14, p. 41

29 New Urban Agenda, *op. cit.,* note 14, p. 10

30 COMPASS, *op. cit.,* note 14, p. 41

31 *Ibid.,* p. 44

32 New Urban Agenda, 2018, p. 10

33 The Regulation (EU) 1315/2013 on Union guidelines for the development of the trans-European transport network (TEN)

34 New Urban Agenda, *op. cit.,* note 14, pp. 11-12

35 COMPASS, *op. cit.,* note 14, p. 47

36 New Urban Agenda, *op. cit.,* note 14, p. 12-14

Agendas influence on spatial planning of the Member States through publications, etc.[37]

*ESDP* is a non-binding strategic document adopted in 1999 by EU Council of Ministers[38] with an aim of balanced spatial planning in conformity with sustainable development.[39] "It is meant to be a general reference frame for public and private decision-makers and provides for implementation procedures to be followed on a voluntary basis and based on the subsidiarity principle."[40] It consist of two parts, policy oriented part A, and analytical Part B.[41]

*Territorial Agenda of the European Union* is a successor of the ESDP. It was adopted in 2007 with an aim of sustainable territorial development of the EU and is also non-binding document.[42]

*Lepzig Charter* was adopted by European Ministers for Urban Development and Regional Planning in Leipzig in 2007. The aim was "to establish city-wide Integrated Urban Development in order to strengthen and further develop European cities. A special focus was to be placed on districts with special requirements for development."[43] Two key principles of the Leipzig Charter are an integrated urban development approach and attention to the deprived urban neighbourhood.[44] Evaluation of the Leipzig Charter started in 2017 and the result was the adoption

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37 *Ibid.*, pp. 5-9

38 With the presence of European Commissioner for Regional Policy (Faludi, A., *Evaluating Plans: The Application of the European Spatial Development Perspective*, in: E. R. Alexander (ed.) Evaluation in Planning: Evolution and Prospects, Routledge, 2016, p. 121, pp. 119-146. For more on the application of the ESDP see also Faludi, A., *The Application of the European Development Perspective*, The Town Planning Review, Vol. 74, No. 1, 2003, pp. 1-9, For the application of the ESDP on EU level see in: *ESPON project 2.3.1, Application and effects of the ESDP in the Member States*, 2007, pp. 81-121, and on national and regional level same document, pp. 130-155., [https://www.espon.eu/sites/default/files/attachments/fr-2.3.1-full_rev_Jan2007.pdf] Accessed 7 April 2022

39 Biot V.; Colard, A., *Challenges and issues of spatial planning in the European Union: European vision and supraregional co-operation,* Belgeo, Special issue: 29th International Geographical Congress, 2000 [https://journals.openedition.org/belgeo/13962#tocto2n5], Accessed 7 April 2022

40 *Ibid.*

41 More on the structure and aims of the ESDP see in: Faludi, A., *Spatial Planning Traditions in Europe: Their Role in the ESDP Process*, International Planning Studies, Vol. 9, No. 2–3, 2004, p. 155

42 Fischer, T. B.; Sykes, O., *The Territorial Agenda of the European Union: Progress for Climate Change Mitigation and Adaptation,* The Town Planning Review, Vol. 80, No. 1, 2009, p. 57

43 On Leipzig Charter see: *Leipzig Charter on Sustainable European Cities*, Available at: [https://english.leipzig.de/construction-and-residence/urban-development/leipzig-2020-integrated-city-development-concept-seko/implementation/leipzig-charter], Accessed 7 April 2022

44 van Lierop, C., *The New Leipzig Charter*, European Parliamentary Research Service, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/659384/EPRS_ATA(2020)659384_EN.pdf] Accessed 7 April 2022

of the *New Leipzig Charter - The transformative power of cities for the common good*, with an aim of „comprehensive picture of current challenges and objectives for a sustainable urban development, structured in three dimensions: just, green, and productive cities."[45] The text of the New Leipzig Charter was based on the Leipzig Charter from 2007, but taking into account global challenges.[46] It was adopted in 2020. Achieving just, green and productive cities requires the implementation of key principles of good governance, defined through five established principles: urban policies for the common good, integrated approach, participation and creation, multilevel governance, and a place-based approach. The Charter emphasizes participation as key to successfully delivering a high-quality built environment. It is experimenting with new forms of participation that can help cities manage conflicting interests, share responsibilities and find innovative solutions while reshaping and maintaining urban spaces and forming new alliances to create integrated urban spaces. [47]

In order to stimulate growth, liveability and innovation in the cities of Europe, and with the scope of better regulation, funding and knowledge, in 2016 was launched *Urban Agenda for the European Union*. It states that „a balanced, sustainable and integrated approach towards urban challenges should, in line with the Leipzig Charter on sustainable European cities, focus on all major aspects of urban development (in particular economic, environmental, social, territorial, and cultural)".[48] Some of main principles are full respect of subsidiarity and proportionality principles and competences, contribution to territorial cohesion by reducing the socioeconomic gaps, enabling urban authorities to work in a more systematic and coherent way.[49]

## 2.2. Domestic (Croatian) level

While spatial planning is an activity that directs the spatial distribution of people, goods and activities with the aim of optimal use of space, and in a narrower sense it is the process of making spatial plans, physical planning is wider term and it is based on the comprehensive nature of spatial planning in a relationship on the planning of individual economic areas, respect for generally accepted principles,

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45 Leipzig Charter on Sustainable European Cities, *op. cit.,* note 43

46 van Lierop, C., *op. cit.,* note 44

47 The New Leipzig Charter, [https://ec.europa.eu/regional_policy/sources/docgener/brochure/new_leipzig_charter/new_leipzig_charter_en.pdf], Accessed 5 April 2022

48 New Urban Agenda, *op. cit.,* note 14, p. 13

49 European Commision, *Urban Agenda for the EU*, [https://ec.europa.eu/futurium/en/urban-agenda-eu/what-urban-agenda-eu.html#Objectives], Accessed 7 April 2022

protection of space, scientific and professional knowledge and best practices as well as international guidelines and documents in the field of spatial planning.[50]

Organization of physical planning system in Croatia is defined by numerous regulations, programmes, strategies, and spatial plans.[51] Constitution of the Republic of Croatia and Local Self-government Act[52] are basic acts on spatial planning.[53] Spatial plans of the local level are most numerous spatial plans in the Republic of Croatia and some chapters in this part of the paper analyse only them.

In comparison of Croatian legal framework to other European countries,[54] Croatia has more documents and strategies then other countries, which are not necessary more efficient.[55] As a result of extremely wide legislative framework and due to the participation of the experts from various fields such as architecture, sociology, law, geography, etc., from the one side and participation of the citizens in public discussion (as a mandatory phase in the procedure for the development and adoption of spatial plans) from the other side, spatial planning is a complex and usually long lasting process.

### 2.2.1. *Overview of Physical Planning Regulation in the Republic of Croatia*

Since 1990, physical planning was regulated by three Physical Planning Acts and numerous programs and strategies. This chapter brings timeline of domestic regulation regarding physical planning.

Prior the adoption of the first *Physical Planning Act* in 1994, area of spatial planning was regulated by the Law on Amendments of Physical Planning Act.[56] First set of regulation is related to the first Physical Planning Act which was introduced in 1994.[57] This Act was followed by Strategy of Physical Planning of the Republic

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50 Pegan, *op. cit.,* note 1, pp. 7-8

51 Art. 129 (a) of the Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14

52 Art. 19, 20, 73-75, 78a-82 Local Self-government Act, Official Gazette No. 33/01, 60/01, 129/05, 1 09/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20

53 Bienenfeld, J., *Dokumenti prostornog uređenja*, Pravo i porezi, No. 3, 2007, p. 23

54 Namely Steiermark, Bayern, Denmark, Netherlands and Finland (Krtalić, V., *Planiranje razvoja države, regionalno i lokalno planiranje*, Pravo i porezi, Vol. 28, No. 4, 2019. p. 26

55 Krtalić, *Ibid*, p. 26

56 Law on Amendments of Physical Planning Act, Official Gazette No. 34/1991, NN 49/1992, NN 14/1994.

57 Physical Planning Act, Official Gazette No. 30/1994, 68/1998, 35/1999, 61/2000, 32/2002, 100/2004

of Croatia in 1997[58] and Ordinance[59] in 1998.[60] Physical Planning Programme was adopted in 1999 and Regulation[61] on physical planning in protected coastal area was adopted in 2004.[62]

Next *Physical Planning and Construction Act* (hereinafter: PPCA) was adopted in 2007.[63] It regulated basic goals of physical planning, subjects of physical planning, their rights and obligations, system of the documents of physical planning, levels of the documents of spatial planning, purpose, content, significance, and financing of their development, harmonisation between levels of the documents, their procedure and the adoption, public participation, competent development authority of the main interest and construction. With its adoption, Physical Planning Act from 1994 with its amendments was no longer in force.[64]

Current *Physical Planning Act*[65] (hereinafter: PPA) was adopted in 2013, and entered into the force in 2014.[66] Regulation on the Physical planning information system (Croatian abbreviation: ISPU)[67] and Ordinance on State plan of spatial development (Croatian Abbreviation: DPPR)[68] are in force since 2015. New Spatial Development Strategy of the Republic of Croatia[69] was adopted in 2017, and Decision on the Development of the State plan for spatial development (Croatian Abbreviation: DPPR) [70] in 2018.[71]

Mentioned PPA changed the regulation of spatial plans, actually completely new system of physical planning was developed after the adoption of the new PPA in 2013. Reasons for the adoption new system were numerous.[72]

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58 Text of the Strategy is available at: [ https://mpgi.gov.hr/UserDocsImages//dokumenti/Prostorno/StrategijaRH//Strategija_I_II_dio.pdf], Accessed 31 March 2022

59 Croatian: *pravilnik*

60 Ordinance on on the content, criteria of cartographic views, mandatory spatial indicators and standard of spatial plan studies, Official Gazette No. 106/1998

61 Croatian: *uredba*

62 Regulation on spatial planning in protected coastline area, Official Gazette No. 128/2004

63 Physical Planning Act, Official Gazette No. 76/2007, 38/2009, 55/2011, 90/2011, 50/2012

64 Krtalić, *op. cit.,* note 54, p. 83

65 Physical Planning Act, Official Gazette No. 153/2013, 65/2017, 114/2018, 39/2019, 98/2019

66 Construction Act was also adopted in 2013, Official Gazette No. 153/13, 20/17, 39/19, 125/19

67 Regulation on the Physical planning information system, Official Gazette No. 115/2015

68 Ordinance on State plan for spatial development, Official Gazette No. 122/2015

69 Spatial Development Strategy of the Republic of Croatia, Official Gazette No. 106/2017

70 Decision on the Development of the State Spatial Development Plan, Official Gazette No. 39/2018

71 List of regulations in spatial planning area is available at the website of the Ministry of Physical Planning, Assests, Construction and State Assets: [https://mpgi.gov.hr/access-to-information/regulations-126/regulations-in-the-field-of-physical-planning-8641/8641], Accessed 4 April 2022

72 Reasons for the adoption of PPA are presented in the Final proposition of PPA

Therefore, the new law regulates the subject of the PPA and the goal of the physical planning system, meaning of the relevant terms in SPA, implementation and adoption of sectoral acts, authorities of the competent minister, the goals of spatial planning, principles and subjects on spatial planning, tracking the conditions of space and in the area of spatial planning, conditions on spatial planning, Spatial Development Strategy of the Republic of Croatia, spatial planning system – general questions, types of spatial plans, procedure of creation and the adoption of spatial plans, implementation of spatial plans, building land, supervision of the implementation of the SPA, and misdemeanours.[73] Other documents regulating spatial planning are sectoral acts necessary for each area in spatial planning process.[74]

### 2.2.2. *Organization of the Spatial Planning in Croatia*

Spatial Planning System in the Republic of Croatia is organised in three levels.[75] First level consists of documents and spatial plans on state level. Those are State Plan for Spatial Development (Art. 66-67 of PPA), Spatial plan of areas with special features (Art. 68-69 of PPA), Spatial plan of continental shelf area of the Republic of Croatia, Spatial plan of national park, park of nature and other spatial plan with special marks which should be adopted due to regulation in State plan on spatial development (Art. 60/2 of PPA) and Urban Development plan (Art. 70 of PPA).[76] Spatial plans of regions and spatial plan of the City of Zagreb [77] create second level. On this level documents are Spatial plan of the region and Spatial Plan of the City of Zagreb (Art. 71-73 of PPA) and Urban development plan of regional importance (Art. 74 of PPA).[78] The third level are spatial plans on local level, namely Spatial plan of the city or municipality[79] (Art. 75-76 of PPA), General urban plan (Art. 77-78 of PPA) and Urban Development Plan (Art. 79-80 of PPA).[80]

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73 Final proposition of PPA, pp. 78-80

74 List of sectoral acts is available at: [https://www.arhitekti-hka.hr/hr/zakoni-propisi/popis/prostorno-uredenje-i-gradnja/prostorno-uredenje/], Accessed 13 April 2022

75 Art. 60 of the PPA

76 Krtalić, *op. cit.,* note 54, p. 19

77 According to the Art. 2 of the *City of Zagreb Act*, Official Gazette No. 62/01, 125/08, 36/09, 119/14 , 98/19,144/20, Zagreb has position of the region.

78 Krtalić, *op. cit.,* note 54, p. 19

79 On territorial administrative division of the Republic of Croatia see in: Koprić, I., *Glavna obilježja postojećeg i prijedlog novog teritorijalnog ustrojstva Hrvatske – zašto nam treba teritorijalna reorganizacija*, in: Koprić, I. (ed.) Reforma lokalne i regionalne samouprave, Institut za javnu upravu, Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije, 2013., Zagreb, pp. 1-30

80 Krtalić mentions location permit as a local spatial plan (Krtalić, *op. cit.,* note 54, p. 19), but, local permit is an individual administrative act, and spatial plans are general acts. The distinction is far important, and can be seen in the procedure of the adoption of act, in the announcement/delivery of act,

Basic principles of harmonisation of different levels of spatial plans are regulated in Art. 61 of the PPA according to which Spatial plan should be in the accordance with the PPA and documents adopted on the on the basis of PPA. (Art. 61/1 of PPA). The spatial plan of the lower level must be harmonized with the spatial plan of the higher level. (Art. 61/2 of PPA). The spatial plan of a narrower area must be harmonized with the spatial plan of a wider area of the same level (Art. 61/3 of PPA). Spatial plans of the same level must be mutually harmonized (Art. 61/4 of PPA).

### 2.2.3. *Judicial Supervision of local level Spatial Plans*

Local level spatial plans are general acts according to the case law of the High Administrative Court of the Republic of Croatia, Administrative Disputes Act and Local Self-government Act. At first sight, provision in Art. 58 of PPA on legal nature of spatial plans puts spatial plans in the field of by-laws in general. But Croatia has a complex division of by-laws based on the competent authority of its supervision. Representative bodies in the local self-government unites are entitled for the adoption of spatial plans. First control exercised over general acts is an administrative control regulated in Art. 78 -82 of the Local Self-government Act.

Judicial control of spatial acts[81] is in jurisdiction of the High Administrative Court of the Republic of Croatia, since this is the only Court[82] entitled for the assessment of the legality of general acts in the Republic of Croatia (Art. 3/2, 12/3, 83 of the Administrative Disputes Act).[83] High Administrative Court can decide spatial plan is unlawful and abolish such act.[84] The judgement on the abolishment

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in the judicial control, etc. For detail overview of the distinction between general act and individual administrative act see for example in: Omejec, J.; Banić, S., *Diferencijacija propisa i općih akata u budućoj praksi Ustavnog suda i Upravnog suda u povodu Zakona o upravnim sporovima (2010.)*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 49, No. 2, 2012., pp. 309-324; Crnković, M., *Objektivni upravni spor u hrvatskom i poredbenom pravu*, doctoral thesis, 2015

81 More on judicial control of spatial plans see in: Šikić, M.; Crnković M., *Ustavnosudska i upravnosudska kontrola zakonitosti akata jedinica lokalne i područne (regionalne) samouprave*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 37, No. 1, 2016, pp. 423-447; Held, M., *Judicial Control of Spatial Plans as Prerequisite of Economic Development in Croatia*, in: Šimić Banović, R. (ed.), Sixth Bosnian Herzegovinian, Croatian and Turkish Jurist Days - The Legal Framework for Economic Competitiveness, Zagreb, Faculty of Law, University of Zagreb, 2019, pp. 110-132

82 For reasons on the division of control between Constitutional Court of the Republic of Croatia and High Administrative Court of the Republic of Croatia see in: Omejec, J.; Banić, S., *op. cit.,* note 80, pp. 309-324 and *Decision and Regulation of the Constitutional Court of the Republic of Croatia, U-II-5157/2005* from 5 March 2012, Official Gazette No. 41/2012

83 Administrative Dispute Act, (ADA), Official Gazette No. 20/10, 143/12, 152/14, 94/16, 29/17, 110 /21

84 Art. 86/3 ADA

should be published in the Official Gazette of the Republic of Croatia.[85] The party can ask revision of the administrative decision based on unlawful spatial act in three months after publishing the judgement on the abolishment in the Official Gazette of the Republic of Croatia.[86]

## 3. CURRENT SITUATION IN SPATIAL PLANNING IN MEMBER STATES OF THE EU AND CROATIA UNDER AND AFTER THE COVID-19 PANDEMIC

Recent literature on urbanisation made a step forward form economic growth and development to ensuring public health conditions[87] caused by the largest and most serious pandemic in the century, which started in towns and was moving towards urban and rural areas due to the globalisation and connectivity throughout the globe. COVID-19 put at least one new task before spatial planners – planning process must incorporate measures that enhance public health.[88] "Cities must remain open, dynamic spaces reflecting collective freedoms and expressions. Citizens should continue to exercise their rights in demanding better services and transparency from the authorities while performing civic duties responsibly. "[89]

### 3.1. European Union level

European Union, as well as international organisations give guidelines and recommendations to Member States how to overcome COVID-19 pandemic in the area of spatial planning in general and spatial planning process. Focus is no more on well-known areas covered by the spatial and urban planning process, but it includes resilient cities, 15-minutes' walk cities, it is focused more than ever on local self-government units, availability of public services, markets, health institutions, parks, etc. This chapter will focus on three different documents in the analysis of guidelines and recommendations on the prevailing consequences of the COVID-19 pandemic in spatial planning.

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85 Art. 86/4 ADA

86 Art. 87 ADA

87 Creighton, C.; Keil, R. A.; Harris S., *Extended urbanisation and the spatialities of infectious disease: Demographic change, infrastructure and governance*, Urban Studies, Vol. 58, 3, 2020, p. 2, Available at: [https://www.researchgate.net/publication/340313382_Extended_urbanisation_and_the_spatialities_of_infectious_disease_Demographic_change_infrastructure_and_governance], Accessed 5 April 2022

88 *Spatial Planning Guidelines during COVID-19*, (Guidelines during COVID-19), UNHABITAT, p. 2, Available at: [https://unhabitat.org/sites/default/files/2020/11/covid19_spatialplanning_eng1.pdf], Accessed 5 April 2022

89 *Ibid.,* p. 2

### 3.1.1. *Regional Policy brief*

*Regional Policy brief* states that "the pandemic has impacted urban economies, equity, employment, public services, infrastructure, and transport, affecting virtually all individuals, especially vulnerable households, businesses, and workers."[90] As a consequence, measures taken to improve spatial planning process and urban development of the cities must as well be integral and they should be multi-dimensional, coordinated, swift and decisive, reinforce urban economic resilience, create value and provide tangible solutions for the whole community, leaving no one behind, they should allow to the policy makers to implement recovery plans, encourage multi-governance and multi-stakeholder engagement to promote urban economic resilience during and after the pandemic.[91] The goals of the Regional policy brief document are to "provide an overview of the socio-economic impacts of the COVID-19 pandemic in the UNECE region[92] and gain a better understanding of urban economic resilience challenges during and after the pandemic, identify broader urban economic resilience needs of cities arising from the multi-dimensional impact of the pandemic in the context of recovery plans and offer policy recommendations, best practice examples, tools, and mechanisms for sustainable urban economic recovery".[93]

The Policy brief document analyses the impact of pandemic and formulates recommendations in four chapters - urban governance, socio-economic impacts of the COVID-19 pandemic, nature-based solutions and climate neutrality for environmental quality and urban planning and transportation policies and programmes. [94]

## 3.2. Spatial Planning Guidelines during COVID-19

*Spatial Planning Guidelines during COVID-19* can be divided into several categories, guidelines for short, medium and long-term spatial planning response and recovery measures post COVID-19,[95] and they cover social, economic and

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90 *Regional Policy Brief on Building Urban Economic Resilience during and after COVID-19 in the UNECE Region*, (Regional Policy brief), Economic Commission for Europe, Committee on Urban Development, Housing and Land Management, Eighty-second session, Geneva, 6-8 October 2021, Item 5 of the provisional agenda, p. 4., Available at: [https://unece.org/housing/publications/regional-policy-brief-building-urban-economic-resiience], Accessed 5 April 2022

91 *Ibid.,* p. 4

92 United Nations Economic Commission for Europe (UNECE) was set up in 1947 by Economic and Social Council.

93 Regional Policy Brief, *op. cit.,* note 90, p. 4

94 *Ibid.*

95 Guidelines during COVID-19*, op. cit.,* note 88, p. 2

environmental sustainability. Document is divided on regional scale, city scale, neighbourhood scale, and building scale.

On regional scale documents puts focus on linkage between rural and urban area which are crucial for flow of goods, but also for flow of services and flow of people. The recommendation is to strengthen and enhance connectivity between cities, states, and regions as an important step in building socio-economic resilience. Next recommendation is decentralization of services as a result of stronger connectivity of smaller cities and mega cities where mega cities transfer some of their duties on smaller cities such as questions regarding housing and employment needs. Next recommendation considers holistic approach to planning „combining grey, green and blue infrastructure at different levels to support healthier cities and citizens".[96]

City scale begins with the recommendation on decentralization and polycentric cities which have possibility to serve larger amount of population. Compact urban city is further recommendation as a city which minimizes distances between all key segments for quality urban life such which offer pedestrian zones, cyclist zones as alternative way of transport. „Multi-functional cities also attract citizens with diverse skills resulting in a healthy mix of people to cater to the diverse needs and services of the city while allowing opportunities for social interaction."[97] Another recommendation refers to planned density which maintains optimal quality of life with access to crucial public services. It is important to mention that density should not be mistaken with overcrowding where people do not have adequate access to public services. Public transport and housing are mentioned as a precondition for quality of life in urban areas, as well as access to basic public services such as water, sanitation and disposal, social services such as education and health facilities for example, and digital infrastructure as well.

Neighbourhood scale suggest compact neighbourhoods where citizens meet their needs in 15 minutes' walk area. If slums and informal settlements were transferred into compact neighbourhoods, it would have a lot of positive effects, such as overall health. This measure will influence on social distancing and made it possible. Urban agriculture through community gardens and rooftop farming can be a stopgap solution in food deserts or in times of crises.[98]

In the part of building scale, „Focus needs to be directed to informal settlements, ensuring residents have sufficient living areas to avoid overcrowding, with estab-

[96] *Ibid.,* p. 3
[97] *Ibid.,* p. 4
[98] *Ibid.,* p. 6

lished connections to basic services such as clean water, waste and sanitation facilities. Here renewable forms of energy should become „the prevalent model for design and construction".[99]

### 3.3. Report on the on the challenges for urban areas in the post-COVID-19 era (2021/2075(INI))

*Report on the on the challenges for urban areas in the post-COVID-19 era (2021/2075(INI))* (hereinafter: Report)[100] in its part called "explanatory statement" contains suggestion that Europe must adapt to the new situation caused by the pandemic of coronavirus and embrace new model for the urban areas of the European Union. A wide spectre of EU initiatives already impacts towns, although the EU has no direct impact on urban planning in the Member States. Further, the EU must ensure the partnership envisaged in the Common Provision Regulation.[101] According to the Report, the Commission must put forward a Code of conduct on partnerships that should set minimum "standards involvement of regional, local, urban and other public authorities, economic and social partners and relevant bodies representing civil society, and non-governmental organisations. This will ensure their participation throughout the preparation, implementation, monitoring, and evaluation of Union programmes, including participation in monitoring committees "[102] to ensure participation of civil society in all stages of spatial and urban planning.[103]

According to the Report, cities are considered as key partners in finding a way out of the pandemic. Their perspective on the development should be toward an inclusive, sustainable, and resilient Europe. "The report offers a set of recommendations addressing some of the most severe challenges of urban areas in the post-COVID era, organised into four chapters and divided into 67 statements,

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99 *Ibid.,* p. 7

100 *Report on the on the challenges for urban areas in the post-COVID-19 era (2021/2075(INI)),* Available at: [https://www.europarl.europa.eu/doceo/document/A-9-2021-0352_EN.html], Accessed 5 April 2022

101 Common Provision Regulation, Official Journal of the European Union, L 231, 30 June 2021

102 Report on the challenges for urban areas in the post COVID-19 era, *op. cit.,* note 100, p. 20-21

103 *Ibid.,* p. 2

prepositions, guidelines, and recommendations: inclusive cities,[104] green cities,[105] innovative cities,[106] and tailor-made policy initiatives. "[107]

The chapter on inclusive cities Report has numerous statements on the current problems of urban areas and recommendations for its improvement, such as the need for an EU framework to support local and national strategies to fight homelessness and ensure equal access to decent housing for all by promoting an integrated approach combining housing support with social care, health services and active inclusion,[108] establish specific strategies and appropriate measures to overcome obstacles to the right to housing such as discrimination, financialization, speculation, touristification, abusive lending practices and forced evictions,[109] investments through all kind of available funds such as ERDF, Just Transition Fund, InvestEU, ESF+, Horizon Europe, NextGenerationEU and especially through the Recovery and Resilience Facility, Coronavirus Response Investment Initiative and the Coronavirus Response Investment Initiative Plus.[110]

Through chapter on sustainable (and green) cities Report emphasizes the importance of sustainable urban development, including sustainable and affordable public transport, for the economic, social, and territorial cohesion of the Union and the quality of life of its population, [111] states that COVID-19 crisis has shown the need for new urban planning and mobility solutions in order to make urban areas more resilient and adaptable to mobility demand and that the crisis should be taken as an opportunity to reduce transport congestion and greenhouse emissions,

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104 For more on inclusive cities under the COVID-19 pandemic see for example*: Inclusive Cities: COVID-19 Research and Policy Briefings*, COMPASS, 2020 [https://www.compas.ox.ac.uk/project/inclusive-cities-covid-19-research-and-policy-briefings/], Accessed 5 April, 2022; Reimagining Inclusive Cities in the COVID-19 Era, Cities Alliance, 2021, [https://www.citiesalliance.org/newsroom/events/reimagining-inclusive-cities-covid-19-era], Accessed 5 April 2022

105 See for example document: *Cities and Pandemics: Towards a More Just, Green and Healthy Future*, UN-HABITAT, 2021, Available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/cities_and_pandemics-towards_a_more_just_green_and_healthy_future_un-habitat_2021.pdf], Accessed 5 April 2022

106 See for example document of UNESCO – *Creative cities' response to COVID 19*, 2020, United Nations Educational, Scientific and Cultural Organization, Paris, France, Available at: [https://unesdoc.unesco.org/ark:/48223/pf0000374264], Accessed 5 April 2022

107 Report on the challenges for urban areas in the post COVID-19 era, *op. cit.,* note 100, p. 19

108 *Ibid.*, point 7, p. 8

109 *Ibid.*, point 8, p. 8

110 *Ibid.,* point 10, p. 8

111 *Ibid.,* point 21, p. 10

[112]it calls for action to improve urban air quality to minimise the risks for human health and fight environmental noise levels, which are rising in urban areas,[113] etc.

Report in the chapter on innovative (and learning) cities the emphasizes importance of digital communication between all actors, and notes that the pandemic has accelerated digitalisation, and technology has become imperative for teleworking, home-schooling, e-commerce, e-health, e-government, digital democracy and digital entertainment, and also calls on the Commission to monitor these developments closely and to ensure full compliance with the Union *acquis*, in particular as regards workers' and social rights.[114]

Under taylor made policy initiatives Report insists that regional and local authorities have a key role in all stages of EU decision-making: planning, preparation, and implementation; calls for more direct EU funding to be made available to local and regional authorities in order to improve efficiency.[115]

## 4. SPATIAL PLANNING IN CROATIA UNDER AND AFTER THE COVID-19 PANDEMIC

As the first deaths from coronavirus infection were recorded in Italy on 22 February 2020, [116] on 24 February controls on border crossings with Italy were stepped up, self-isolated health controls were provided for all travellers coming from infected areas, and a recommendation to schools not to go on excursions and trips to Italy.[117]

### 4.1. COVID-19 pandemic and the introduction of emergency measures

On March 5, the Minister of Health declared the danger of the COVID-19 epidemic.[118] A day later, the Ministry of Science and Education informed schools and universities to postpone travel abroad, and on March 9, all foreign nationals

112 *Ibid.,* point 24, p. 11

113 *Ibid.*, point 34, p. 12

114 *Ibid.*, point 40, pp. 13-14

115 *Ibid.*, point 59, p. 16

116 Seckin, B., *Italy confirms first death from coronavirus*, Anadul Agency, 2020, Available at: [https://www.aa.com.tr/en/europe/italy-confirms-first-death-from-coronavirus/1741337], Accessed 7 April 2022

117 Ministarstvo zdravstva, *Koronavirus nCoV,* 2020, Available at: [https://vlada.gov.hr/UserDocsImages/2016/Sjednice/2020/Velja%C4%8Da/209%20sjednica%20VRH/Novi%20direktorij/209%20-%206.pdf], Accessed 7 April 2022

118 Government of the Republic of Croatia, *Koronavirus.hr*, 2020, Available at: [https://www.koronavirus.hr/sve-mjere-koje-vlada-poduzima-u-borbi-s-koronavirusom/69], Accessed 7 April 2022

coming from crisis areas were given a mandatory 14-day quarantine.[119] It was also recommended to postpone all organized gatherings with more than a thousand people. On March 11, 2020, the World Health Organization declared a global pandemic, and on March 11, 2020, at the suggestion of the Croatian Institute of Public Health, the Ministry of Health decided to declare an epidemic of COVID-19 caused by SARS-CoV-2 in Croatia.[120] This date can be considered the day of entering the second phase of the crisis. Entering the acute crisis phase in that phase, much more severe measures are applied than in the previous one, and preventive measures have been moved to prohibitive measures.

## 4.2. Research of the procedure for the development and adoption of spatial plans under the influence of the COVID-19 pandemic

To prevent the transmission of COVID-19 disease, many preventive and restrictive measures were introduced, including restrictions on the movement of people, closing borders and educational institutions, mandatory quarantine, and banning all public gatherings, etc. The competent ministry - the Ministry of Physical Planning, Construction and State Property on the official website during the COVID-19 pandemic[121] published instructions, decisions, notices, and measures of the Ministry in the fight against the epidemic of the COVID-19. On March 20, 2020, the competent ministry issued an instruction regarding the holding of public presentations during the public debate on the proposal of the spatial plan, which, taking into account the recommendation to limit public gatherings of a large number of people, exceptionally allows public presentations through Livestream with participants.[122]

### 4.2.1. *Semi-structured interviews*

To gather information and opinions regarding the experience of the impact of COVID-19 restrictive measures on the development and adoption of spatial

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119 Ministry of the Interior, *Priopćenje za medije Stožera civilne zaštite Republike Hrvatske od 14. ožujka 2020,* Available at: [https://civilna-zastita.gov.hr/vijesti/priopcenje-za-medije-stozera-civilne-zastite-republike-hrvatske-od-14-ozujka-2020-u-10-00-sati/2256], Accessed 7 April 2022

120 Odluka o proglašenju epidemije bolesti COVID-19 uzrokovana virusom SARS-CoV-2, 2020, Available at: [https://zdravstvo.gov.hr/UserDocsImages/2020%20CORONAVIRUS/ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf], Accessed 7 April 2022

121 Ministry of Physical Planning, Construction and State Assets, Available at: [https://mpgi.gov.hr/covid-19-upute-gradjanima-i-tijelima-vezane-uz-resor/10648], Accessed 26 January 2022

122 Ministry of Physical Planning, Construction and State Assets [https://mpgi.gov.hr/UserDocsImages/OMinistarstvu/Onama/naputak_%20JLS-JR-COVID-19.pdf], Accessed 26 January 2022

plans, a qualitative approach is used in this study in the form of semi-structured interviews with experts who perform spatial planning activities in the territory of the Republic of Croatia.

The Ministry of Physical Planning, Construction, and State Assets issue a consent to legal entities to perform professional spatial planning activities.[123] Experts who are employees of legal entities who have been approved to perform all professional activities of spatial planning were interviewed.[124] A best-effort attempt was made to obtain a representative sample and 10 interviewees were finally recruited. We carried out online interviews between March and April 2022. The basic data on the participants are summarized in **Table 1**.

**Table 1.** Profiles of participants

| Code | Gender | Age group | Profession | Work experience | Authorised expert | Institute / legal person |
|---|---|---|---|---|---|---|
| 1 | Female | 36-40 | urban architect | 14 | Yes | Legal person |
| 2 | Male | 56-60 | / | 25 | No | Institute |
| 3 | Female | 61-65 | urban architect | 38 | Yes | Institute |
| 4 | Male | 36-40 | civil engineer | 11 | Yes | Institute |
| 5 | Male | 26-30 | urban architect | 5 | Yes | Legal person |
| 6 | Male | 41-45 | urban planner | 18 | Yes | Legal person |
| 7 | Male | 41-45 | geographer | 17 | Yes | Institute |
| 8 | Female | 41-45 | spatial planner | 15 | Yes | Institute |
| 9 | Female | 61-65 | urban planner | 37 | Yes | Legal person |
| 10 | / | 41-45 | urban planner | 16 | Yes | Legal person |

The findings are grouped into the following categories in terms of spatial planning under the influence of the COVID-19 pandemic: the procedure for the development and adoption of spatial plans, participation, and changes in the physical planning system.

123 Ministry of Physical Planning, Construction and State Assets [https://mpgi.gov.hr/UserDocsImages//dokumenti/Prostorno/Popisi//Popis_svi_SP_PU_17.3.2022.pdf], Accessed 7 April 2022

124 Professional activities relating to the development of the draft proposal and draft final proposal of the spatial plan, in addition to the development of these drafts, and administrative tasks related to the development and adoption of the spatial plan, unless otherwise prescribed by this Act, shall be performed by the spatial plan competent development authority (hereinafter: the competent development authority). The Institute, institute for physical planning of a county or City of Zagreb, institute for physical planning of a major city, or a legal person developing the draft proposal or final proposal of the spatial plan (hereinafter: the expert developer) shall appoint the responsible development manager for draft proposal of the spatial plan (hereinafter: the responsible manager) prior to the beginning of its development (Art. 81-82 PPA).

4.2.1.1. *Procedure for the development and adoption of spatial plans*

Most of participants, employees of institutes and private offices (legal person), pointed out that the introduction of measures had a significant impact on the organization of work, which consequently slowed down the process of making plans. Maintaining social distance by working from home, working shifts and limiting field research and meetings have reduced the spread of the virus. However, these measures also had a negative impact on the duration of the process and the procedure for the development and adopting spatial plans, as described below:

"Working from home initially slowed down the company's business. It took several weeks to get used to the new way of working (shifts or entirely away from home, virtual meetings, elaboration and verification of documents remotely, operational tasks, etc.). Until the statement of the relevant ministry, the biggest shortcoming was the inability to hold public presentations, which is why a large number of plans stopped in the process. It was a blow to both the business of the companies and to the investors, as investments became even more uncertain. Even after the statement, some of the developers continued the practice of not holding public presentations, which slowed down some plans for years. An additional problem lies in the way it works - the absence or limitation of fieldwork has reduced the quality of analysis and spatial solutions, and the lack of live meetings has reduced the quality of communication between stakeholders."

(Interviewee 5, Male, 9/4/2022)

"The measure of working from home and holding public hearings online had the most significant impact on the organization of work in the Institute. Professional spatial planning tasks are specific tasks in which the interaction between plan makers, local self-government units, and interested parties is very important. These limitations, which I mentioned, have greatly affected and slowed down the process of making spatial plans."

(Interviewee 4, Male, 9/4/2022)

"Organization of work from home, work in shifts. Since spatial planning is an interdisciplinary job, in normal conditions, we are used to close cooperation and teamwork of colleagues, which includes frequent physical contact in terms of conversations, discussions, and joint work, especially in making graphic parts of plans. With the introduction of these measures, this has become more difficult

and has automatically affected the duration of business processes. The effectiveness of employees at work from home depends on the conditions that the person has."

(Interviewee 7, Male, 11/4/2022)

Despite these difficulties, participants also point to rapid adaptation to emerging circumstances, as the following excerpt show:

"A lockdown marked the spring of 2020. The office of xx people functioned in a way that we all worked from home. Before the summer, when the first wave of the epidemic subsided, work was organized in shifts (50% of people worked in the office for a week, 50% from home). We have introduced such shift work on several occasions, depending on the situation with the pandemic.

Given the good technical support, working from home did not negatively affect the work process, although a significant part of the time had to be set aside for mutual coordination. However, over time, this problem has been resolved with the introduction of internal zoom meetings.

However, the process of drafting and adopting plans slowed down significantly, mainly because the representatives of the developers were not technically well organized to that extent, i.e., their ability to work from home included the use of telephone or e-mail. There were no field visits, and no public hearings were held in the first months of the epidemic. However, coordination through zoom was established relatively quickly, which almost completely replaced business trips and business meetings and contributed to greater efficiency of the process itself."

(Interviewee 9, Female, 11/4/2022)

Employees primarily point out that the measures had a direct impact on the decline in the quality of communication with representatives of administrative bodies of local and regional self-government units, as the following excerpt show:

"The measures that most affected communication were travel restriction measures because we had to organize virtual meetings for which part of the local government representatives were not ready. The quality of these meetings was questionable, given the lack of technological preparation. However, most representatives have found an operational way to communicate over time."

(Interviewee 5, Male, 9/4/2022)

While, for example, the decisions of the competent development authority on the temporary suspension of the procedures for the development and adoption of spatial plans have slowed down the process of making individual plans by several months or stopped them permanently, as the excerpt below show:

"In the first phase of the pandemic, work on developing spatial plans was almost suspended. Only in 2021 the processes of making spatial plans continue."

(Interviewee 3, Female, 5/4/2022)

The role and work of the competent ministry in giving instructions regarding the prescribed measures for the prevention and control of the epidemic of the disease COVID-19, which related to the procedures for the development of spatial plans, participants rated with an average score of 3.33. The following excerpts illustrate some of the interviewees' views:

"As usual, the Ministry was inert in making decisions and uninterested in the problems of professional developers. The profession itself had to initiate the harmonization of measures with real needs."

(Interviewee 5, Male, 9/4/2022)

"Regarding pandemic issues and the consequent implementation of spatial planning procedures, the Ministry, as usual, acted only when they were set up. Otherwise, the Ministry very rarely sends circular instructions, clarifications, etc. In connection with the pandemic, the instructions relied on the prescribed restrictive measures that would block the procedures, while there were no innovative improvements."

(Interviewee 8, Female, 11/4/2022)

4.2.1.2. *Participation*

As stated earlier in the text, on March 20, 2020, the competent ministry issued an instruction regarding the holding of public presentations during the public debate on the proposal of the spatial plan, which, taking into account the recommendation to limit public gatherings of a large number of people, exceptionally allows public presentations through Livestream with participants.

The following comment illustrate interviewees' view on the impact of the COVID-19 pandemic on the level of participation in the development of spatial plans:

"Initially, the response was, as expected, lower. Over time, as the overall culture of virtual space grew, more and more Livestream services functioned, and most citizens successfully accessed public presentations. Of course, the quality of such communication is not equal to the one performed live, and the problem of accessibility to different age groups should not be neglected."

(Interviewee 5, Male, 9/4/2022)

Most of the participants believe that the participation of citizens and public bodies through the Livestream service should be left as an option even after the cessation of the implementation of social distancing measures, as the following excerpt show:

"It can remain a possibility because it allows the participation of interested citizens who are in a different location from the one where the public debate is held, but in my opinion, there are still a large number of those who do not have the opportunity to follow public debates in this way. If it is introduced as an additional option, I do not see any disadvantages."

(Interviewee 1, Female, /4/2022)

"Certainly, but in a way that still maintains the classic exposition. It would continue to allow access to public hearings, primarily for the domicile population, especially those who are not inclined to the Internet and those who are physically unable to participate in public exhibitions due to work commitments or distance."

(Interviewee 8, Female, 11/4/2022)

4.2.1.3. *Changes in the spatial planning system*

The aftermath of the COVID-19 pandemic has prompted spatial planning experts to consider how "people-oriented" concepts (e.g., 15-minute city) can be incorporated into spatial planning systems to reduce negative impacts on space and people.

The following comment illustrates some of the interviewees' views on the impact of the COVID-19 pandemic to change professional attitudes when making spatial plans:

"Experts in spatial planning have received confirmation of what they already know by profession, and that is that space should be planned in its entirety and that the starting point of such planning is a man with all his characteristics and needs. The pandemic has to some extent, emphasized topics such as the 15-minute city, but "pandemic optics" in this regard should not be overemphasized as a starting point for such processes - because they lie in much broader issues and the totality of conditions affecting human life.

Another positive thing that can be learned from the experience is a partial increase in efficiency by digitizing specific processes. Although digitalization is not always the solution to all problems, specific processes have shifted over the last two years (virtual meetings and faster decision-making, reduction of physical paperwork, faster harmonization of bases and data, some increase in public administration efficiency, etc.)."

(Interviewee 5, Male, 9/4/2022)

"The pandemic has partially influenced attitudes when making spatial plans. I notice that a much larger number of people (experts, politicians, and the interested public) now understand the importance of moving to green, renewable, sustainable..."

(Interviewee 4, Male, 9/4/2022)

"The pandemic has affected many things, and it is too early for final positions. However, as individuals, we have become much more aware of the need for better housing, more even distribution of social facilities, and a significantly higher share of green space ... It will undoubtedly be necessary to follow the trend of deurbanization or the growing needs of housing in direct contact with nature and areas of lower housing density.

How much will this affect spatial plans? Honestly, I do not know. Yet."

(Interviewee 9, Female, 11/4/2022)

### 4.2.2. *Case study in Croatia - Primorsko-Goranska County*

In addition to the previously described analysis, semi-structured interviews, in the process of preparing a scientific paper, additional research was conducted. Statistical analysis was performed, which observed the Primorje-Gorski Kotar County and the number of public presentations held in the observed period of four years. Primorje-Gorski Kotar County is located in the west of Croatia, and consists of 14 cities, 22 municipalities and 536 settlements within cities and municipalities.[125] The public institution "Institute for Physical Planning of the Primorje-Gorski Kotar County" keeps the Register of Spatial Plans, providing conditions for access to information via the official website,[126] enabling analytical tasks related to spatial documentation. The information gathered on the official website of the Institute also enabled the collection of data for the preparation of this analysis.

**Table 2.** Primorje-Gorski Kotar County - number of public presentations held in the period from the beginning of January 2018 to the end of December 2021

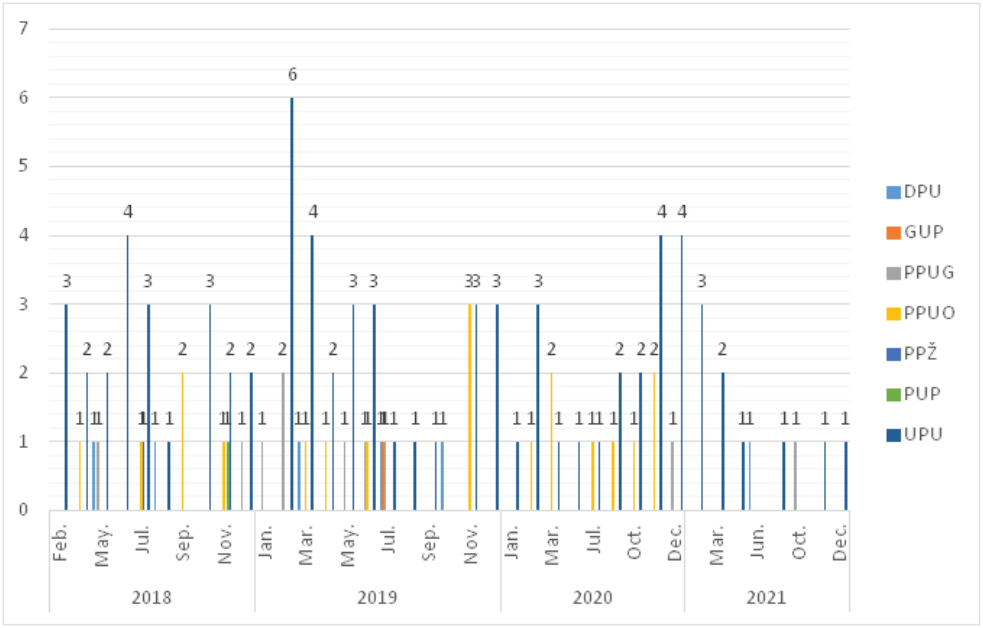
| | | SPATIAL PLANS | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | REGIONAL LEVEL | | LOCAL LEVEL | | | | | |
| | | County spatial plan | Spatial development plan of a city or municipality | General urban plan | Urban development plan | Detailed development plan | Implementation urban development plan | | |
| **Year** | **Month** | **PPŽ** | **PPUG** | **PPUO** | **GUP** | **UPU** | **PUP** | **DPU** | **Total** |
| **2018** | | **1** | **2** | **5** | | **22** | **1** | **2** | **33** |
| | Feb. | | | | | 3 | | | 3 |
| | Mar. | | | 1 | | 2 | | | 3 |
| | May. | | 1 | | | 2 | | 1 | 4 |
| | Jun. | | | | | 4 | | | 4 |
| | Jul. | 1 | | 1 | | 3 | | | 5 |
| | Aug. | | | | | 1 | | 1 | 2 |
| | Sep. | | | 2 | | | | | 2 |
| | Oct. | | | | | 3 | | | 3 |
| | Nov. | | | 1 | | 2 | 1 | | 4 |
| | Dec. | | 1 | | | 2 | | | 3 |
| **2019** | | | **6** | **6** | **1** | **27** | | **3** | **43** |

[125] See: Art. 11, Act on areas of counties, cities and municipalities on the Republic of Croatia, Official Gazette No. 86/2006, 125/2006, 16/2007, 46/2010, 95/2008, 145/2010, 37/2013, 44/2013, 45/2013, 110/2015

[126] Zavod za prostorno uređenje Primorsko-goranske županije, Geoportal županije, Available at: [https://zavod.pgz.hr/geoportal_zupanije], Accessed 7 April 2022

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Jan. | | 1 | | | | | | 1 |
| | Feb. | | 2 | | | 6 | | | 8 |
| | Mar. | | | 1 | | 4 | | 1 | 6 |
| | Apr. | | | 1 | | 2 | | | 3 |
| | May. | | 1 | | | 3 | | | 4 |
| | Jun. | | 1 | 1 | | 3 | | | 5 |
| | Jul. | | 1 | | 1 | 1 | | 1 | 4 |
| | Aug. | | | | | 1 | | | 1 |
| | Sep. | | | | | 1 | | | 1 |
| | Oct. | | | | | | | 1 | 1 |
| | Nov. | | | 3 | | 3 | | | 6 |
| | Dec. | | | | | 3 | | | 3 |
| **2020** | | | **1** | **8** | | **19** | | | **28** |
| | Jan. | | | | | 1 | | | 1 |
| | Feb. | | | 1 | | 3 | | | 4 |
| | Mar. | | | 2 | | 1 | | | 3 |
| | **On March 11, 2020, the Ministry of Health declared an epidemic of COVID-19 caused by SARS-CoV-2 in Croatia.** | | | | | | | | |
| | Jun. | | | | | 1 | | | 1 |
| | Jul. | | | 1 | | 1 | | | 2 |
| | Sep. | | | 1 | | 2 | | | 3 |
| | Oct. | | | 1 | | 2 | | | 3 |
| | Nov. | | | 2 | | 4 | | | 6 |
| | Dec. | | 1 | | | 4 | | | 5 |
| **2021** | | | **1** | | | **9** | | **1** | **11** |
| | Feb. | | | | | 3 | | | 3 |
| | Mar. | | | | | 2 | | | 2 |
| | May. | | | | | 1 | | | 1 |
| | Jun. | | | | | | | 1 | 1 |
| | Sep. | | | | | 1 | | | 1 |
| | Oct. | | 1 | | | | | | 1 |
| | Nov. | | | | | 1 | | | 1 |
| | Dec. | | | | | 1 | | | 1 |
| **Total** | | **1** | **10** | **19** | **1** | **77** | **1** | **6** | **115** |

**Graph 1.** Primorje-Gorski Kotar County - number of public presentations held in the period from the beginning of January 2018 to the end of December 2021




To find out the answer to whether and how the COVID-19 pandemic affected of the procedure for the development and adoption of spatial plans, an analysis was made and summarized in **Table 2.** and **Graph 1.**, showing the number of public presentations within four years, from January 2018 to December 2022. The table and graph show a decrease in public presentations in the last two years, which corresponds to the beginning of the COVID-19 pandemic.

## 5. CONCLUSION

The first goal of this paper was to analyse how the EU tries to overcome the consequences of the pandemic in the spatial planning area. Since EU does not have direct competence in spatial planning, the analyses of domestic regulation of each Member State is of great importance. Croatia has complex physical planning system, which results in the complexity of spatial planning and in the process of the adoption of spatial plans. Regulation of physical planning system in the Republic of Croatia started in 1994 with the adoption of the first PPA. In the last 20 years, attempts have been made to establish adequate and comprehensive regulation of spatial planning, which has resulted in the adoption of new laws (2007 and 2013), by-laws and other documents (e.g. strategies and programmes), for which it is not possible to say with certainty how effective they are because certain shortcomings

still exist. Compared to other European countries, some authors[127] state that the documents regulating spatial planning are more numerous, which does not necessary result in their higher efficiency.

EU influences in the spatial planning area mostly through recommendations, guidelines and directives in certain field of spatial planning. Analyses has shown that EU tries to overcome consequences of the pandemic through various reports and guidelines as well as recommendations with suggestions how Member States could adapt to the new situation caused by the pandemic of coronavirus and embrace new models for the urban and rural areas of the European Union. Documents at European Union level are mainly aimed at improving life in cities, which are considered to be the focal points of economic, educational and cultural life. They emphasize the importance of preserving life and health, as well as the need of organisation of life in the so-called 15 minutes' walk areas. The documents also contain provisions of the importance of mutual cooperation between the Member States and the Commission, which supports the balanced spatial development of all Member States through various funds and organization. The adoption of new unbinding documents is also assessed as good practice for sustainable urban development (e.g. New Leipzig Charter).

The problems caused by the pandemic can be seen in particular if one Member State is analysed, which was the second goal of the paper. Our research has explored the procedure for the development and adoption of spatial plans under the influence of the COVID-19 pandemic. Semi-structured interviews were used to examine the views and insights of 10 participants.

Research has shown the following: first, the introduction of measures had a significant impact on the organization of work, which slowed down the process of making plans. Maintaining social distance by working from home, working shifts and limiting field research and meetings have reduced the spread of the virus. However, these measures also had a negative impact on the duration of the process and the procedure for the development and adoption of spatial plans. Second, despite these difficulties, participants also point to rapid adaptation to emerging circumstances. Spatial planning and the process of developing and adopting spatial plans are complex and usually time-consuming. Therefore, the pandemic only partially affected the process of making spatial plans. The measures slowed down the procedures for drafting and adopting spatial plans, confirmed by analyzing the number of discussions held in the observed period of four years in the Primorje-Gorski Kotar County. Third, the possibility of participating in public

[127] Krtalić, *op. cit.,* note 54

presentations through the Livestream service, which was also used to hold meetings between all participants, not only enabled another form of citizen participation but also ensured faster adaptation of participants who perform professional spatial planning activities to the challenges caused by the COVID-19 pandemic. Most of the participants believe that the participation of citizens and public bodies through the Livestream service should be left as an option even after the cessation of the implementation of social distancing measures.

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UDK 341.645(4-67EU):347.4
Review article

# THE POTENTIAL OF ARTICLE 259 TFEU AS A TOOL FOR UPHOLDING THE MUTUAL TRUST IN THE EU

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***ABSTRACT***

*The principle of mutual trust, whose fundamental importance is recognized by the CJEU, is not mentioned in the Treaties, but nonetheless, it plays an essential role for the EU integration process and has become a structural principle of the EU law. In addition to its role as a basis for a large set of EU rules in the areas such as the internal market and the area of freedom, security and justice, this principle is also closely related to the EU founding values including the rule of law. Having in mind that is not a "blind trust" but an assumption, it is applied through ensuring compliance with the Union law for which both the Member States and the European Commission share responsibility, inter alia, by means of the infringement procedure.*

*Under Article 259 TFEU, Member States are also entitled to bring a direct action against another Member State for an alleged infringement of an obligation under the Treaties. However, it is extremely rare for a Member State to take action upon the Article 259 TFEU and its potential remains untapped till now.*

*This contribution aims to answer why do Member States are inactive in terms of invoking the infringement procedure. It argues that infringement procedure initiated by a Member State against another Member State should not be perceived as a violation of the mutual trust be-*

*tween them but as a tool to uphold the mutual trust and to protect the Union's founding values, including the rule of law.*

***Keywords:*** *Article 259 TFEU, Court of Justice of the EU, Member States' direct actions, mutual trust*

## 1. INTRODUCTION

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail", states Article 2 TEU.[1] The key values on which the European Union (EU) is based are "not only a political and symbolic statement" - it has concrete legal effects[2] and Member States presume the adherence to the values from the pre-accession to the full membership.

The institutions of the Union that are tasked with the preservation of the values have not been effective so far in guaranteeing European values because of a lack of political will as demonstrated.[3] Most commentators have argued that only political mechanisms can be used to enforce the values of Article 2 TEU and legal mechanisms although available, have not been used sufficiently.

The effective enforcement of values of Article 2 TEU can be demonstrated with two infringement actions both under Article 258 and 259 TFEU. These articles can be applied as instruments for enforcing EU values and the Court of Justice of the EU (CJEU) may call for systemic compliance, where the Member State may be asked to undo the effects in order to preserve the values indicated in Article 2. Under the Treaties, infringement procedures can be initiated by two parties: either by the European Commission under the Article 258 TFEU or by Member States under Article 259 TFEU to bring the actions of the Member States into line with EU law and its values.

What should be done today when the EU is experiencing a crisis of values? Some Member States are faltering in their commitments to the basic principles that were supposed to be secured by EU membership. Between the financial crisis and

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1 Art. 2 TEU (Lisbon)

2 Piris, J. C., *The Lisbon Treaty,* Cambridge University Press, Cambridge, 2010, p. 71

3 Scheppele, K. L.; Kochenov, D.; Grabowska-Moroz, B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Vol. 39, 2020, p. 6, [https://doi.org/10.1093/yel/yeaa012]

the rise of nationalist and far-right parties across the EU, Member States' governments have found domestic support both for bashing the EU and for questioning the democratic rotation of power, the unflinching protection of human rights and the security of the rule of law. At the same time while the EU poses an effective system of judicial protection, there are scholars that claim that there are insufficiencies in the system of values' protection. Although much can be done without treaties change, effective involvement of the institutions is difficult due to the high thresholds for the activation of existing provisions, as well as the different nature of response required by values violations compared with the *acquis* violations.

The paper explores the potential of the Article 259 TFEU from few different perspectives. First, it analyses the principle of mutual trust in the EU that embodies the essential imperatives of the European construct: unity, diversity and equality between Member States as an inevitably connected tool for the integration process in the Union. This principle, although not mentioned in the Treaties, has an important role in structural harmonization of the EU legislation, ensuring compliance with the Union law, including the EU values. The second part of the paper refers to the Article 259 TFEU and analyzes the potential reasons for its rare usage by the Member States of the EU i.e., why the number of direct actions of a Member State against another Member State for an alleged infringement of an obligation under the Treaties is extremely low.

Finally, the authors argue that the infringement procedure under the Article 259 TFEU cannot be perceived as a violation of the mutual trust between Member States, but as a tool to protect the fundamental values of the Union, including the rule of law. In this light, the authors conclude that the duty of guardianship of the Treaties should not be only left to the European Commission, but the Member States should have more proactive role in overcoming the systemic deficiency and rule of law violations of the non-compliant Member States.

## 2. PRINCIPLE OF MUTUAL TRUST AND (REINFORCING OF) THE EUROPEAN INTEGRATION

Although the notion of mutual trust is not mentioned in the Treaties, it has become a genuine "light motive" of discourses on EU integration. In order to better understand the principle of mutual trust one should first look up for its origins. Academics and scholars working in the field of the European integration claim that this principle is inevitably connected with the intergovernmental theory.

Namely, the main actors in intergovernmentalism are nation states, particularly national governments. Intergovernmentalism was initially conceived in the realist

tradition in which nation states are considered the principal actors and that states are treated as "black boxes" (unitary actors). There were no references to an intrinsic interest in cooperation, but an understanding that anarchy is the prevailing state of affairs within which states operate. The main mechanisms are bargaining and safeguarding national interests in the international arena. From the 1990s, intergovernmentalism has been developed further and the micro foundations of the theory were further spelled out. In this development, national interests started to play a stronger role in intergovernmentalism. State preferences were more clearly theorized to be based on domestic preferences, which in turn could be based on economic actors or other foundations.[4]

In this manner we can go further and connect the principle of mutual trust with the Andrew Moravcsik theory of liberal intergovernmentalism. Moravcsik labeled his approach to liberal intergovernmentalism because he drew on "domestic" forces and economic interests to inform what might be state preferences. At the same time, his work was also in line with the realist theories of international relations as it assumed that states (national governments and representatives of national governments) are the main players and that they ultimately are unitary actors.[5]

Being primarily related to the economic integration, the principle of mutual trust appeared at an early stage of European integration, in the area of mutual recognition of diplomas and professional qualifications and in the field of free movement of goods.[6] It was developed in the context of the internal market, in particular in situations where (detailed) harmonization could not be reached or was considered undesirable. As a principle, it imposes to the Member States to presume, to a certain extent, the compatibility of different national "legal solutions", or in other words to "trust" acts issued by other Member States, or legal practices or situations tolerated in their territory. Being an attractive tool for integration by allowing the opening-up of the different national legal orders[7], mutual trust also served as a foundation of the principle of mutual recognition in the field of judicial cooperation in civil matters. Mutual recognition as a method of cooperation, whereby a decision of one Member State is more or less automatically accepted in another Member State and obtains legal force, presumes, in turn, trust in the sense that the rules of the first Member

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4 Verdun, A., *Intergovernmentalism: Old, Liberal, and New,* Oxford Research Encyclopedia, Politics, 2020, p. 4, [https://doi.org/10.1093/acrefore/9780190228637.013.1489]

5 *Ibid.,* p. 7

6 Rizcallah, C., *The Principle of Mutual Trust in EU Law in the Face of a Crisis of Values,* 2021, available at: [https://eapil.org/2021/02/22/the-principle-of-mutual-trust-in-eu-law-in-the-face-of-a-crisis-of-values/#:~:text=The%20principle%20of%20mutual%20trust%20is%20indeed%20presented%20as%20being,168)], Accessed 29 March 2022

7 *Ibid.*

State are adequate, that they offer equal or equivalent protection and that they are applied correctly. As the CJEU held in its judgment in *NS* case[8] "the raison d'être of the European Union and the creation of an area of freedom, security and justice are based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights".

As a matter of fact, the principle of mutual trust plays an essential role for EU integration as it embodies the essential imperatives of the European construct: unity, diversity and equality between Member States. Moreover, it can be drawn in line with the intergovernmentalists' approach - despite the safeguarding of national substantive and procedural diversities, the principle of mutual trust makes it possible to unify the national legal orders, which remain distinct and equal.

Fundamental importance of the principle of mutual trust has been recognized by the usual "engine of the European integration" – the CJEU. In Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR)[9], the Court emphasized that "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained". Although the principle of mutual trust is mainly related to the Single Market and the Area of Freedom, Justice and Security, it reaches beyond the area of *acquis* enforcement. In *Trade Agency* case[10], for instance, the question arose whether a court of a Member State in which enforcement is sought can refuse enforcement of a default judgment without any statement of reasons. In the specific circumstances of the case, it had to be assessed whether the judgment at issue infringed the right to a fair trial, as laid down in Article 47 of the Charter of Fundamental Rights of the EU. Having in mind that the right to a fair trial is considered as an element of the EU rule of law concept, it is obvious that upholding the mutual trust in the EU is inevitably related to the founding values protection, including the rule of law and human rights.

The same "link" can be spotted in the *Zarraga* case[11], where the Court held that the authorities of the executing Member State were not entitled to verify whether

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8 Joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department, and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, par. 83

9 Opinion of the Court 2/13 of 18 December 2014, Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, ECLI:EU:C:2014:2454, par. 191

10 Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2012] ECLI:EU:C:2012:531, par. 51

11 Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247, paras. 46 and 70

the court which issued the judgment requiring the return of the child had respected the child's right to be heard, as provided for by the Regulation. This decision was brought on the basis of the principle of mutual trust as it requires the national authorities to consider "that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognized at EU level, in particular, in the Charter of Fundamental Rights".[12]

In that context, on a very general level, the principle of mutual trust means that one Member State can be confident that other Member States respect and ensure an equivalent level of certain common values, in particular the principles of freedom, democracy, respect for human rights and the rule of law. Therefore, the principle of mutual trust is indeed described as being "based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU".[13] However, the major challenges faced by the Union and the Member States in economic, security and migration matters have indeed revealed deep divisions as to the meaning of European integration and the values on which it is based, which lead to the existence of widespread and persistent failures causing a rule of law backsliding in a few Member States.[14] This situation increases the likelihood that national legal solutions are incompatible with democratic values and the rule of law.

The existence of the "crisis of values" amplifies the risks towards upholding the mutual trust in the EU. On the other hand, the next phase of the European integration has to be the "integration through the rule of law', as the further development of this process must be based on a secure and solid ground, reaffirming the Union as a community of values.[15] In that manner, if we turn the story upside down, mechanisms for protecting the rule of law and EU values in general, can contribute to upholding the mutual trust between the Member States that ultimately, will result in reinforcing the European integration process. Given the central role of Member States in the light of the intergovernmentalism, it is the direct state action that can play a crucial role for ensuring compliance with the Union law, including the EU values, and thus enhance the mutual trust among the Member States.

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12 *Ibid.*, par. 70

13 Opinion of the Court 2/13 of 18 December 2014, *op. cit.*, note 9, par. 168

14 Rizcallah, C., *loc. cit.*, note 6

15 Lenaerts, K., *New Horizons for the Rule of Law within the EU*, German Law Journal, Vol. 21, No. 1, 2020, pp. 29-34

## 3. ARTICLE 259 TFEU – AN ENEMY WITHIN OR A SECRET FRIEND

One may ask himself how do we connect the principle of mutual trust with the Article 259 TFEU and are not the both opposed one to another? On the first glance when someone reads the provisions under Article 259 TFEU stating that: "A Member State which considers that another Member State has failed to fulfill an obligation under the Treaties may bring the matter before the CJEU to the fore"[16] can assume that this is provision of an article for building a "mistrust" in the Union. How can we better explain the possibility of one Member State to call on responsibility to another Member State before the Court of Justice? Furthermore, if the few cases[17] brought before the CJEU under the provisions of the Article 259 TFEU are analyzed, one can also not state the opposite.

The number of actions of Member States against other Member States are very rare and can be considered as having "merely channeling national political interest and thus of small, if not quite non-existent, EU law value".[18] The fact that Article 259 TFEU is not frequently used is indicated by only eight cases in the history of the EU initiating an infringement procedure by one Member State against another. There are only six judgements delivered for the following cases in front of the CJEU:

1. *France v United Kingdom*, C-141/78, October 1979: Fisheries dispute;
2. *Belgium v Spain*, C-388/95, May 2000: Designation of origin of wine;
3. *Spain v UK*, C-145/04, September 2006: Eligibility to vote in EP elections in Gibraltar;
4. *Hungary v Slovakia*, C-364/10, October 2012: Refusal to allow entry to President of Hungary;
5. *Austria v Germany*, C-591/17, June 2019: Passenger car vignette;
6. *Slovenia v Croatia*, C-457/18, concerning a maritime border dispute, and two cases have been withdrawn.[19]

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16 Art. 259(1) TFEU (Lisbon)

17 Case 141/78 *France v UK* [1979] ECR 2923; Case C-388/95 *Belgium v Spain* [2000] ECR I-3123; Case C-145/04 *Spain v UK* [2006] ECR I-7917; Case C-364/10 *Hungary v Slovakia* [2012] ECLI:EU:C:2012:630

18 Kochenov, D., *Biting Intergovernmentalism: the case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool*, Jean Monnet Working Paper, NYU Law School, No. 11, 2015, p. 10

19 Nicolaides, P., *Member State v Member State" and other peculiarities of EU Law*, 2019, [https://www.maastrichtuniversity.nl/blog/2019/06/"member-state-v-member-state"-and-other-peculiarities-eu-law], Accessed 3 April 2022

On the other hand, between 2002 and 2018, the Court of Justice ruled in 1418 cases of infringement brought by the Commission and found against Member States in 1285 cases, with 91% success rate of the Commission. Most of the cases brought under Article 259 are ones with political dimension connected to the bilateral disputes between the Member States which the Commission has refused to get involved in.[20]

In one of the cases brought before the Court of Justice (*Hungary v. Slovakia*) Hungary invoked free movement of persons law to argue that Slovakia's refusal to let the Hungarian President cross the border to be present at the unveiling of a statute of Saint Stephan, the founder of the Hungarian state, on the very sensitive anniversary of the invasion of Czechoslovakia by Warsaw pact troops (including Hungarians) in 1968 - was in violation of the EU law. However, the background of this case was not to protect the free movements of people because it was obvious that the Hungarian president was unwelcome in Slovakia. The purpose of Hungary was purely political and the State used the provisions under the Article 259 of the TFEU in order to achieve political justice. Or with other words in the context of *acquis* enforcement, Article 259 TFEU was deployed by *de facto* abusive Member States seeking to reap political benefit by instrumentalizing an allegation of non-compliance with the *acquis*, not supported by the Commission.

The reasons for limited usage of Article 259 can be found in few grounds. Some authors claim that Article 259 TFEU has been rarely used due to the EU mechanisms in preventing direct confrontation between Member States. The Commission's central role in the commencement of infringement procedures, therefore, contributes significantly to the preservation of friendly relations between Member States by preventing their direct confrontation. Good neighborly relations within the EU are thus largely maintained through the advanced mechanisms for the settlement of disputes between Member States.[21]

Additionally, through the prism of the intergovernmentalism theory Member States refrain from using the Article 259 TFEU in order not to be perceived as the enemy within. However, the EU law enforcement including EU values is of utmost importance for the shared interests of the Member States and Article 259 TFEU has full potential to become effective instrument for achieving this goal. Member States can use this article for initiating actions in areas that are not ad-

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[20] As Kochenov notes in *Gazeta Prawna,* 2020, according to Íñiguez, G., *The Enemy Within? Article 259 And The Union's Intergovernmentalism,* 2020, [https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr], Accessed 7 April 2022

[21] Basheska, E., *Good European Neighbours - The Turów Case, Interim Measures in Inter-State Cases, and the Rule of Law*, 2021, [https://verfassungsblog.de/good-european-neighbours/], Accessed 6 April 2022

dressed by the Commission in order to safeguard the EU fundamental values and EU law. Nevertheless, the potential of Article 259 TFEU has been rarely used so far.

Other authors consider that Member States are inactive in terms of invoking the infringement procedure because they rely on the European Commission as a "Guardian of the Treaties". In this case, the Commission is not obliged to start an infringement procedure as European integration process is based primarily on the transfer of sovereignty of the Member States *vis a vis* the EU. In that manner, the infringement proceedings depend neither on political support from the Member States, nor on the cooperation of domestic courts. The attitude is that EU law related issues are responsibility of the EU itself.

In the case of the Article 259 TFEU the Commission is expected to deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. Many of the claims brought by Member States are halted at this stage, and taken up by the Commission instead – thus reaching the Court as "traditional" Article 258 proceedings, rather than as disputes between two Member States. This explains the residual nature of cases actually brought under Article 259 itself.[22] If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.[23]

On the other side we have scholars who claim that Article 259 TFEU actually helps us avoid the conceptual skepticism regarding allowing the EU to grow its enforcement powers out of proportion in comparison with the scope of conferral. Virtually all such criticism focuses on the potential harmfulness of extending the EU's action in the area of values in the current climate of the EU's design and functioning – all the said need to enforce the values notwithstanding. The way Article 259 TFEU works, however, puts the Member States themselves – not the Union and its institutions – into the spotlight. This means that when an action by a Member State which is related to the adherence to the values expressed in Article 2 TEU by some other Member State is brought directly to the Court of Justice, it is obviously the Member State bringing the action which acts as the guardian of values in the first place, not an institution of the Union. This potentially diminishes the arguably problematic aspects related to an overly broad interpretation of the legal effects of Article 2 TEU.[24]

[22] Íñiguez, C., *loc. cit.*, note 20

[23] Arts. 259(3)(4) TFEU (Lisbon)

[24] Kochenov, D., *op. cit.*, note 18, p. 9

Most importantly, while the very structure of the law enforcement provisions in the EU seems to beg the conclusion that Article 259 TFEU enjoys a rather auxiliary place in the grand scheme, with the institutions taking over the task of *acquis* enforcement from the individual Member States, the same does not seem to be entirely true in the values enforcement context. Since the values declared in Article 2 TEU are shared between the EU and its Member States' legal orders, it is impossible to claim that the institutions of the Union are the key actors primarily responsible for their enforcement. On the contrary, in the context of the complete interdependence of the Union and its Member States in general Article 2 TEU compliance throughout the Union, the Member States should by definition be allowed to play a much greater role here compared to the ordinary context of *acquis* enforcement.[25]

The infringement procedures must only be based on the EU law. The actions based on Article 259 TFEU should "supply the much-needed momentum to push the Commission to take a somewhat more active stance on the matter. It could thus be combined with the deployment of other measures available in the EU's values' enforcement palette, such as the pre-Article 7 procedure for instance".[26]

Some scholars may argue that the real protection of the Union values is under the Article 7 TEU procedure and there is no need to look up for further protection of the values under the Article 259. On the contrary, the protection given under Article 7 is conditioned and it has to be on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.[27] The procedure is organized in two distinct parts and by setting a main role for the Council and the European Council, it is the Member States that must take a decision. So given like this, the values' enforcement is crucially political and relies to a great degree on the will of the individual Member States, even if channeled via the institutions. Therefore, Article 7 TEU represents the intergovernmentalists' turn. The procedure foreseen in Article 7 TEU cannot, under any circumstances, be considered an operational or even suitable instrument to ensure the rule of law in the Member States of the EU and the observance of the values

25 *Ibid*.

26 Kochenov, D., *op. cit.*, note 18, p. 17

27 Art. 7 TEU (Lisbon)

enshrined in Article 2 TEU. In order to be operational, it has to be modified and sharpened - lower thresholds for triggering the Article 7 mechanisms have to be provided.

Direct actions under this article may lead towards enforcement of EU fundamental values and core principles of the Member States. The benefits of deploying Article 259 TFEU as opposed to other Treaty provisions are as following "the Article requires *national* as opposed to the EU-level institutional action, which solves the issue of the high thresholds for using the other mechanisms and also respects the federal sensitivities, by limiting the possibility of supranational power-grabs under the pretext of values enforcement."[28] This powerful instrument can lead towards a state where the Member States by they own capacities can address the Court for enforcement of values on which the Union is based. The potential effectiveness of this instrument lies in its capacity to empower Member States, acting together with the CJEU to solve problems without relying on the capacity of the institutions of the EU themselves. This will lead towards more effective action on EU level, avoiding the necessary thresholds of institutional levels and avoiding the robust institutional mechanisms of the EU institutions themselves, and empowering the Member States instead.

## 4. MEMBER STATES' ACTIONS TO BREAK THE IMPASSE

The insertion of values in the Treaties represents the intention to introduce their status to binding EU law. One of the weakest elements in the legal-political edifice of today's EU is ensuring that the Member States' governments are faithful to the basic principles of democracy, protection of fundamental rights, and the rule of law.[29] The existence of serious violations of the fundamental values, the rule of law in particular, in an increasing number of Member States on the one hand, and deterioration of the situation on the other hand, caused the "crisis of values" that the EU currently faces.[30] The rule of law crisis not only undermines EU political integration, but it also endangers the protection of Treaty freedoms and fundamental rights at the core of EU law and threatens the very essence of the European project since it concerns the fundamental values upon which the Union is built and which

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28 *Ibid*.

29 Scheppele *et al.*, *op. cit.*, note 3, p. 4

30 In its 2021 Rule of Law Report as a comprehensive assessment of developments affecting the rule of law across EU Member States, the European Commission expressed concerns with regard to Poland and Hungary, where the situation has only further deteriorated. Several mechanisms for upholding the rule of law have been already activated, including launching infringement procedures. See Bogdandy, A.; Ioannidis, M., *Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done*, Common Market Law Review, Vol. 59, No. 1, 2014, pp. 59-96

are spelled out in Article 2 TEU. Hence, despite ten years of EU attempts at reining in rule of law violations and even as backsliding Member States have lost cases at the CJEU, illiberal regimes inside the EU have become more consolidated: the EU has been losing through winning.[31]

The most illustrative example of the interconnection between mutual trust and the rule of law is the case of Member States refusal to execute European Arrest Warrants (EAWs) with regard to the Polish requests for suspects' extradition. Last in the row, Amsterdam Court in 2021 decided in such manner, due to the fear that "there is a danger that the judges in Poland who have to rule on the criminal case of the accused person will not be able to do so freely, partly because of the risk of disciplinary proceedings".[32] This judicial action followed more broad public discussion in the Netherlands on the situation in Poland over accusations on backsliding in rule of law standards. Hence, in December 2020, the Dutch House of Representatives (the Tweede Kamer) adopted a resolution compelling the government to bring Poland before the CJEU. In light of the Commission's failure to enforce the Courts' previous judgment, the Tweede Kamer noted, and of the "serious threats" faced by the Polish judiciary, the Dutch government should take the lead, and ensure the protection of rule of law across the Union.[33]

Prior to this, the Rechtbank Amsterdam (the central court instance that decides on the execution of all incoming EAWs in the Netherlands) took leading decisions on 16 August 2018[34] and 4 October 2018[35], by which surrenders to Poland were suspended for the time being. Moreover, Netherlands' Court made a reference for urgent preliminary ruling, asking the CJEU whether the existence of evidence of systemic or generalized deficiencies concerning judicial independence in Poland or of an increase in those deficiencies does not in itself justify the judicial authorities of the other Member States refusing to execute any European arrest warrant issued by a Polish judicial authority.[36] The Rechbank Amsterdam decided to refer the cases to CJEU as a follow-up to its judgment in *Aranyosi and Căldăraru* – L.M.

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31 Scheppele *et al.*, *op. cit.*, note 3, p. 42

32 Statement by the Rechtbank Amsterdam, 10 February 2021, [https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/IRK-ziet-af-van-overlevering-Poolse-verdachte.aspx], Accessed 7 April 2022

33 TVP World, Lower House Speaker addresses Dutch counterpart over rule of law, 8 December 2020, [https://polandin.com/51233330/lower-house-speaker-addresses-dutch-counterpartafter-resolution-calling-for-suing-poland], Accessed 7 April 2022

34 Rechtbank Amsterdam, 16 August 2018, ECLI:NL:RBAMS:2018:5925

35 Rechtbank Amsterdam, 4 October 2018, ECLI:NL:RBAMS:2018:7032

36 Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P/Openbaar Ministerie* [2020] ECLI:EU:C:2020:1033

case[37] which was delivered against the backdrop of the reforms of the Polish judicial system, seeking clarification of the used approach in the light of the recent developments involving deterioration of Poland's rule of law.

Analysis on the main parameters of these decisions shows that CJEU's approach includes a certain amount of leeway for interpretation by the national authorities examining the execution of EAWs from countries in which shadows lie over the rule of law.[38] In other words, the Court of Justice provided an exception to the principle of mutual recognition, which underpins the system of judicial cooperation in criminal matters. The issues of the *L.M.* case law had their reflections in the decisions made by the German courts[39] while similar doubts were also raised by a Spanish court[40]. This situation reveals lack of trust among the EU national courts on the basis of the rule of law violations. The scope of the exception to the principle of mutual trust based on rule of law considerations developed under the *L.M.* judgment has been further extended in other fields of judicial cooperation, namely in the competition law as the *Sped-Pro*[41] case showed.

Another example of Member States' (re)action over the rule of law crisis occurred even in an "early" phase, with the letter of foreign ministers[42] signed by Denmark, Finland, Germany and the Netherlands calling for cutting funds to values-vio-

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37 Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] ECLI:EU:C:2018:586. CJEU reaffirmed its view that such a refusal is possible only following a two-step examination: having assessed in a general manner whether there is objective evidence of a risk of breach of the right to a fair trial, on account of systemic or generalized deficiencies concerning the independence of the issuing Member State's judiciary, the executing judicial authority must then determine to what extent such deficiencies are liable to have an actual impact on the situation of the person concerned if he or she is surrendered to the judicial authorities of that Member State

38 Wahl, T., *Refusal of European Arrest Warrants Due to Fair Trial Infringements Review of the CJEU's Judgment in "LM" by National Courts in Europe*, EUCRIM, No. 4, 2020, p. 328, [https://doi.org/10.30709/eucrim-2020-026]

39 Rechtsprechung OLG (Oberlandesgericht or the Higher Regional Court) Karlsruhe, 07 January 2019 - Ausl 301 AR 95/18; Rechtsprechung OLG Karlsruhe, 17 February 2020 - Ausl 301 AR 156/19; Rechtsprechung OLG Karlsruhe, 27 November 2020 - Ausl 301 AR 104/19;. Federal Constitutional Court (BVerfG), Order of 15 December 2015, 2 BvR 2735/14, an English summary is provided by the press release, available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html], Accessed 7 April 2022

40 TPV World, Spanish court demands answers on judicial independence, 2 October 2018, available at: [https://tvpworld.com/39285995/spanish-court-demands-answers-on-judicial-independence], Accessed 7 April 2022

41 Case T-791/19, *Sped-Pro v Commission* [2022] ECLI:EU:T:2022:67

42 Letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the Commission, referred in the Speech: The EU and the Rule of Law – What next? by the Vice-President of the European Commission, EU Justice Commissioner Viviane Reding, 4 September 2013, available at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_67], Accessed 17 May 2022

lating Member States invoked by the autocracy elements that started to emerge in Hungary. This was a clear expression of the Member States' consideration that the EU's capacity for action in the domain of values must be upgraded in order to be timely and effective and that some of them were willing to step up as strong defenders of the rule of law and values enforcement in the EU.

Taken measures can also be observed in line with the Article 4(3) TEU which imposes certain "duty of loyalty"[43] towards the EU stating that "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties". Hence, protection of the very existence of the EU as a rule-of-law-based regime is certainly one in that direction. Such approach can also be argued in the light of the intergovernmentalism as the main theory on which this paper is based. In intergovernmentalist theorizing, institutional actors operating within supranational organizations play a minor, facilitative role at best, instead, Member States shape and steer the course of European integration, which also explains the usually moderate speed of the European project.[44]

It is evident that rule of law violations have effects that spill over the national borders, thus it is in the compliant Member States' interests to protect themselves and their own citizens against potential abuse of their rights when they are subject to jurisdictions affected by rule of law backsliding.[45]After all, in the context of the liberal intergovernmentalism, European integration, meaning the treaty amending decisions, have resulted from interstate bargaining on the basis of domestically determined preferences.[46] Having in mind that EU founding values are stipulated in the treaties, they are mutually agreed on the basis of the domestic interests in the first place.

Hence, new avenues for rule of law protection have to be explored in the light of the dominant intergovernmentalist approach in which the Commission is no longer the sole or even the prime driver of the European integration process. In the above mentioned offbeat case - *Sped Pro*, CJEU ruled that before rejecting a complaint on the grounds that the competition authority of a Member State is

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43 Schepelle *et al.*, *op. cit.*, note 3, p. 42

44 As in Smeets, S.; Zaun, N., *What is intergovernmental about the EU's '(new) intergovernmentalist' turn? Evidence from the Eurozone and asylum crises*, West European Politics, Vol. 44, No. 4, 2021, pp. 852-872, [doi: 10.1080/01402382.2020.1792203]

45 Editorial, *Enforcing the Rule of Law in the EU. In the Name of Whom?* European Papers, Vol. 1, No. 3, 2016, pp. 771–776

46 Moravcsik, A., *Preferences, Power and Institutions in 21st-Century Europe*, Journal of Common Market Studies, Vol. 56, No. 7, 2018, p. 1649

"better placed", the Commission must examine, in a concrete and precise manner, the indications provided by the complainant evidencing generalized and systemic deficiencies in the rule of law of that Member State. What is more interesting about this case is that it was filed by a Polish company as an action for annulment of Commission's rejection of prior complaint against PKP Cargo, a company controlled by the Polish State.[47] In that manner, it was basically a request from a domestic actor to be protected by the Commission against its own State on issues which are part of the more broad fight against the so-called "rule of law backsliding" and showed how these (formerly) abstract values may become justiciable in concrete filed of EU law where the EU institutions and Member States are called upon to cooperate on the basis of the mutual trust principle.[48]

In the light of this fight against the rule of law crisis that is endangering the very essence of EU integration, European Commission cannot be left alone with the duty of guardianship of the Treaties, particularly when there are clear signs of being not enough proactive and effective in handling the problem. In the third infringement ruling by the CJEU in relation to Poland's rule of law breakdown – *Disciplinary regime for judges* case[49], initiated on the basis of the "standard" Article 258 TFEU, five Member States intervened – Belgium, Denmark, the Netherlands, Sweden, and Finland. As it was stated, the intervention was made not in support of the Commission in order to attack Poland but rather to underscore the spirit of openness, mutual trust and exchange of best practices.[50]

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47 On 4 November 2016, Sped-Pro, a Polish operator in the freight sector, filed a complaint with the European Commission against PKP Cargo, a company controlled by the Polish State. Sped-Pro alleged that PKP Cargo had abused its dominant position on the market for rail freight in Poland by refusing to conclude a cooperation contract at market conditions. By decision of 12 August 2019 (AT.40459), the Commission rejected the complaint pursuant to Art. 7(2) of Regulation 773/2004, on the basis that the Polish competition authority was better placed to examine it according to the criteria set out in the Notice on cooperation within the Network of Competition Authorities. On 15 November 2019, Sped-Pro filed an action for annulment of the Commission's decision, arguing, *inter alia*, that the Commission was better placed to examine the complaint, given the systemic and generalized deficiencies in the rule of law in Poland, which affected the independence of the Polish competition authority and courts. See Lamo Perez, D., *Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the "L.M. Doctrine" to Cooperation Between Competition Authorities (Sped-Pro, T-791/19),* Kluwer Competition Law Blog, 2022, [http://competitionlawblog.kluwercompetitionlaw.com/2022/03/01/mutual-trust-and-rule-of-law-considerations-in-eu-competition-law-the-general-court-extends-the-l-m-doctrine-to-cooperation-between-competition-authorities-sped-pro-t-791-19/], Accessed 7 April 2022

48 *Ibid*.

49 Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)* [2021] ECLI:EU:C:2021:596

50 Rule of Law, *5 Member States support the European Commission in Case 791/19: What they said*, 2020, [https://ruleoflaw.pl/5-member-states-support-the-european-commission-in-case-791-19-what-they-said/], Accessed 7 April 2022

The Member States' actions to break the impasse are not a power-grab by the Commission, but efforts to take the enforcement of founding values upon which they have agreed, into their own hands when confronted by reluctance in the Union institutions – a version of the intergovernmentalism named by Kochenov as "biting intergovernmentalism".[51] Given that a fundamentally different role needs to be played by the Member States in the enforcement of values, next step in that regard should be activating the direct infringement action under Article 259 TFEU as an immediately deployable mechanism. The potential importance of Article 259 TFEU rises to a great extent: in a context where self-help is traditionally prohibited, this provision acquires crucial importance if the institutions use their discretion either to be silent on a matter of concrete violations – proposing some ephemeral procedures for future use notwithstanding – or winning irrelevant cases which have no bearing on the actual state of the rule of law in the non-compliant Member States.

Having in mind the Commission's approach applied so far, it is based on tackling separate cases of rule of law violations without being able to address the systemic deficiency in the non-compliant Member States. One of the often cited example in that regard is the case on age discrimination grounds against Hungary[52], where the retirement age for the judges was significantly reduced as part of the national government's "strategy" to undermine the independence of the judiciary, but it was ruled as unjustified age discrimination and thus a violation of the EU anti-discrimination *acquis,* failing to drive (non)compliance with the rule of law as a fundamental value of Article 2 TEU. Although the Commission won this case, this intervention was considered as ineffective[53] since the violation was remedied through a compensation of the retired judges but did not get to the very essence of the problem and the actual background of this case that refers to making space for appointing "ideologically compatible" judges.

Hence, several influential scholars[54] have proposed violations of the rule of law to be tackled in a "systemic infringement action" and developed such "technique" which would allow gathering together numerous examples that Article 2 TEU is

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51 Kochenov, D., *op. cit.*, note 18, p. 17

52 Case C-286/12, *European Commission v Hungary* [2012] ECLI:EU:C:2012:687

53 For an analysis see Scheppele, K. L., *Making Infringement Procedures More Effective,* Verfassungsblog, 2020, [https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/], Accessed 7 April 2022

54 *Ibid.*; Kochenov, D., *op. cit.*, note 18, p. 1; Bárd, P.; Śledzińska, A. S., *Rule of law infringement procedures: A proposal to extend the EUs rule of law toolbox*, CEPS Papers in Liberty and Security in Europe, No. 9, 2019, p. 2, available at: [https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf], Accessed 7 April 2022

being seriously violated in a Member State, arguing that "the whole is more than the sum of the parts" and that the set of alleged infringements rises to the level of a systemic breach of basic values such as the rule of law. However, the Commission is obviously indecisive to take such step under the Article 258 TFEU so it is a high time for the Member States to challenge the rule of law systemic deficiency through its "twin" Article 259 TFEU.

## 5. CONCLUSIONS

Article 259 TFEU is best suited for bringing infringement actions against Member States which fail to respect to the values and principles that are core foundations of the European Union. The infringement procedure under the Article 259 TFEU cannot be perceived as a violation of the mutual trust between Member States. In fact, Article 259 TFEU is an essential tool for preservation of the fundamental values of the EU that are not only of symbolic nature, but their violation produces certain legal implications. These values include the rule of law as a core principle in the EU, and adherence to these values is expected by all Member States, from the stage of pre-accession, until their full membership.

The exceptionally low number of actions of Member States against other Member States shows that the legal mechanisms, although available, have not been used sufficiently and political mechanisms have overtaken their place. Even the institutions of the Union that are expected to preserve the European values have not been efficient enough on this matter. So far, Article 259 TFEU has been used as a tool for channeling predominantly national political interests and the guardianship of the Treaties in the context of protection of fundamental values of the Union, including the rule of law, has been left to the European Commission.

However, this duty can be easily overtaken by the Member States of the EU if they present more proactive role and use Article 259 TFEU for actions against another Member States. This horizontal approach in resolving issues between Member States regarding preservation of values can be used as a mechanism for overarching the disputes with regard to values and principles of the Union, without additional institutional interference.

Such assertiveness by the Member States should not be considered as "invoking a scandal" but as fulfilling the duty to uphold the principle of mutual trust in light of the Article 4(3) TEU and to safeguard the EU's constitutional architecture that is increasingly fragile. Gaining assurance that such shortcomings with regard to the rule of law can be resolved would ultimately strengthen the trust between the Member States. In other words, also approached from the perspective of the global

systemic assessment of the provisions aimed at ensuring compliance, Article 259 TFEU acquires a new life, the one of much greater importance – in the context of values' enforcement as opposed to simply guaranteeing *acquis* compliance.

Another advantage of the usage of Article 259 TFEU is the fact that it can be immediately used by any Member State of the Union and even in case of institutional obstacles the Member States can call upon the CJEU to resolve the issue and protect the values of the EU. The EU law enforcement including EU values is of utmost importance for the shared interests of the Member States and Article 259 TFEU has full potential to become effective instrument for achieving this goal.

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UDK 347.78:004.7
342.721:004.7
Original scientific paper

# THE ANALYSIS OF THE APPLICATION OF PERSONAL DATA PROTECTION NORMS BY COLLABORATIVE PLATFORMS*

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***ABSTRACT***

*This paper analyses the practical application of the legal norms enacted to ensure the protection of the right for personal data protection as defined in Article 8 of the Charter of Fundamental Rights of the European Union. This paper identifies the categories of personal data collected and processed by collaborative platforms and analyses the lawfulness of this processing considering the individual legal bases, with particular regard to consent, contract performance and legitimate interests pursued by platforms. This paper further discusses the use of cookies to obtain personal data by collaborative platforms and provides a comparison of selected collaborative platforms and their approaches to cookies regulation.*

***Keywords****: collaborative platforms, cookies, consent, contract performance, legitimate interest, personal data*

## 1. INTRODUCTION AND METHODOLOGY

The importance of the objective to ensure the application of the fundamental right for personal data protection on the Internet has been confirmed by the adoption of the General Data Protection Regulation (hereinafter only as 'GDPR'), the in-

* This paper is funded by the Slovak APVV project under contract No. APVV 17-0561

tention of which was i. e. to influence how online platforms process personal data of their users. The basis for this development was the extensive amount of data, whether personal or other, collected and processed by platforms for different purposes, including for commercial purposes.[1]

The collection and processing of personal data also concerns the users of collaborative platforms. The affected users include all platform users, namely those that offer to provide different services, those that only search the offers of these service providers as well as those that actually choose and order the provision of a service. Information collected about these users, their activity on collaborative platforms and data about individual transactions realised through these platforms create large datasets that can be analysed and used for different purposes, including to strengthen the platform's market position.[2] The collection and processing of user's personal data inevitably triggers the application of the relevant personal data protection regulation, specifically GDPR, that establishes the conditions that must be met to ensure the lawfulness of such processing. The objective of this paper is to analyse whether these conditions are satisfied and how the relevant legislation is applied by collaborative platforms in practice.

This paper analyses the approach of the selected collaborative platforms to the issue of ensuring the required level of protection of their users' personal data and the compliance of the adopted measures with the applicable EU legislation. Specifically, the dominant representatives of collaborative platforms operating in different sectors of the economy, namely in the accommodation sector (Airbnb and Booking) and in the transport sector (Uber, Bolt and BlaBlaCar), are analysed on

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1 As regards commercial use and utilization of personal data see also: 1) Treščáková, D., *On some aspects of protection of personal data in the European area,* n: Topical issues problems of modern law and economics in Europe and Asia, Moscow: Moskovskij gosudarstvennyj juridičeskij universitet imeni O. E. Kutafina, 2018, pp. 144-162; 2) Treščáková, D., *Právo elektronického obchodu, Širšie súvislosti*, Praha, Nakladatelství Leges, 2021, p. 229; 3) Treščáková, D.; Hučková, R., *Niektoré aspekty ochrany osobných údajov v rámci elektronického obchodovania*. Days of Law 2015, Brno, Masarykova univerzita, 2016, pp. 105-119

2 As regards the market power of collaborative platforms and the relevant competition law aspects see also: 1) Capobianco, A.; Nyeso, A., *Challenges for Competition Law Enforcement and Policy in the Digital Economy*, Journal of European Competition Law & Practice, Vol. 9, No. 1, 2018, pp. 19 - 27; 2) Lougher, G.; Kalmanowicz, S., *EU Competition Law in the Sharing Economy*, Journal of European Competition Law & Practice, Vol. 7, No. 2, 2016, pp. 87 - 102; 3) Rudohradská, S., *The Position of Collaborative Platforms from the Perspective of Competition Law*, in: Evolution of Private Law – New Challenges, Katovice, Instytut Prawa Gospodarczego, 2020, p. 163-175; 4) Rudohradská S.; Treščáková, D., *Proposals for the digital markets act and digital services act – broader considerations in context of online platforms*, in: Duić, D.; Petrašević, T. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 5, 2021, pp. 487-500

the basis of their own internal rules and regulations regarding the personal data protection as presented and available to their users directly on these platforms.

## 2. CATEGORIES OF PERSONAL DATA PROCESSED BY COLLABORATIVE PLATFORMS

It is undisputed that collaborative platforms process large amounts of information regarding their users and their activities realised on these platforms to achieve different objectives. In the majority of cases the information collected will present personal data relating to an identified or identifiable natural person (hereinafter only as 'data subject'), the processing of which must adhere to the applicable legislation.

In compliance with the definition of personal data as specified in Article 4 (1) (a) of GDPR, personal data may relate to an identified data subject, if, within a group of persons, he or she is "distinguished" from all other members of the group, or to an identifiable data subject when, although the person has not been identified yet, it is possible to do so.[3] As is stated by Pinkavova and Fořt, personal data "can be information that relates to a natural person in any way without this separate information being able to identify any natural person."[4] Therefore even information that does not seem as personal data at first sight may be regarded as such if it has the potential to identify a specific natural person in connection with other information that the controller has at its disposal.

As regards the identification of personal data collected and processed by collaborative platforms, these can be distinguished into different categories on the basis of the analysis of the selected collaborative platforms' internal regulations made publicly available by these platforms with the objective to conform to their transparency and the provision of information obligation established by Articles 12-14 of GDPR. On this basis, the following categories of personal data may be differentiated:

1. personal data provided to the collaborative platforms from users themselves,
2. personal data collected by collaborative platforms automatically,
3. personal data collected by collaborative platforms from third parties or other sources.

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[3] Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, 01248/07/EN WP 136, p. 12

[4] Pattynová, J.; Suchánková, L.; Černý, J. a kolektiv, *Obecné nařízení o ochraně osobních údajů (GDPR), Data a soukromí v digitálním světe. Komentář*, Praha, Leges, 2018, p. 51

The first category of personal data collected and processed by collaborative platforms includes data that is provided to platforms directly from their individual users, whether voluntarily or on the basis of the platforms' request, as platforms may perceive the provision of certain personal data as necessary to achieve their objectives. Platform users may provide their personal data to collaborative platforms in different ways. Firstly, personal data may be provided in the registration process when the user wants to establish its user profile on a platform, as user registration is usually a prerequisite for making use of services provided by that platform. Personal data provided in this way usually include information that enables the user's identification (name, surname, date of birth, address, gender, photo etc.) and user's contact information (email address, phone number). Secondly, personal data may be provided in connection with the reservation of a specific service provided through a collaborative platform. As collaborative platforms mediate the provision of different services and due to the fact that they intervene in the process of service provision to varying degrees, the personal data provided in this way usually include:

a) data that enables closer identification of the user with the objective to verify their identity, e. g. Airbnb, Uber and Bolt require the provision of a personal ID card, passport, driving license or other form of user's identification,
b) information regarding the type of business of the service provider, their professional capacity, knowledge and experience including information from their criminal record (required from the drivers of Uber and Bolt) in order to review the service providers' reliability,
c) information relating to the assets shared by service providers (vehicle ID, its description as well as information regarding the insurance) to ensure their suitability for use,
d) payment information (bank account number, information about the credit card) in order to verify the user's solvency and for payment execution, *e.g.* through the platform's own company (*e.g.* Airbnb Payments UK Ltd.)

Thirdly, users also produce information processed by collaborative platforms when they provide them with feedback to the services provided either by platforms themselves or by individual service providers active on these platforms (*e.g.* rating system of Uber or Bolt drivers, possibility to write reviews of the accommodation reserved through Airbnb or Booking etc.). Users also provide platforms with information that may be regarded as personal data when they communicate with customer services established by these platforms or when they participate on competitions, surveys or other promotional events organised by the platform. As is

clear from this enumeration, collaborative platforms process vast amount of data that is provided by the users themselves.

The second category of data distinguished from the platform's personal data policies consists of personal data that is collected and processed automatically, without any participation from the users. The sources of information in this regard are the collaborative platform's own websites and mobile applications that enable the user to interact with the platform and make use of its services. Information collected in this way relates to the services provided through collaborative platforms by individual service providers. These include e. g. date and time of service's use, type of a service provided, type of a service the user is interested in being provided, type of a service offered by different service providers, the amount paid for the services' provision, the method of payment, information on the way how a reservation was created, use of a promo code etc. This category of data also includes information regarding the user's hardware and software used to interact with platform's websites and mobile applications. Following information may be collected in this regard: device's IP address, web browser, operating system, language and other user preferences and in the case of mobile devices information on the type of a device used and its settings. This category of personal data also encompasses information that relates to the user's activity on collaborative platforms, such as the websites visited, the content displayed to the user, individual search inputs, date and time of the access, the length of the access, third party services used before the access to the platform, websites visited by the user before and after their access to the platform and any other user activities on the platform. Furthermore, platforms also automatically collect and process other data such as login information, information enabling the identification of a precise or approximate location of the user's device (through IP address or GPS), data from the assets shared or from the mutual communications between users on the platform.

The third category of personal data comprises of data provided to collaborative platforms from third parties or other sources that include companies that are materially connected and coordinate their activities with collaborative platforms, external companies that provide platforms different services as well as public databases, registrars, and other publicly available sources of information. The nature of services provided by external companies include e. g. payment services, insurance, marketing, social network (cookies, interconnection of user accounts across platforms), cybersecurity, dispute mediation, legal, administrative, or other services that require the processing of users' personal data. As regards the public databases, registrars, and other publicly available sources of information, these are used in order to verify users' existence and reliability and include e. g. the commercial register, the list of debtors on public health or social insurance etc.

## 3. THE LAWFULNESS OF PERSONAL DATA PROCESSING

The subject responsible for ensuring compliance with personal data protection rules is a controller that alone or jointly with others determines the purposes and means of personal data processing. In the context of collaborative economy, collaborative platforms will be considered as controllers as they determine the scope of person data collection and the objectives of their processing.

According to Article 5(2) of GDPR, the controller is responsible for, and must be able to demonstrate compliance with the principles of personal data processing that are defined by GDPR. One of the most important principles in this regard is the principle of lawful processing that requires that personal data are processed lawfully on the basis of at least one of the legal bases stipulated in Article 6(1) of GDPR. Controller is obligated to determine which legal base for personal data processing is applicable as regards all personal data processed and must "alone analyse and consider which legal base is best applicable to a specific processing operation in the context of personal data processing's purpose."[5] In the following text the selected legal bases for personal data processing will be closely analysed in the context of their application by collaborative platforms.

### 3.1. Consent

Consent as a legal basis for personal data processing defined in Article 6(1)(a) of GDPR presents one of the most frequently applied legal basis in practice. The reason for this is most likely the legal uncertainty of controllers that prefer its application if the admissibility of other legal bases for personal data processing is unclear. However, the process of obtaining consent just 'to be sure' is not acceptable under the current legislation that distinguishes consent only as one of the admissible legal bases that should not be used as the first, but rather as the last solution that legitimates personal data processing by the controller in a specific case. The controller is, in this regard, obligated to duly consider the admissibility of other legal bases and only if they are not applicable, controller may request the provision of consent from the data subject for the processing of their personal data for one or more specific purposes.

Consent of the data subject is defined in Article 4(11) of GDPR as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." One of the most

[5] Valentová, T.; Birnstein, M.; Golais, J., *GDPR / Všeobecné nariadenie o ochrane osobných údajov, Zákon o ochrane osobných údajov, Praktický komentár*, Bratislava, Wolters Kluwer, 2018, p. 108

important conditions for the provision of a valid consent is the fact that the consent provided is active, namely that it represents the data subject's decision to agree with the use and processing of their personal data for a specific purpose. As Advocate General provided in its Opinion in the case C-673/17 Planet 49, "it is not sufficient in this respect if the user's declaration of consent is pre-formulated and if the user must actively object when he does not agree with the processing of data"[6] as it would not be clear in this case whether the user actually read information that was provided to them and therefore if consent was provided freely and with the understanding that it could be rejected. The above-stated definition of consent clearly established the need for "an unambiguous indication of the data subject's wishes and a clear affirmative action signifying agreement to the processing of personal data."[7]

The requirement of active consent is especially important in the context of the collection and processing of personal data by online platforms on the Internet, whose users are usually not aware of the scope of data collection and objectives pursued by their processing. The Recital 32 of GDPR states in this regard that the provision of consent "could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent."

The active consent condition and other requirements for the provision of a valid consent may be the reason why the reliance of collaborative platforms on consent provision is rather limited. Following the requirement to limit the purpose of personal data processing to one or more specific purposes, collaborative platforms refer in their internal personal data regulations to the provision of consent most frequently to legitimize personal data processing for marketing purposes. Specifically, this concerns:

- sending marketing communications per email (Booking)
- provision, personalization, evaluation of results and improvement of advertising (Airbnb)
- sending marketing materials and information necessary to ease the process of service provision or the reservation process (BlaBlaCar)
- suggesting and recommending goods and services relating the platform's services that the user may find interesting (BlaBlaCar)

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6 Opinion of the Advocate General in the case C-673/17 Planet 49 [2019] C:2019:246, para. 61

7 *Ibid.*, para. 70

- identifying users and sending advertisements through social networks (BlaBlaCar).

Other purposes for personal data processing include access to user's location (Booking, Bolt), access to user's contacts (Booking), verification of information provided to the platform by the user in the form of personal documentation (BlaBlaCar), provision of information to the user regarding the services provided, *e.g.* confirmation of reservation (BlaBlaCar), enabling the mutual communication of users regarding the services provided (BlaBlaCar) or connecting user's account with their account on social networks (Airbnb).

As regards consent provision, it is also necessary to analyse whether collaborative platforms adhere to their obligation to enable their users to withdraw their consent at any time and whether the process of consent withdrawal is indeed as easy as the process of its provision, as requires Article 7 of GDPR. The results of our analysis provide that only some platforms duly inform their users about their right to withdraw consent prior to its provision (Airbnb, Booking and Uber). As regards Booking and Uber, these platforms inform their users about their right to contact the responsible person within the platform's organization with their request for consent withdrawal. Airbnb, on the other hand, also provides the possibility to inform the platform about the user's consent withdrawal directly through changes in the user's account settings. Other analysed platforms only provide the general possibility to contact the responsible person within the platform's organisation (data protection officer) with any requests regarding personal data processing, not specifying that this includes consent withdrawal. However, as the applicable legislation only requires that consent withdrawal should be as easy as its provision, the last approach stated cannot be immediately considered as not in compliance with the requirements stipulated in Article 7 of GDPR.

### 3.2. Contract performance

The processing of personal data is considered lawful under Article 6(1)(b) of GDPR if it is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into contract. In this regard we can distinguish two cases of this legal basis application, namely the processing of personal data in pre-contractual relations if steps ought to be taken at the request of the data subject and processing in relation to the fulfilment of the already concluded contract.

On this legal basis the controller is allowed to process only personal data "necessary for the performance of a contract (*i.e.* the fulfilment of contractual obliga-

tions) within the time period necessary to achieve the contract's purpose [where] the necessity of processing ich analysed in relation to the subject matter of the contract."[8] As regards personal data, processing of which will fall under this legal basis, the controller will be entitled to process primarily personal data necessary for the identification of the data subject as one of the contractual parties as well as personal data that directly relate to contract performance (e.g. shipping address, payment data), especially if they are considered as essential elements of the contract by the applicable legislation.

In the context of collaborative platforms, internal regulations of all of the analysed platforms directly refer to the contract performance as a legal basis for personal data processing in relation to the provision of platform services to individual users. These platform services differentiate in nature, but include in general:

a) operation of the platform, its improvement and further development (Airbnb),
b) reservation of services through the platform, including reservation and delivery of the necessary confirmations and other documents to users (Booking, BlaBlaCar),
c) provision of customer services by the platform (Booking, BlaBlaCar),
d) enabling mutual communication between users on the platform (BlaBlaCar),
e) provision of payment services (Airbnb through its subsidiary – Airbnb Payments UK Ltd.)

Contract performance as a legal basis for processing of personal data of collaborative platforms' users according to their internal regulations is, therefore, strictly limited to the provision of selected services provided by these platforms to their users, the objective of which is to, primarily, mediate contact between the relevant service provider or the platform and the person searching for the provision of these services.

### 3.3. Legitimate interests

The processing of personal data by collaborative platforms may also be considered lawful if it is necessary for the purposes of legitimate interests pursued by the controller or by a third part, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection

[8] Hudecová, I.; Cyprichová, A.; Makatura, I. a kolektiv, *Nariadenie o ochrane fyzických osôb pri spracúvaní osobných údajov / GDPR. Veľký komentár*, Bratislava, Eurokódex, 2020, ISBN: 978-80-8155-094-2, p. 152

of personal data, in particular where the data subject is a child (Article 6(1)(f) of GDPR).

This legal basis for personal data processing differentiates from other legal bases as its application is conditional on the execution of the so-called balancing test that examines the following aspects (a) legitimacy of the controller's or third party's legitimate interest, (b) necessity of personal data processing to achieve the objective pursued and (c) proportionality of processing. This assessment is not "a straightforward balancing test consisting merely of weighing two easily quantifiable and comparable 'weights' against each other. Rather, the test requires full consideration of a number of factors, so as to ensure that the interests and fundamental rights of data subjects are duly taken into account."[9]

GDPR provides specific examples of legitimate interests that may be pursued by controllers or third parties. These include:

- the processing of personal data strictly necessary for the purposes of preventing fraud[10]
- the processing of personal data for direct marketing purposes[11]
- legitimate interests of controllers that are part of a group of undertakings or institutions affiliated to a central body in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data[12]
- the processing of personal data to the extent strictly necessary and proportionate for the purposes of ensuring network and information security[13]
- indicating possible criminal acts or threats to public security by the controller and transmitting the relevant personal data in individual cases or in several cases relating to the same criminal act or threats to public security to a competent authority[14]

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9 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, 844/14/EN, WP 217, p. 3

10 Recital, para. 47, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, p. 1-88

11 *Ibid.,* Recital, para. 47

12 *Ibid.,* Recital, para. 48

13 *Ibid.,* Recital, para. 49

14 *Ibid.,* Recital, para. 50

- transfers which can be qualified as not repetitive and that only concern a limited number of data subjects.[15]

The examples of legitimate interests defined above are also applied by the collaborative platforms in their internal regulations regarding personal data processing. The most generally defined purpose pursued by all collaborative platforms in this regard is the realisation of their business activities. To illustrate, collaborative platforms use legitimate interest as a legal basis for personal data processing of their data subjects to achieve the following objectives:

- to improve the functioning of the platform and related user experience (by platform testing and resolving detected issues, analysing user activity on the platform *e.g.* from search history, reservations, profile information, user preferences, content published by the user etc.) with the objective to understand how the platform is used and to personalize and adjust the user experience,
- to improve and adjust goods and services provided through the platform including related services (payment, insurance etc.)
- to enable mutual communication between platform users,
- to create and administer user accounts,
- to analyse platform's performance (traffic on the platform, number of services reserved etc.)
- to inform users about platform changes and actualisations of conditions for their use.

Another objective pursued by all collaborative platforms is their legitimate interest on ensuring collaborative platform's security and trustworthiness. In this regard, personal data of platform's users are processed for the following partial objectives:

- to control the compliance with the conditions for the platform's use and to identify infringements; To illustrate, Uber analyses information from the drivers' vehicles to identify dangerous behaviour (speeding, quick acceleration or braking) and to raise awareness about safer driving.[16]
- to prevent and identify fraud which can include fraudulent offers of service providers, fraudulent interest of potential service recipients, fraudulent payments etc. Some platforms create blacklists of users that seriously and/or repeatedly infringed the platform's conditions of use and ban these users from the platform.

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15 *Ibid.,* Recital, para. 113

16 Uber Privacy Notice, 2021, available at: [https://www.uber.com/legal/sk/document/?name=privacy-notice&country=slovakia&lang=en-gb], Accessed 10 March 2022

- to prevent and detect cases of attacks on platform's security and to provide security incident management including the assessment of risks,
- to help with the investigation and prosecution of criminal offences, including tax frauds (*e.g.* Airbnb).[17]

Another example of a referral to a legitimate interest as a legal basis for personal data processing by collaborative platforms that is most frequently mentioned in their internal regulations is direct marketing. Under this objective the collaborative platforms:

- use contact information of their users, especially their email addresses for regular sending of marketing communications (advertisements, promo activities, competitions etc.) to promote goods and services provided by the platform,
- to create individualised offers and to personalize content that is displayed to the individual user,
- to promote their own services through social media, e. g. by connecting user account on the platform with their account on social networks (*e.g.* BlaBlaCar),[18]
- to send requests to users to attend market research realised by the platform,
- to analyse, evaluate and optimize their own advertisement campaigns.

Other objectives pursued on the basis of the collaborative platform's legitimate interest include enabling of mutual communication between the platform and its users, provision of customer services, research and development, dispute resolution and answering of legal requests. As regards the communication between the platform and its users, this may be necessary *e.g.* to notify platforms users about changes on the platform or of its terms of service, to send notifications regarding user's platform account, to send invoices for services provided or to process other user requests or questions. This is closely connected with the communication of the user with the platform through customer services provided by that platform. To illustrate, Booking[19] connects the phone number of the user to their reservation and monitors the content of the phone calls to control the quality of services provided and to educate their customers service employees. The legitimate interest on research and development is also declared by some collaborative platforms,

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17 Airbnb Privacy Policy, available at: [https://www.airbnb.co.uk/help/article/2855/airbnb-privacy?_set_bev_on_new_domain=1646917422_OWRkMGYyMjNhZTUx] Accessed 10 March 2022

18 BlaBlaCar Privacy Policy, 2022, available at: [https://blog.blablacar.sk/about-us/privacy-policy], Accessed 10 March 2022

19 Booking Privacy Policy, available at: [https://www.booking.com/content/privacy.sk.html.], Accessed 10 March 2022

including Uber[20]. Some collaborative platforms also define as their legitimate interest the investigation and resolution of disputes regarding the services provided through the platform.

The above provided examples of objectives pursued by processing personal data of collaborative platform users on the basis of the legitimate interest demonstrate the diversity of processing operations realised by collaborative platforms to achieve these usually very generally defined purposes. In this regard, it is not possible to unambiguously determine whether platform interests are overridden by the interests or fundamental rights and freedoms of the data subject or not. However, as the balancing test is firstly realised by the collaborative platform itself, the legitimacy of personal data processing on this basis cannot be excluded without further analysis. The individual platform users themselves will be required to contact the platform in case of doubts and to object the processing of their personal data. Such actions would trigger new process of assessment that could lead to either confirmation or refutation of the applicability of the legitimate interest as the legal basis for data subject's personal data processing. This would be especially important if the user's objection was directed towards direct marketing including profiling, as in this case the controller is no longer authorized to process personal data for these purposes and must end such processing immediately.

## 4. COOKIES AS A TOOL TO COLLECT PERSONAL DATA AND DIFFERENT POLICIES OF COLLABORATIVE PLATFORMS

Collaborative platforms employ different tools that collect and process personal data of their users. One of these tools used by all of the analysed collaborative platforms are cookies. Cookies can be characterized, in general, as small data or text files placed in the end user's terminal equipment by a website's server with the objective to store and transmit requested information back to this server. Barth defines cookies in their technical sense as referring to the state of information that passes between an origin server and user agent and is stored by the user agent.[21]

Different types of cookies employed by collaborative platforms can be distinguished. From the legal perspective, it is necessary to differentiate between the so-called 'first-party' and 'third-party' cookies. Whereas the former presents cookies employed on the end-user's terminal equipment by a website they actually visited, the latter type of cookies are „set by websites that belong to a domain that is dis-

[20] Uber Privacy Policy, 2021, available at: [https://www.uber.com/legal/sk/document/?name=privacy-notice&country=slovakia&lang=en-gb], Accessed 10 March 2022

[21] Barth, A., *Request for Comments 6265: HTTP State Management Mechanism*, 2011, available at: [https://tools.ietf.org/html/rfc6265], Accessed 10 March 2022

tinct from the domain of the website visited by the user as displayed in the browser address bar, regardless of any consideration whether that entity is a distinct data controller or not."[22] As regards first party cookies, these are usually essential for the proper functioning of the website, as without them in effect, the content of many websites is not accessible to the website's visitors. First-party cookies are also beneficial to end-users, as they identify them as individuals, allowing for example automatic login or customization of the website's content. Third-party cookies, on the other hand, are employed by websites other than those that the end-user actually visited and are therefore often rejected by many end-users. Rejection of third-party cookies should not, in theory, have any effect on the functioning of the website visited, but this is not always the case (*e.g.* Facebook does not allow its users to login into their Facebook account if they reject third-party cookies in the browser settings).

Another category of cookies that can be distinguished include the so-called session cookies that are active only during the time of the end-user's visit on the website and the so-called persistent cookies that are stored in the end-user's terminal equipment with the objective to collect and monitor user's activities even after their visit of the website.

Purposes pursued by the employment of cookies include:

a) enabling the use of all of the visited website's functionalities (necessary, functional cookies),
b) preservation of information on user's preferences as regards the website visited (language, country etc.) (necessary, functional cookies),
c) verification of the user's identity as regards the login into their personal accounts or realisation of commercial transactions online without the need to repeatedly enter login information (necessary, functional cookies),
d) analysis of the effectiveness and user's interaction with the website, specifically as regards the websites visited, functionalities used, content displayed, length of a visit etc. (analytical cookies),
e) analysis of the effectiveness of advertisements displayed on the website and direct online marketing based on previous behaviour of the end-user (marketing cookies).

The applicable legislation regulating cookies is the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the process-

[22] Article 29 Data Protection Working Party, (2012) Opinion 04/2012 on Cookie Consent Exemption adopted on 7 June 2012 by the Article 29 Data Protection Working Party, 00879/12/EN

ing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) that regulates the processing of traffic data (Article 6). Traffic data must be processed on the basis of the user's consent with the right to withdraw consent provided by the user at any time. Moreover, the Recital (25) of the Directive 2002/58/EC further specifies: "Users should have the opportunity to refuse to have a cookie or similar device stored on their terminal equipment. This is particularly important where users other than the original user have access to the terminal equipment and thereby to any data containing privacy-sensitive information stored on such equipment. (…) The methods for giving information, offering a right to refuse or requesting consent should be made as user-friendly as possible."[23] The use of cookies with the objective to collect and process information is, therefore, not prohibited in general, but must be compliant with the applicable legislation regulating the provision of a valid consent. In this regard, the relevant provisions of GDPR are referred to (Article 2(f) of the Directive 2002/58/EC).

GDPR recognizes the ability of cookies to collect and process information that can be considered as personal data directly in its definition of personal data that includes *inter alia* any information relating to an identifiable natural person, meaning a person that can be identified, directly or indirectly, in particular by reference to different identifiers, including the so-called online identifiers (Article 4(1) of GDPR). Recital (30) further interprets the term 'online identifiers' as identifiers provided by natural person's "devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers (…) [that] may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them."[24] However, cookies may not always be able to identify the natural person, as information collected in this regard will not always lead to the identification of one specific natural person. It is, therefore, necessary to distinguish these cases in practice and to apply the relevant legislation accordingly. The ability of cookies to be considered as personal data has further been

[23] Recital para. 25, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31 July 2002, pp. 37-47

[24] Recital para. 30, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1-88

confirmed in the CJEU's case law, specifically in its decisions in the case C-210/16 Wirtschaftsakademie Schleswig-Holstein[25] and in the case C-673/17 Planet 49.[26]

As has been examined above in connection with personal data collected by collaborative platforms in general, if personal data is collected by cookies, a legal basis for such collection and processing must also be determined. Directive 2002/58/EC refers in this regard to consent as the applicable legal basis to be considered.

Especially important condition in relation to the use of cookies by collaborative platforms is to ensure the active provision of a consent. This condition is represented by the co-called opt-in principle that requires active conduct of the user to provide consent with personal data processing for a specific purpose. The previously accepted opt-out principle considered consent provided in a passive manner as sufficient, a practice that no longer adheres to the applicable legislation. Passive consent with the use of cookies was previously based on the absence of user's objections with the employment of cookies. Therefore, if a user visited a website and did not actively object to the use of cookies, this was interpreted by website operators as the provision of a consent. However, due to the precision of provisions regarding consent, this practice is no longer acceptable. The analysis of notifications displayed to the user when they visit websites of the analysed collaborative platforms have demonstrated that all of these platforms recognize and apply the opt-in principle, as they provide the user with the possibility to consent with the use of cookies by clicking the accept button directly in the notification banner (Airbnb, Booking, Uber, Bolt, BlaBlaCar) or separately through cookie settings available in their platform account (Airbnb, BlaBlaCar).

Another requirement for the provision of a valid consent that is especially relevant as regards the use of cookies is the right to withdraw consent provided by the user and the need for such withdrawal to be as easy as was the provision of consent. In practice, consent with the use of cookies can usually be provided in a notification panel displayed at the time of the user's first visit to the website. However, after consent is provided, this notification panel is no longer visible on the website in question. In order for the user to be able to withdraw their consent, the website should include information on how such withdrawal may be executed. Our analysis has shown that only some of the analysed collaborative platforms inform their users about their right to withdraw consent directly in connection with the personal data processing realised through the use of cookies (*e.g.* Airbnb that in-

[25] Judgement of the Court in the case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein* [2018] ECLI:EU:C:2018:388

[26] Judgement of the Court in the case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband* eV *v Planet49* [2019] ECLI:EU:C:2019:801

forms their users about this right directly in its notification banner as well as in its Cookie Policy), whereas other collaborative platforms contain such information only in their general policies regarding personal data processing.

The employment of cookies for different purposes can be identified in relation to all of the analysed collaborative platforms that make use of cookies both on their websites as well as in their mobile applications. In our analysis we have focused primarily on the use of cookies on collaborative platforms' websites due to the ability to verify numerous aspects related to the use of cookies through browser settings, especially as regards the issue of whether cookies were employed even before the relevant end-user provided their consent.

As has been specified above, the primary condition for the lawful employment of cookies on collaborative platforms' websites is the provision of the end-user's consent with their application. Consent of the end-user is primarily provided to the platform at the time of the end-user's first visit of the website through a notification panel displayed on the website. The general presumption in this regard is that no personal data should be collected and processed before a valid consent is provided. Therefore, no cookies that collect such personal data should be employed (this does not concern cookies that do not collect personal data but are necessary to ensure the website's functioning). The results of our analysis have shown that in conflict with this presumption all of the analysed collaborative platforms employed cookies even before any consent with their use was provided. This conclusion was verified by accessing collaborative platforms' websites in the Incognito mode through browser settings that enable the user to see what cookies are used on the visited website with prior deletion of all cookies from the browser. All of the analysed collaborative platforms employed cookies even prior to consent provision, e. g. Booking employed 33 cookies, Airbnb and Bolt 27 cookies, Uber 16 cookies and BlaBlaCar 13 cookie files. However, as it is not possible to distinguish which cookies employed before consent provision collected and processed personal data and which did not, it cannot be unambiguously stated that use of these cookies by collaborative platforms was unlawful. However, due to the high number of cookie files used this conclusion also cannot be rejected.

In addition to the collaborative platforms' notification banners, all of these platforms have created their own internal rules for the use of cookies included in their cookie policies.[27] The purpose of these rules is to inform collaborative platform'

[27] These internal rules include:
-Airbnb Cookie Policy, available at: [https://www.airbnb.ie/help/article/2866/airbnb-cookie-policy?locale=en&_set_bev_on_new_domain=1647003350_NmRmNmEwY2YxOWJi], Accessed 14 March 2022

users about the individual aspects of the cookies' employment. These regulations should, in our opinion, include the following information:

- description of cookies and their general purpose
- classification of cookies distinguishing first- and third-party cookies and session and persistent cookies
- purposes pursued by cookies
- data collected by cookies
- time of cookies' employment
- the possibility to change settings including the right to withdraw consent
- the use of cookies by third parties
- the possibility to contact the platform if the user has any questions

The provision of this information will ensure the fulfilment of another obligation of collaborative platforms relating to the provision of a valid consent, specifically the obligation to ensure that the consent provided by the user is informed. This obligation was interpreted by the CJEU in its decision in the case C-673/17 Planet 49, where the Court stated that information that the service provider (in this case the relevant collaborative platform) must provide to the website user includes *inter alia* information about the duration of the operation of cookies and information regarding the question whether third parties may have access to those cookies or not.[28] In the following Table 1 we provide a summary of information regarding the use of cookies included in the cookies policies of the analysed collaborative platforms. For comparison, the Table 2 further specifies information that is provided to end-users directly in the platforms' notification banners displayed at the time when they visit the website for the first time.

-Booking Cookie Statement, available at: [https://www.booking.com/content/privacy.html], Accessed 14 March 2022

-Uber Cookie Policy (Global), available at: [https://www.uber.com/legal/en/document/?name=cookie-notice&country=slovakia&lang=sk], Accessed 14 March 2022

-Bolt Cookie Declaration, available at: [https://bolt.eu/sk/cookie-declaration/], Accessed 14 March 2022

-BlaBlaCar Cookie Policy, available at: [https://blog.blablacar.co.uk/about-us/cookies-policy], Accessed 14 March 2022

[28] Judgement of the Court in the case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband* eV *v Planet49* [2019] ECLI:EU:C:2019:801, para. 81

**Table 1.** Information included in collaborative platforms' Cookies Policies

| Information / Platform | Booking | Airbnb | Uber | Bolt | BlaBlaCar |
|---|---|---|---|---|---|
| general description of cookies | x | x | x | | x |
| cookies classification | x | x | x | x | x |
| classification of *first party cookies* and *third party cookies* | x | | | | x |
| classification of *session cookies* and *persistent cookies* | x | x | | | |
| classification of cookies on the basis of the objectives pursued (analytics, marketing etc.) | x | x | x | x | x |
| general description of objectives pursued without cookies classification | | x | | | |
| specification of data collected | x | | | | |
| identification of individual cookies employed | x | | | x | |
| specification of the time for cookies storage | x | | | x | |
| information on the possibility to change browser settings | x | x | x | | x |
| possibility to withdraw consent | | x | | | |
| possibility to contact the platform | x | | x | | x |
| information about cookies used by third parties | x | x | x | | x |

*Source:* Authors

**Table 2.** Information included in collaborative platforms' notification banners

| Information / Platform | Booking | Airbnb | Uber | Bolt | BlaBlaCar |
|---|---|---|---|---|---|
| cookies are used to collect personal data | | x | | | |
| identification of cookies' purposes of use | x | x | x | x | x |
| direct link to cookies policies | x | x | x | x | x |
| possibility to withdraw consent | | x | | | |
| possibility to adjust cookie settings by choosing selected types of cookies | x | x | x | x | x |
| information on cookies being used by third parties | x | | | | x |

*Source:* Authors

Information provided in the Table 1 demonstrates the fact that collaborative platforms usually include information regarding the description of cookies and their general purpose in their cookie policies. All of the collaborative platforms also differentiate between cookies on the basis of the purpose pursued by their use, specif-

ically recognizing necessary cookies, analytics cookies, marketing and advertising cookies. All of the collaborative platforms also allow their users to customize the provision of their consent for all or for some of these categories of cookies (with the exception of strictly necessary cookies that cannot be rejected or deselected from the options provided on all of the analysed collaborative platforms) directly through the selection in their notification banners.

However, not all recommended information regarding the use of cookies can be found in the analysed cookies policies. To illustrate, only two collaborative platforms – Booking and Bolt – specify in their policies the individual cookie files employed and the time of their employment and storage on the end-user's device and only one platform – Booking – provides information on the individual user data collected by cookies. The lack of this information may be due to the fact that all of the analysed collaborative platforms have created their own policies on personal data processing that specify in general what user data is collected and processed and the time for its processing. Despite of this we would recommend that this information should also be included separately in the collaborative platforms' cookies policies to simplify users' access to this information without the need to analyse the lengthy provisions of collaborative platforms' internal rules on personal data processing.

## 5. CONCLUSION

The analysis of the application of personal data protection norms by selected collaborative platforms provided interesting insights into how the relevant legislation is applied in practice. As regards the identification of the scope of personal data collected and processed by collaborative platforms, we may conclude that the presumed vast amount of user information at the platform's disposal was indeed confirmed. Moreover, the previous reliance on consent provision for the legitimization of personal data processing was substituted by one of the other legal bases enabling personal data processing, namely legitimate interests of the controller that are heavily applied and relied on by the analysed collaborative platforms in their internal regulations. In relation to the use of cookies as tools for personal data collection, we may conclude that the previous practice allowing for a passive consent provision is no longer applied by the analysed collaborative platforms that enable their users to actively consent with the use of cookies, allowing them to also select which categories of cookies (with the exception of strictly-necessary cookies) may be implemented. Our analysis has also identified some issues in this regard, namely the employment of some cookies before consent provision (identified in relation to all of the analysed collaborative platforms), uncertainty regarding the

process of consent withdrawal and the absence of information provided to users regarding cookies employment.

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ISBN 978-953-8109-46-1