Recent Challenges of Public Administration 3

Papers Presented at the Conference of

'3rd Contemporary Issues of Public Administration'

on 26th September 2018

Lectiones Iuridicae
23

The participants of the conference in the Ceremonial Hall of the Major's Office in Szeged (from left to right): Maria Karcz-Kaczmarek, Giovanna Ligugnana, Krystyna Nizioł, Anna Piszcz, Monika Namisłowska, Judit Siket, Erzsébet Csatlós, Deniz Tekin-Apaydın and Eylem Apaydın

Készült a Szegedi Tudományegyetem
Állam- és Jogtudományi Kara
Közigazgatási Jogi Tanszékén

Tanszékvezető:
Takács Albert
egyetemi tanár

Recent Challenges of Public Administration 3

Papers Presented at the Conference of
'3rd Contemporary Issues of Public Administration'
on 26th September 2018

Editor
Erzsébet Csatlós

Iurisperitus Kiadó
Szeged, 2019

Lectiones Iuridicae

Sorozatszerkesztő
Balogh Elemér
egyetemi tanár

© Apaydın, Eylem 2018
© Csatlós Erzsébet 2018
© Karcz-Kaczmarek, Maria 2018
© Ligugnana, Giovanna 2018
© Nizioł, Krystyna 2018
© Piszcz, Anna 2018
© Schiffner Imola 2018
© Siket Judit 2018
© Takács Albert 2018
© Tekin-Apaydın, Deniz 2018

Műszaki szerkesztő:
Kovács Ildikó

Felelős kiadó:
Balogh Elemér dékán, a Pólay Elemér Alapítvány kuratóriumának elnöke
Készült az Innovariant Kft.-ben
Felelős vezető: Drágán György
ISSN 2062-5588
ISBN 978-615-5411-80-9

TABLE OF CONTENTS

Preface. 7

Editor's note 9

Giovanna Ligugnana
Environmental NGOs and Access to Justice: Article 9(3) of the Aarhus Convention and the EU Courts Perspective. 11

Anna Piszcz
Publicisation as the Transfer of Competences from Civil Justice to Public Administration: An Attempt of Classification and Recent Examples from Poland . 39

Eylem Apaydın
The Application of the Principle of Good Faith on Administrative Contracts from the Turkish Law Perspective 53

Maria Karcz-Kaczmarek
Public Forms of Dissemination and Protection of Musical Inheritage of Culture . . 75

Krystyna Nizioł
Regulatory Impact Assessment in Poland and in the European Union in the Context of Economization of Law – Chosen Issues. 96

Judit Siket
Local Governments in the System of Separation of Powers – Regulatory Powers in the Field of Local Public Affairs 108

Deniz Tekin Apaydin
The Canal Istanbul Project: Governance by National Law or International Law? 122

Imola Schiffner
New Aspects in the Family Reunification Procedure in the Case-Law of the Court of Justice of the European Union 142

Erzsébet Csatlós
Consular Protection of EU Citizens in Third States: Variety is Delighting? 157

PREFACE

Public administration is bureaucracy in the positive sense of the idea. Max Weber defined bureaucracy in his typology of powers as the most effective organizational form. His critics aimed to demonstrate that bureaucracy could never be effective, because it is unfit for correcting itself compared with committed defects. ‘Modern’ public administration is a concept of qualities and values that contain the capacity of self-correction. ‘Modern’ public administration reflects more than a ‘contemporary’ or an ‘actual’ sense; it is also able to take into adaptations and innovations. ‘Modern’ public administration implements the sine qua non elements of the ideal type of bureaucracy, but in addition to this, it uses the new forms of public cooperation and communication at the same time, and creates limited scope for changes and flexibility.

The needs of innovation and adaptation in public administration have many sources. First, the metamorphosis of the infrastructural and technical conditions of the administration is worth mentioning. To use a medical analogy: the ‘diagnostical’ potential of the public administration increased on a huge scale. It must be evident that the potential power and organization of the public administration should be in harmony with growing possibilities. The quality of the public administration of a rule-of-law-state still depends on the relation between possibility, capacity, and effectivity.

The motive for change and adaptation is in transformation along with the territorial dimension of the public administration. Public administration still belongs to the nation state but in a different manner as it used to be. The phenomenon of globalization could be followed by the public administration, if it spills over the limits of the national State. The regionalization and self-governments make a new constitutional situation, from which the nation state seems as a confederation of several administrative bodies. The basic question is therefore if this kind of fragmentation correspond to the basic function of public administration.

For public communities, which are sometimes identical with the national state, sometimes wider or less than the state, is an earnest of success that the public administration would be equal to the requirements of changing conditions. The recognition of the needs and conditions, and the searching for methods of adjustment to them is not futurology, but is a special field of scientific thought. Every initiative which makes this aspects for the matter in dispute is welcome.

The Department of Public Administrative Law of the Faculty of Law and Political Sciences in Szeged is devoted to a comprehensive approach of facts and development of public administration. The manifestation of the mission of our department was a round-table conference organized recently by any enthusiastic colleges. Now, we can talk about

such event as a custom to welcome our scholars and to share our recent scientific results with our environment. The edited version of the presentations is here accessible for the gentle readers. It is to be hoped that the below published studies contribute to the better understanding of ’modern’ public administration.

Benevolo lectori salutem!

Szeged, 20th December 2018

Dr. habil. Albert Takács, CSc.
Head of Department of Public Administrative Law

EDITOR'S NOTE

The idea of having collegial gatherings to share some thoughts related to public administration has long been desired. Research work should not be *l'art pour l'art*; it is important to get to know each other's results, to explore the matching points, to introduce the new waves to the scientific profile of the Department. Finally, it is also our mission to give students the possibility to set the frames for expanding their knowledge beyond the obligatory teaching and show some actual challenges of public administration and recent developments in legal literature.

This volume is a manifestation of such event and this time it gave floor to a rich variety of topics from lectures of different countries: Poland was represented by *Maria Karcz-Kaczmarek* and *Monika Namysłowska* (Łódz), *Anna Piszcz* (Białystok), *Krystyna Nizioł* (Szczecin), from Italy, *Giovanna Ligugnana* joined us, and we also welcomed Turkish guests, *Deniz Tekin Apaydın* (Istanbul) and *Eylem Apaydın* (Kocaeli) and on behalf of the University of Szeged, *Imola Schiffer*, *Judit Siket* and *Erzsébet Csatlós* held lectures.

It is a pleasure to see that year by year, a growing number of academics visit us to provide insight of different aspects of public administrative law and we are honoured to give a forum to exchange ideas and explore overlapping areas of interest and make new acquaintances and professional relationships. It was also nice to see that the number of audience has also increased, so the mission of organizing the event seems to be on the road to reach its goal.

As organiser, I would like to express my gratitude to the participants for their valuable contributions, and our Dean, *Prof. Dr. Elemér Balogh*, former Head of Department, who has always supported our aims and made the publication of the volume possible. I am also grateful for the anonymous reviewers of the articles whose contribution in the form of their generous and devoted work has increased the scientific level of this volume.

Szeged, 20th December 2018

Dr. Erzsébet Csatlós, PhD
Senior lecturer
Department of Public Administrative Law

Giovanna Ligugnana
Associate Professor
Department of Law, University of Verona
giovanna.ligugnana@univr.it

ENVIRONMENTAL NGOS AND ACCESS TO JUSTICE: ARTICLE 9(3) OF THE AARHUS CONVENTION AND THE EU COURTS PERSPECTIVE

I. Introduction: access to justice in environmental matters in the Aarhus Convention

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[1], signed by the EU in 1998 and enforced by the same organisation in 2005[2], provides for wide access to justice in environmental matters allowing *members of the public* to play a relevant role in protecting the environment.

The Convention is structured in three 'pillars', each of them establishing a *right of the public* for the signing Parties to implement: access to environmental information, participation in public decisions affecting environment and access to justice in environmental matters. This latter, actually, is a sort of *transversal* right, because the convention sets special rules for the public to have access to justice (both judicial and non-judicial) in case of violations of the rights connected with the first pillar,[3] with the second pillar[4] and, finally, to any other violation of environmental law.[5]

In the context of the Convention, access to justice is generally subject to the framework of the Parties' national legislation. However, some grounds of review are specified in Art. 9 in accordance with the *pillar* concerned: par.1 grants access to justice whenever a request for information is *ignored*, *wrongfully refused*, *inadequately answered* or *otherwise not dealt with*. Par. 2 states the criteria of the *sufficient interest* or *impairment of a right* (that are the basic, common requisites to challenge administrative decisions before the national administrative courts) to have access to justice in case the provisions on participation are violated. Par. 3 contains a more general provision, stating that, in the framework of the Parties' national legislation, and in addition to the rules concerning access to justice what

---

1 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 28.06.1998, Aarhus, 2161 UNTS 447 [Aarhus Convention].

2 Council Decision of 17 February 2005, 2005/370/EC, on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005. 1–3.

3 See Convention, Art. 9 par. 1, referred to "any person".

4 See Convention Art. 9 par. 2, referred to "the public *concerned*".

5 See Convention Art. 9 par. 3, referred to "members of the public" with no further specification.

is provided in the previous paragraphs, members of the public should have access to justice to challenge any violation of national environmental law.

What is the role of environmental NGOs in the context of the Convention?

According to Art. 2, par. 5, NGOs promoting environmental protection and meeting the requisites required by national legislation, are automatically considered *public concerned*, meaning “the public affected or likely to be affected by, or having an interest in, the environmental decision-making”. Art. 9, par. 2, states that NGOs’ interest is deemed *sufficient* and they are deemed to have rights that can be impaired. Finally, according to Art. 9 par. 3, NGOs (as members of the public) meeting the criteria laid down by national law, should have access to justice and the chance to challenge acts and omissions in violation of environmental law. Therefore, environmental NGOs enjoy a sort of *special status* in the Convention since they actually should not need to demonstrate a special interest to gain access to justice.

In the implementation of the Convention’s provisions on access to justice by the European Union (EU), however, many problems (and much criticism on the part of the environmental NGOs) arose. Here, all the peculiarities of the EU legal system and of its relationship with international law emerged. The *contentious* case of the environmental NGOs shows how formal compliance with international law could turn out in substantial non-compliance and how less than smooth the integration between the two legal systems can be. Longstanding litigation has involved the environmental NGOs, the EU judiciary and the Aarhus Convention Compliance Committee (ACCC) in the attempt to guarantee the Convention’s rights.

This paper aims to highlight the main problems surrounding the implementation of the Convention by the EU and the following litigation on access to justice in the framework of the relationship between EU law and international law as it has been shaped by the Court of Justice.

The paper is organised as follows: chapter II offers a preliminary overview of the Aarhus Convention in the context of mixed agreements and their interpretation. Chapter III describes the implementation of the Convention’s provisions by the EU, through Regulation 1367/2006 and the main problems arising for the NGOs and their access to justice in environmental matters. Chapter IV provides description and some discussion on the lengthy litigation that involved the NGOs, the EU judiciary and the Compliance Committee at the international level. Chapter V draws some conclusions and attempts some hypotheses on future developments.

II. The Aarhus Convention as a mixed agreement

The Aarhus Convention (the Convention) was signed by the European Community and its Member States. It is, therefore, a *mixed* agreement.

This circumstance might be of little relevance in the present discourse were it not for the fact that the EU judiciary – and the EU Court of Justice (Court of Justice), especially – have always played a critical role in the interpretation of this kind of agreement, considerably extending its own jurisdiction during the past decades. Some of this interpretative effort involved the Convention as well.

It is worth stating from the beginning that what follows is not intended to be a thorough description of mixed agreements which form an extremely complex topic.[6] Nor will this work discuss the more general issue of the EU international relations according to the division of competences between the EU and the Member States, which has to be considered already known.

The rest of this paragraph is rather intended to highlight some general issues relating to mixed agreements that could be useful for the following examination of the Aarhus Convention. The very existence of mixed agreements mainly stems from the fact that these agreements involve matters pertaining both to the EU and the Member States competencies.[7] Mixed agreements have found different classifications in academic literature. According to *Allan Rosas*[8] they could be classified following the obligations of the parties in the Convention (whether they are *parallel* or *shared* and, in the latter case, whether they are *coexistent* or *concurrent*).[9]

A further classification of mixed agreement suggests a division between bilateral (only one third party) and multilateral agreements. This latter case is typical of environmental agreements in general and of the Aarhus Convention in particular.

Finally, mixed agreements might be classified according to their *completeness*. A complete agreement is one signed by all the Member States whereas an incomplete agreement is signed only by some of them.[10]

The *state* of the competencies in mixed agreements and the subsequent responsibility in complying with the relevant obligations, have often been the object of Declaration by the European Union. Apparently, these declarations seldom led to clarification for the other parties, especially where a final paragraph stating that "*The*

---

6 The literature on mixed agreements is rather extensive and grew in importance especially during the last century's Eighties. However, the practice of concluding this type of agreements dates back to the early Sixties. See for example O'Keeffe, David – Schermers, Henry G. (eds.): *Mixed Agreements*, Kluwer, Deventer, 1983; Dolmans, Maurits J.F.M.: *Problems of Mixed Agreements: Division of Powers within the EEC and the Right of Third States*, Asser Instituut, The Hague, 1985; Koskenniemi, Martti (ed.): *International Law Aspects of the European Union*, Kluwer, The Hague/London/Boston, 1998. More recently, Heliskoski, Joni: *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States*, Kluwer, The Hague/London/New York, 2001; Eeckhout, Piet: *External Relation of the European Union*, *Legal and Constitutional Foundations*, Oxford University Press, Oxford, 2004; Hillion, Christophe – Koutrakos, Panos (eds.): *Mixed Agreements Revisited*, *The EU and its Member States in the World*, Hart Publishing, Oxford, 2010; Cannizzaro, Enzo – Palchetti, Paolo – Wessel, Ramses A.: *International Law as Law of the European Union*, Martinus Nijhoff Publishers, Leiden, 2012.

7 The issue of mixed agreements is obviously connected to the division of competencies resulting from Articles 2 to 6 of the EU Treaty of Functioning, where EU exclusive and shared (and residual) competencies are defined.

8 Rosas, Allan: Mixed Union – Mixed Agreements. In: Koskenniemi, Martti (ed.), 1998. 128.

9 Parallel competencies imply that both the Union and the Member States have the power to conclude the whole agreement assuming the relevant rights and obligations. In case of shared competencies, instead, part of the agreement falls into the Union's competence and another part in the Member States' one. Here, another distinction could be drawn between subjects pertaining to coexistent competencies – with part of the agreement involving exclusive competencies either of the EU or the States – and subjects of concurrent competence *stricto sensu*, where both the EU and the States have the power to conclude international agreements without any of them having the power to prevent the other from doing so. The environment belongs to this latter category.

10 For this distinction see Granvik, Lena: Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness. In: Koskenniemi, Martti (ed.) 1998. 255. In this perspective, the Aarhus Convention is a complete agreement.

exercise of Community competence is, *by its nature*, *subject to continuous development*", was added.[11]

In this context, it is worth noticing that two different declarations were issued by the European Community for the Convention, one at the moment of signing, the other at the moment of approving (ratifying) it[12]. The first declaration is particularly important for the topic under discussion here, because, as we will see further on, the EU Commission strongly relied on it when the ACCC found for non-compliance to the Convention's obligations on the EU part, as in access to justice.[13]

The Declaration issued at the moment of signing the Convention states:

> "*Within the institutional and legal context of the Community* (…), *the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention*" [14].

The same sentence appears in the second Declaration (issued on approval of the Convention, in 2005) where the EU also states that the implementation of Article 9, par. 3 of the Convention – *i.e.* the establishing of "*administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*" – rests on Member States, unless the relevant authorities are Community institutions or bodies.[15] Here again a final clause on the exercise of Community competence which is, "*by its nature*, *subject to continuous development*" is added.

A further clause stipulates that "[*t*]*he European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force*". [16]

---

[11] See Koutrakos, Panos: *EU International Relations Law*, Hart Publishing, Oxford/Portland, 2015. 176.

[12] Such declarations are actually required by Article 19, par. 5 of the Convention to Regional Economic Integration Organizations (REIOs) stating that: "In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence". All the Declarations of the signing parties are available on the UNECE website: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII13&chapter=27&clang=_en#EndDec (30.09.2018)

[13] See Comments by the European Commission, on behalf of the European Union, to the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32, point 21. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

[14] Declaration by the European Community in Accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Annex to Council Decision 2005/370/EC of 17 February 2005 OJ L 124 17.5.2005. 3.

[15] "[the] Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations".

[16] On the difficulties stemming from this statement see Fasoli, Elena: Apportioning the Obligations Arising Under the UNECE Aarhus Convention Between the EU and its MSs: the Real Scope of the 'Community Law in Force'. *Diritto Pubblico Comparato ed Europeo*, 20 (2018) 1, 186.

II.1 The interpretation of mixed agreements

The role of the Court of Justice in the interpretation of mixed agreements has been the object of several judgments, though the solutions it found were not always of the utmost clarity[17].

Scholars usually describe the theoretical path followed by the Court starting from the *Haegeman* case[18]. Stating on the interpretation of a 1961 bilateral agreement between the Community, the Member States and Greece, the Court decided for its own jurisdiction assuming that, being the agreement signed by the Council, it would have to be considered an act of the European institutions. Therefore, it would be subject to the Court's interpretation following (the then) Article 177 of the EEC Treaty.[19]

Twelve years later the Court faced the same issue of interpretation in *Demirel case*.[20] The case involved the interpretation of a bilateral agreement with Turkey on the free movement for workers. In the proceedings for preliminary ruling some member States suggested that the free movement of third countries' workers fell outside the interpretative jurisdiction of the Court. This latter, however, held the contrary and found for its own interpretative jurisdiction (also) claiming for the necessity of a uniform application of the agreement's provisions by the States.

At the end of the Nineties the issue of the interpretative jurisdiction of the Court on mixed agreements rose again in relation to Article 50 of the (so-called) TRIPs Agreement[21] on trade marks.

In *Hermès case*[22] and later in *Dior case*[23] the Court relied on the argument of the Community interest to a uniform interpretation of an agreement's provision that fell both within the Community's and the Member States' competence. "*Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation*".[24]

The Court, in the end, built the theoretical framework of mixed agreements on two main points: its own jurisdiction as in their interpretation, close cooperation between the Community and the Member States as in fulfilling the relevant obligations.[25] However, this

---

[17] The literature on the topic is rather extensive. See, for example, Heliskoski, Joni: The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements. *Nordic Journal of International Law*, 69 (2000) 4, 395; Koutrakos, Panos: Interpretation of Mixed Agreements. In: Hillion, Cristophe – Koutrakos, Panos (eds.) 2010. 116.; Koutrakos, 2015. 229; Neframi, Eleftheria: Mixed Agreement as a Source of European Union Law. In: Cannizzaro, Enzo – Palchetti, Paolo – Wessel, Ramses A. (eds.), 2012. 325.

[18] C-181/73, *R. & V. Haegeman v Belgian State*, Judgment of 30 April 1974, ECLI:EU:C:1974:41.

[19] Preliminary ruling. The argument was not totally convincing since the agreement could not be considered an act of the Community institutions only to the extent it would have involved the Community competencies.

[20] C-12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*, Judgment of 30 September ECLI:EU:C:1987:400, point 9.

[21] Trade-Related Aspects of Intellectual Property (TRIPs), Marrakesh, 15 April 1994, 1869 UNTS 299.

[22] C-53/96, *Hermès International v FHT Marketing Choice BV*, Judgment of 16 June 1998, ECLI:EU:C:1998:292.

[23] C-300/98 and C-392/98 (joint cases), *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*, Judgments of 14 December 2000, ECLI:EU:C:2000:688 [Dior]

[24] *Dior*, points 37–38.

[25] Koutrakos, 2015. 243. Some interesting considerations on the interpretation of mixed agreements can be also drawn from the case-law on States' failures to fulfil obligations, where the Court (often without extensive argumentation) includes in the area of Community law subjects covered by some Conventions' provisions

framework is not always clear, and the Court's reasoning not always convincing, being "*either cryptic or unnecessarily convoluted*," [26] at least as far as the jurisdiction is concerned.

II.2 Direct effects of mixed agreements

The *Dior* case is also interesting because it raises the question whether a mixed agreement's provisions can have direct effects. Here, the Court of Justice envisages a distinction between its jurisdiction in interpreting the agreement and its jurisdiction in recognising direct effects to some of its provisions.

After examining the conditions under which the Community law can recognise direct effects to the provisions of an international agreement (its provisions must contain clear, precise and unconditional obligations, and they must not be subject, in their implementation and effects, to the adoption of any implementation measure), the Court links the existence of its jurisdiction on direct effects of international agreements to the existence of Community legislation in the relevant field.[27]

The definition and scope of *legislation* in respect to a given field is, again, unclear. In *Merck Genéricos*[28], for example, the Court adopted a rather restrictive approach holding that, in the field of trademarks, Community legislation was at that moment very sectoral and not comprehensive enough to consider it covering the subject.[29]

Another important decision of the Court of Justice involving direct effects of mixed agreements refers to the very Art. 9, par. 3 of the Aarhus Convention. In the *Lesoochranárske zoskupenie VLK* case[30] the Slovak Supreme Court instituted preliminary ruling asking whether the aforementioned provision could be deemed to have direct effects in national legal systems and whether the same provision implied the right to challenge any measure adopted by public bodies in violation of national environmental law.The Court of Justice

that apparently lay outside it. See, for example, C-13/00, *Commission v Ireland*, Judgment of 19 March 2002, ECLI:EU:C:2002:184, on the application of the Berne Convention and C-239/03, *Commission v France* Judgment of 7 October 2004, ECLI:EU:C:2004:5 (also known as *Étang de Berre*) on the application of the Convention on the Protection of the Mediterranean Sea from Pollution.

26 Koutrakos, 2015. 246.

27 "In a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion". Dior, point 48.

28 C-431/05, *Merck Genéricos – Produtos Farmacêuticos Ldª v. Merck & Co. Inc. e Merck Sharp & Dohme Ldª*, Judgment of 11 September 2007, ECLI:EU:C:2007:496.

29 The Court omitted to consider "four legislative proposals pending at the time; these included measures on compulsory licensing of patents relating to pharmaceutical products for export to countries with public health problems, the Community patent, the conferment of jurisdiction on the Court of justice in disputes relating to the Community patent, and the establishment of the Community Patent Court and concerning appeals before the Court of First Instance". Koutrakos, 2015.131.

30 C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, Judgment of 8 March 2011, ECLI:EU:C:2011:125 [*Lesoochranárske zoskupenie VLK*. The case is also known as *Slovak bear*]. On this case see Hoops, Björn: The Interpretation of Mixed Agreements in the EU after *Lesoochranárske zoskupenie. Hanse Law Review*. Vol. 10. No 1. 2014. 3.

adopts here the *Dior* approach, considering first the existence of EU legislation covering the object of Art. 9, par. 3 of the Convention (the right to a wide access to justice in environmental matters), as a condition for its jurisdiction on direct effects. In this case, the only existing piece of legislation is Regulation 1367/2006, implementing Article 9 in its entirety but only for the Community institutions and bodies. Thus, strictly speaking, the condition for a statement of the Court on the Convention's direct effects was not met.[31] However, the Court held that

> "*a specific issue which has not yet been the subject of EU legislation is part of EU law*, *where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it.* (*…*) *In the present case*, *the dispute in the main proceedings concerns whether an environmental protection association may be a 'party' to administrative proceedings concerning*, *in particular*, *the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV*(*a*) *to the Habitats Directive*, *so that*, *under Article 12 thereof*, *it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.* (*…*) *It follows that the dispute in the main proceedings falls within the scope of EU law*".[32]

Furthermore, the Court considers it is

> "*irrelevant that Regulation No. 1367/2006*, *which is intended to implement the provisions of Article 9*(*3*) *of the Aarhus Convention*, *only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9*(*3*) *of the Aarhus Convention with respect to national administrative or judicial proceedings.* (*…*) *Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law*, *it is clearly in the interest of the latter that*, *in order to forestall future differences of interpretation*, *that provision should be interpreted uniformly*, *whatever the circumstances in which it is to apply.* (*…*) *It follows that the Court has jurisdiction to interpret the provisions of Article 9*(*3*) *of the Aarhus Convention and*, *in particular*, *to give a ruling on whether or not they have direct effect*".[33]

Once found for its jurisdiction, the Court denied that direct effects could derive from Art. 9 par 3 of the Aarhus Convention. This latter did not contain any clear and precise obligation that could directly regulate the legal situation of individuals.

> "*Since only members of the public who meet the criteria*, *if any*, *laid down by national law are entitled to exercise the rights provided for in Article 9*(*3*), *that provision is subject*, *in its implementation or effects*, *to the adoption of a subsequent measure*".[34]

It is worth noticing that in *Lesoochranárske zoskupenie VLK*, the Court of Justice stated on direct effects of an international convention for the first time. In *Dior case*, in fact, it

---

[31] See Advocate General *Sharpston*'s Opinion, point 72.

[32] *Lesoochranárske zoskupenie VLK*, points 36–38.

[33] *Lesoochranárske zoskupenie VLK*, points 41–43.

[34] *Lesoochranárske zoskupenie VLK*, points 45.

had only defined the criteria to establish its interpretative jurisdiction, leaving to national courts the decision on direct effects. Furthermore, as it will emerge in the next chapters, the Court's judgment contained an important statement on the national courts' role in granting compliance with the Convention.[35]

III. EU legislation and access to justice in environmental matters: Regulation No. 1367/2006

In 1996 the European Community issued Regulation No. 1367 (of the European Parliament and of the Council) "*on the application of the provisions of the Aarhus Convention on Access to Information*, *Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*" (Aarhus Regulation).[36] The Regulation implements (nearly) all the Convention's provisions, including Art. 9, par. 3. However, as we will see further on, some of the regulation's provisions raised such difficulties in access to justice as to trigger two parallel disputes. The first involves the EU judiciary, the second involves the Convention's Compliance Committee, this latter having a sort of *suspended* conclusion and thus uncertain consequences.

For a better understanding of the problems underlying access to justice in environmental matters it might be useful to start from the provisions of the Convention relating to the topic in question.

As already stated in the Introduction, Convention's Art. 9 is ideally structured in three parts each of them corresponding to one of its pillars.[37]

Paragraph 1 of Art. 9 refers to access to justice in case access to environmental information is denied or unsatisfactorily handled. Here, the Convention states that each Party shall ensure within the framework of its national legislation, access to a review procedure before a court of law or another independent and impartial body established by law. It is worth noticing that access to *courts* does not completely cover the field of *justice*, since the same paragraph provides that alternative remedies should be granted as well: the parties shall ensure that the interested person "*has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law*".[38]

Paragraph 2 refers to violations of the Convention's provisions on public participation in decision-making related to specific activities affecting the environment. In this case the Convention stipulates that members of the *public concerned* having standing in accordance to national legislation shall "*have access to a review procedure before a court of law and/or another independent and impartial body established by law*, *to challenge the substantive*

[35] *Lesoochranárske zoskupenie VLK*, point 51.

[36] For an overview of the institutional passages that led to the Regulation, see Pallemaerts, Marc: Access to Environmental Justice at EU Level: Has the 'Aarhus Regulation' Improved the Situation? In: Pallemaerts Marc (ed.), *The Aarhus Convention at Ten. Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Europa Law Publishing, Groningen, 2011. 273.

[37] On the topic, see Hedemann-Robinson, Martin: EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1 and Part 2. *European Energy and Environmental Law Review*, 23 (2014) 3 and 4, 102–114. 151–170.

[38] Convention, Art. 9, par. 1.

and procedural legality of any decision, act or omission subject to the provisions of article 6" (*i.e. provisions on participation to environmental decisions*).[39]

The rules of standing are therefore left to the Parties' national legislation, under two conditions: the first is the (general) aim of granting wide access to justice, the second refers to the position of environmental NGOs meeting the requisites set in Art. 2, par. 5[40] which are automatically considered by the Convention *public concerned* which implies that they automatically have standing.

Finally, par. 3 contains a sort of additional general clause on access to justice, with an obligation ("each Party *shall*") to ensure that the members of the public meeting the requisites (if any) set by national legislation, have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

In any case, procedures aimed at solving environmental disputes should provide for adequate remedies and be "*fair, equitable, timely and not prohibitively expensive*". Decisions should be given in writing and be accessible to the public.[41]

The former European Community implemented the Convention through the Aarhus Regulation, with different techniques as to the three pillars. Access to environmental information is essentially regulated with reference to EC Regulation No. 1049/2001 (on access to information held by the European institutions) while the Aarhus regulation's provisions only cover some residual aspects.[42]

Participation in public institutions' environmental decisions is regulated by Article 9 of the Aarhus Regulation which simply recalls the Convention's provisions with a more specific definition of the term *plans and programmes* included in Art. 2 of the same Regulation.[43]

Implementation of Art. 9, par. 3 of the Convention (by Articles 10 – 12 of the Aarhus Regulation) seems more interesting.

As a preliminary consideration it is worth noticing that three principles on access to justice can be found in the Aarhus Regulation's Recitals. The first relates to the compatibility of the Aarhus Regulation with the Treaty's provisions on access to justice and its applicability only to public authorities' decisions.[44] The second is the preference for the administrative remedy rather than direct access to the judiciary: environmental NGOs meeting the requisites laid down in the Aarhus Regulation, shall give the institution the opportunity to reconsider its decisions first, so that access to the Court of Justice must be preceded by a request for internal review to the institution that issued the contested decisions.[45] This leads to the third principle, according to which access to the

---

[39] See, especially, Annex I to the Convention.

[40] Art. 2, par. 5, in turn, refers to the requisites established by national legislation.

[41] See Art. 9 par. 4 of the Convention. Accessibility to the public is actually provided ("shall") for courts' decisions while it is facultative for other bodies' decisions ("whenever possible").

[42] See Arts. 3–8 Regulation No. 1367/2006.

[43] According to Art. 2, par. 1 (e), plans and programmes are (only) the ones which are subject to preparation and, as appropriate, adoption by a Community institution or body, which are required under legislative, regulatory or administrative provisions and contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down general environmental action programme.

[44] See Recital (18) Regulation No. 1367/2006

[45] See Recitals (19) and (20). The same principle applies in case of an institution's omissions.

judiciary is possible only once the request for internal review has been rejected or declared inadmissible.[46]

III.1 Access to internal review: the requisites for environmental NGOs

As previously stated, the Aarhus Convention provides for a special status for the environmental NGOs meeting the requisites laid down by the Parties' national legislation since they are deemed to have interests or rights, the *sufficiency* of which or the impairment of which, enables access to justice.

In implementing the Convention's provisions in the EU legal system, Art. 11 of the Aarhus Regulation states four requisites for the environmental NGOs willing to make a request for internal review to meet. These requisites are further specified in Arts. 3 and 4 of the Commission Decision No. 50/2008 and its Annex.

The first requisite is legal personality. To this requisite, independence and being non-profit must be added. Whenever the national law requires special procedures to have legal personality attested, the relevant documentation must be submitted. Secondly, NGOs shall also have environmental protection as their primary stated objective. This statement does not necessarily have to result from the organisation's statute (as the *formal* object of its activity), since it could also result from less formal sources such as the organisation's website[47]. Thirdly, NGOs must have existed for more than two years and they must be actively pursuing the objective referred to before. This requisite can be drawn partly from the organisation's statute and partly from the annual reports that the NGO shall also provide according to Dec. No. 50/2008.

Finally, the object of the request for internal review must fall within the organisation's objectives and activity.

All the requisites shall be supported by the relevant documents that the organisation is due to provide along with the request for internal review. However, documents containing formal evidence of the requisites can be substituted by any other equivalent documents in case the former cannot be provided for reasons not attributable to the NGO. The same principle applies whenever the documents sent cannot provide evidence of the fact that the object of the request for internal review falls within the objectives of the NGO's activity.

Furthermore, in case the organisation could not provide evidence of its independence or non-profit character through appropriate documents, these requisites can be declared from the organisation, the declaration "*signed by a person empowered to do so within the non-governmental organisation*".[48]

The submission of all the requested documents triggers the internal review procedure, with a first step consisting of the examination of the NGO's requisites by the relevant institution or body. Lack of documentation means a request for additional information "*to be*

[46] See Recital (21).

[47] The Annex to Commission Dec. No. 50/2008/EC (Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No.1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts) states that the NGOs wishing to submit a request for internal review must provide their statute or by-laws or any other document fulfilling the same role under national practice.

[48] See Art. 3, par. 3 of the Commission Dec. No. 50/2008.

provided by the organisation within a reasonable period to be specified by the Community institution or body concerned", with a correlative suspension of the time limits laid down in Article 10 of the Aarhus Regulation.[49] The same institution or body could also directly consult the national authorities of the NGO's country of origin or registration to verify the information provided.

III.2. Access to internal review: the problem of the reviewable acts

The object of internal review, i.e. the decision that can be reviewed, is another critical issue in the Aarhus Regulation context.

According to Art. 10 of the Aarhus Regulation, a request for internal review can be submitted to the institution or body "*that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act*". The definition of administrative act can be found in Art. 2 par. 1 (g) of the same Regulation where it is stated that administrative act means "*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*". Art. 2, par. 2 excludes from the category of administrative acts all the measures taken by a Community institution "*in its capacity of administrative review body*" such as in Arts. 81, 82, 86 e 87 (now, respectively, Arts. 101, 102, 106 e 107) of the Treaty concerning competition; Arts. 226 e 228 (now, respectively, Arts. 258 e 260) of the Treaty concerning infringement procedures; Art. 195 (now Art. 228) concerning complaints to the European Ombudsman and Article 280 (now Art. 325) concerning OLAF proceedings. It is, therefore, excluded, that decisions resulting from contentious procedures undergo further review[50].

Thus, according to Art. 2 of the Aarhus Regulation the only measures that can be reviewed are: a) individual acts, b) issued under environmental law.

The fact that only individual measures are subject to internal review is not really surprising for the administrative lawyer: the rule recalls the typical construction of the administrative decision (so familiar to the continental legal systems) as a decision of individual scope.

However, the functioning of a national administrative system cannot be compared with the functioning of the EU system. European administration, in its various configurations, does not always produce administrative decisions in the form of individual acts, as it works as *direct* administration only in a (very) limited way.[51] This is especially true in the environmental sector, where the institutions' (the Commission's) acts are mostly general

---

[49] See Art. 4, par. 2 of the Commission De (c. No. 50/2008.

[50] See, for example, decision C(2008) 6995 of 23 October 2008, on request submitted by Liga para a Proteção da Natureza and decision B.2 JHM/RVV/mkl D*2014/104829 of 23 October 2014, on request submitted by Friends of the Earth, where the EU Commission (DG Competition), states that the contested 'Guidelines on State aid for Environmental Protection and Energy 2014–2020', were issued according to Article 107 par. 3 (g) of the Treaty and thus excluded from internal review.

[51] EU administration and EU administrative law are the objects of extensive studies. See, among the many, Schwarze, Jürgen: *European Administrative Law*, 1st ed. revisited, Sweet & Maxwell, London, 2006. Craig, Paul: *EU Administrative Law*, 3rd ed., Oxford University Press, Oxford, 2018. Craig, Paul: *UK, European and Global Administrative Law. Foundation and Challenges*, Cambridge University Press, Cambridge, 2015.

or normative following Arts. 290 and 291 of the Treaty of Functioning of the European Union (TFEU).

At the beginning, environmental NGOs sought to bypass this obstacle trying to figure out elements of *individuality* in general acts in the attempt to render the Commission's decisions with a larger impact on the environment (for example, decisions on the use of pesticides or polluting industrial emissions) reviewable. To this aim the most popular route was to consider a general act as a sum of many individual acts.

Another route was to interpret the *individual* measure in the meaning of *non-legislative* measure referring especially to the delegated or implementing acts of Articles 290 and 291 TFEU.[52]

Finally, there are a number of requests for internal review of the Commission's decisions approving derogations to some standard limits under submission of special national plans.[53] In this case the NGOs held that the Commission's approval concerned a group of identified plants for which a temporary derogation was requested.[54]

These arguments have always been rejected by the Commission that has (strictly) considered the *measures of general scope* in the meaning of measures addressed to an indeterminate number of non-individuated persons. Thus, approvals of derogations to the established limits of industrial emissions under a National Transitory Plan are to be considered general acts because they are addressed to the Member State, notwithstanding the fact that only some specific plants will benefit from the allowance.[55]

---

[52] See, for example, the request for internal review of the Commission Regulation No. 149/2008 (of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto) establishing the maximum levels of residues in food products. Here the relevant NGO states: "although the Regulation might have the form of a general measure, the contents of Regulation 149/2008 can be considered to be a compilation of decisions concerning the residues of all the individual products and substances". Art. 2 par. 1 (g) of the Aarhus Regulation should be interpreted as referring to acts that are not strictly 'individual' but rather 'non-legislative', otherwise: "[a]ny other interpretation of this article would make the procedure meaningless as it would exclude practically all Community acts". In the request for internal review of the Commission Executive Regulation No. 359/2012, it is stated: "Il s'agit bien d'un acte non législatif, faisant suite à la demande d'approbation de la société TAMINCO, laquelle a sollicité l'application de la procédure accélérée prévue au article 14 à 19 du règlement 33/2008".

[53] The typical case is the National Transitory Plans related to industrial emissions and air pollution in general. See, for example Article 32 of EU Directive No. 75/2010 (of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) or Article 22 of EC Directive 50/2008 (of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).

[54] The request for internal review of the Commission's decision approving free transitory allowances to the Czech Republic – under Article 10 par 1(c) of EC Directive No. 87/2003 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC – to improve the electricity production, states: "[t]he Commission Decision is a measure of individual scope. It is addressed to the Czech Republic and it applies to objectively determined situations and it entails legal effects for individual beneficiaries – recipients of free allowances. The allocations of free allowances will affect particular operators and installations that are listed in the national plan approved by the Commission, thus there is a specifically determined group of benefitting entities".

[55] See the Commission's Reply to the request for internal review of the Commission's decision approving the Greek Transitional Plan (2013/687/EU): "The Commission Decision 2013/687/EU not to raise any objection to the Greek transitional national plan pursuant to Article 32(5) of Directive 2010/75/EU is addressed to the

The systematic declaration of inadmissibility of the requests for internal review by the Commission triggered a sort of *short-circuit*: what should have been an opportunity for simple and inexpensive access to justice turned out to be a reason for litigation, with a significant (double) intervention of the EU judiciary, first the General Court[56] and then the Court of Justice[57].

The second requisite for a measure to be subject to internal review is to be adopted 'under environmental law', where some uncertainty could rise about the scope of environmental law. It is true that Article 2, par. 1 (f) of the Aarhus Regulation states that

> "*environmental law means Community legislation which*, *irrespective of its legal basis*, *contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving*, *protecting and improving the quality of the environment*, *protecting human health*, *the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.*"

But this definition still seems too wide and requires some refinement.

However, recent case-law confirmed that the concept of environmental law needs extensive interpretation. In *TestBioTech Ev* an environmental NGO had submitted a request for internal review of a Commission decision to authorise the commerce of food containing genetically modified soy. The Commission rejected the request on the basis that the contested decision was not adopted under environmental law but fell within the field of health and food security. The General Court held that

> "*environmental law*, *within the meaning of Regulation No. 1367/2006*, *covers*, *in this case*, *any provision of EU legislation*, *concerning the regulation of genetically modified organisms*, *that has the objective of dealing with a risk*, *to human or animal health*, *that originates in those genetically modified organisms or in environmental factors that may have effects on those organisms when they are cultivated or bred in the natural environment*".[58]

Greek authorities. The Decision confirms that the framework established by the plan is compatible with Art. 32 of Directive 2010/75/EU and the associated Commission Implementing Decision 2012/115/EU (…). It furthermore follows from its recitals that the Decision also confirms that sufficient information has been provided regarding the measures that will be implemented in order to achieve the emissions ceilings. These measures, unlike the overall emissions ceilings, constitute contextual information and are therefore not listed in the Annex of the Decision. Therefore, this Decision does not establish nor approve specific individual obligations for the operators concerned. It is for the Greek authorities to implement the plan and take the decision affecting installations individually".

56 T-338/08 *Stichting Natuur en Milieu & Pesticide Action Network Europe v European Commission*, Judgment of 14 June 2012, ECLI:EU:T:2012:300 [*Stichting Natuur*] and T-396/09, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission*, Judgment of 14 June 2012, ECLI:EU:T:2012:301.

57 Joint cases C-401/12 P to C-403/12 P, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Judgment of 13 January 2015 ECLI:EU:C:2015:4 and joint cases C-404/12 P to C-405/12 P, *Council of the European Union and European Commission v Stichting Natuur en Milieu & Pesticide Action Network Europe*, Judgment of 13 January 2015, ECLI:EU:C:2015:5.

58 T-33/16, *TestBioTech eV v Commission*, Judgment of 14 March 2018, ECLI:EU:T:2018:135. The request for internal review against the Commission's decision authorising *Pioneer Overseas Corporation* and *Monsanto* the trade of soy 305423, MON 87705 e MON 87769 – according to Regulation (EC) No. 1829/2003 (establishing EFSA) – had been submitted by the NGOs *TestBioTech e GeneWatch* on 29 May 2015. The Commission held that: "*GMOs are explicitly mentioned as 'elements of the environment' in Article 2*(*l*)(*d*)(*i*) *of the Aarhus Regulation to which Article 2*(*l*)(*d*)(*vi*) *refers for the purpose of access to environmental information under*

Combining the two requisites of the *individuality* of the measure and its adoption under environmental law, the scope of internal review turns out to be clearly defined: on the one hand, it is limited to the institutions' (and bodies')[59] decisions with individuated addressees (mainly authorisations). On the other hand, as a sort of counterbalance, the width of the concept of environmental law (apparently) opens the review to measures adopted in fields other than the environment strictly considered.

IV. NGOs and access justice: the EU Courts' judgments and the Compliance Committee's findings

It is clear, from what has emerged so far, that the environmental NGOs trying to gain access to the EU justice face a difficult situation.[60] The critical point is that, in this case, the two legal systems (the international and the EU systems) are, somehow, unaligned, so that the implementing system (the EU) cannot satisfy the objectives of the other.

In other words, for what concerns access to justice, the EU legislation stipulates that the environmental NGOs can have access to the Courts only after exhausting all the internal remedies (which is a general rule in the EU and in many other national legal systems) and, thus, only after a request for internal review is rejected. It could be noticed that the rejection (or inadmissibility declaration) of the request for internal review becomes, for the NGO, the *act of direct and individual concern* that Art. 263 TFEU requires for legal persons to have standing before the Courts. This is not, however, the solution to the problem, since the Court would only examine the legality of the internal review decision and not (or only in an indirect way) the challenged institution's decision.

Furthermore, as previously stated, the Commission's decisions with the greatest impact on the environment, are mainly general/regulatory acts.

The implementation of the Aarhus Convention's Art. 9 par. 3 by the EU, in the framework of its legislation and in formal compliance with the same Convention, led to a paradoxical outcome: where the Convention would have claimed a wide access to justice, the EU system ended up narrowing it to an extreme point.

This situation generated two interesting disputes, one (already mentioned) properly *judicial* involving the EU Courts; the other, international and non-judicial involving the Aarhus Convention Compliance Committee against the European Union as a signing Party of the Convention.

Both disputes face the same legal issue – that is the compatibility of the EU legislation to the Convention – but from two partially different perspectives. The EU judiciary adopted

---

Aarhus Regulation, but due to a systematic interpretation and in light of the objective of the Regulation and of the Aarhus Convention, Article 10 is to be interpreted in the sense that only the allegations of the requests for internal review of decisions adopted under Regulation (EC) 1829/2003 under the Aarhus Regulation which cover the environmental and health impacts due to the release of GMOs in the environment are to be re-examined, but not the health impacts of the consumption of GM food and feed". See, Reply of the European Commission to the Request for Internal review of 16.11.2015. 5: http://ec.europa.eu/environment/aarhus/pdf/30_reply.pdf

59 On the reasons to add *bodies* to *institutions* see Pallemaerts (2011). 278.

60 See Caranta, Roberto: Environmental NGOs (eNGOs) or: Filling the Gap between the State and the Individual under the Aarhus Convention. In: Caranta, Roberto – Gerbrandy, Anna – Müller, Bilun, *The Making of a New European Culture: the Aarhus Convention*, Europa Law Publishing, Groningen, 2018. 407440.

a (somehow) narrower perspective, which mainly focused on the possible invalidity of Art. 2, par. 1 (g) and Art. 10 of the Aarhus Regulation. A wider approach has been adopted by the Compliance Committee, which extended its examination to the rules of standing for the environmental NGOs and other, more general, issues related to the EU legal system.

IV.1. The EU Courts' judgments: cases T-338/08 and T-369/09 and joint cases C-401 to C-403/12 and C-404 to C-405/12

Following rejection by the EU Commission of some requests concerning Regulation No. 149/2008 and Decision C(2009) 2560, the interested NGOs instituted proceedings before the General Court, challenging the rejection decision.

The dispute led to two interesting judgments, both of 14 June 2012, that strongly influenced the requests for internal review in the following two years, and where the EU court of first instance stated on the validity of Article 2 of the Aarhus Regulation.

In case T-338/2008 the NGOs *Stichting Natuur en Milieu* and *Pesticide Action Network Europe* challenged the Commission's decision rejecting their request for review of Regulation No.149/2008 stating, on the one hand, that the latter could be considered as a substantially individual act and, on the other hand, that Article 2 par. 1 (g) of the Aarhus Regulation was incompatible with Article 9 par. 3 of the Convention, as the limitation of the review to individual acts left too narrow a space for access to justice: the contrary to what the Convention required.

The General Court dismissed the first complaint, denying that the Commission Regulation could be considered an individual act. It was, in fact, a general act applying

> "*to objectively determined situations and entail*[*ing*] *legal effects for categories of persons envisaged generally and in the abstract*". *Nor could it have been considered a bundle of individual acts because it was not adopted in response to individual claims.*[61]

On the second plea, however, the Court upheld the NGOs argument stating that:

> "*an internal review procedure which covered only measures of individual scope would be very limited*, *since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention*, *such limitation is not justified*".[62]

Furthermore, the Court held that while Article 9 of the Convention left discretion to the signing Parties as to the definition of the persons having the right to recourse and also to the 'type of justice' (administrative or judicial), it did not leave the same discretion as to the types of challengeable acts.

The Court thus decided for invalidity of Art. 10 of the Aarhus regulation and annulled the Commission's contested decisions.

The same arguments were held by the General Court in deciding case T-369/09 and annulling the Commission's decisions that had rejected the requests for internal review submitted by the NGOs *Vereniging Milieudefensie* and *Stichting Stop Luchtverontreiniging Utrecht*.

---

[61] *Stichting Natuur* case, point 41.

[62] *Stichting Natuur* case, point 76.

The aforementioned judgments of the General Court led, on the one hand, to the Commission to appeal to the Court of Justice, but, on the other, they triggered new requests for internal review by NGOs now believing it admissible that internal review covered general acts as well[63]. The Commission, however, systematically rejected this argument, holding that the General Court's judgments had been appealed and the question was thus awaiting final definition by the Court of Justice. In the meantime, Art. 10 of the Aarhus Regulation, as in force, should be applied[64]. Furthermore, as the General Court's judgments produced their effects only in relation to the cases decided, the argument would not hold for any request for internal review[65].

In two different and coeval judgments, the Court of Justice took the opportunity to reconsider the issue of mixed agreements and the relationship between EU and international legislation.

The central point of discussion is, again, the compatibility of Art. 10 of the Aarhus Regulation with Article 9, par. 3 of the Convention. The Court of Justice, however, dismantled the General Court's argument holding that Art. 9 par. 3 could not be used as a parameter to assess the legality of Regulation's Art. 10. The former, in fact, was neither unconditional nor sufficiently precise, this being one of the conditions for an international agreement to be interpreted by the Court of Justice and for the Court to state on the compatibility of EU legislation with international law[66]. In sum, Article 9 par. 3 left the Parties a wide margin of discretion, not only as to the requisites that members of the public have to meet to have access to justice, but also to the modalities (administrative and/or judicial) of that justice. Furthermore, in the Court's opinion, Article 9 par. 3 neither contains a specific obligation that the Union intended to comply with, nor a precise provision which the relevant Union's act recalls.

This way of reasoning inevitably led the Court to conclude that the aforementioned Art. 9 could not be used as a parameter to state on the invalidity of Aarhus regulation's Art. 10 and the General Court, in doing so, erred in law.

IV.1.1. Some reflexions on the Court of Justice's decisions

On a closer examination, the Court's reasoning is not totally convincing, leaving the reader with the impression of a quick dismissal of a thorny issue. However, some suggestions for a different and more articulated approach on the matter might be found in Advocate General *Jääskinen*'s Opinion. After a precise reconstruction of the Court's jurisprudence on the relationship between international and EU law,[67] the Advocate General comes to the

[63] See, for example the request for internal review submitted by *Greenpeace Netherlands* and *Pesticide Action Network Europe* on 27 June 2012 reiterating their request concerning Commission's Directive No. 77/2010. The request had been rejected because it was referred to a general act pending proceedings before the General Court.

[64] EU Commission, DG Environment, 11 July 2014.

[65] EU Commission, DG Health, 6 August 2013.

[66] The Court recalls here its previous judgments, C-308/06, *The Queen*, *on the application of International Association of Independent Tanker Owners* (*Intertanko*) *and Others v Secretary of State for Transpor*t, ECLI:EU:C:2008:312, Judgment of 3 June 2008; and joined cases C-120 and C-121/06, *FIAMM & Others v Council of the European Union and Commission of the European Communities*, Judgment of 9 September 2008, ECLI:EU:C:2008:476.

[67] Opinion of the Advocate General *N. Jääskinen*, 8 May 2014, joint cases C-401/12 P to C-403/12 P.

conclusion that Aarhus Regulation's Article 10 is actually incompatible with the Convention if correctly interpreted.[68]

It is, in particular, worthy of notice that assessing the compatibility of EU legislation with international agreements might lead to different outcomes depending on the subject involved in the latter. In this perspective, the Aarhus Convention could not be compared with other association or partnership agreements, since it is aimed at creating "*a body of rules of general scope including ambitious* '*political*' *objectives*, *which is often the case in particular in the areas of environmental protection and transport law*".[69] The Aarhus Convention, thus, could be seen as a sort of *environmental Constitution*, an agreement establishing the statute of a fundamental right to environmental protection, "*a source of* '*rights of civic participatio*n', *taking the form of a codification of procedural rights in relation to the environment*".[70] If *Lesoochranárske zoskupenie VLK* case-law were to be applied – thus assuming that the margin of discretion left to the signing Parties by an international agreement would prevent this latter's provisions to be used as a parameter for the legality of the implementing EU (secondary) legislation – a twofold problem would arise. In fact, not only would the legality of the Aarhus Regulation be impossible to be assessed by the EU judiciary, but also the national legislation would fall outside the scope of judicial examination because there are no EU directives replicating the content of the Convention's Article 9, par. 3. A *grey zone* would therefore emerge, where no judicial review could apply.

To avoid this situation, a different approach should be taken, that is assume that international agreements' provisions which confer rights but do not have direct effects, could be used as a parameter for judicial review of EU secondary legislation "*provided that the characteristics of the convention in question do not preclude this*".[71]

Anyway, in the Advocate General's perspective, Article 9 par. 3 of the Convention is not to be considered a provision totally lacking direct effect. This might be the case whenever it leaves the Parties to establish the requisites for the members of the public to gain access to public decision-making through participation or access to justice. But a direct effect could be envisaged in relation to the final outcome to be reached, i.e. an effective environmental protection through access to justice.[72] This is one of the main objectives of the Convention and, therefore, it should be affecting its interpretation.

This construction would not admit any restriction of the categories of challengeable (either judicially or through administrative proceedings) acts apart from those acts that are explicitly excluded by the scope of the Convention, since they are adopted by the public authorities in their legislative or judicial capacity.[73]

Furthermore, the limited scope of internal review narrows the potential of the remedy too much: the same Advocate General points out that the only practical applications of

---

[68] See, Opinion, point 60, where the Advocate General states that the Court's case-law on the topic, far from being a consolidated block, is "rather marked by a certain degree of diversity which sometimes borders on inconsistency".

[69] Opinion, point 62.

[70] Opinion, point 87.

[71] Opinion, point 78.

[72] Art. 9, par. 3 of the Convention could be therefore seen as a MIXED provision.

[73] See Art. 2, par. 2 of the Convention.

the review had, until that moment, involved market authorisations to GMOs and chemical products under the *REACH Regulation*.[74]

In sum, interpreting Art. 10 of the Aarhus Regulation in a way which is compatible with the spirit of the Convention, leads to the conclusion that the article is invalid.

On a closer examination, however, the Advocate General's interpretative choice, according to which only legislative acts are outside the scope of internal review, is not totally convincing.

Actually, Art. 2, par. 2 of the Convention, in excluding the acts adopted in the legislative or judicial capacity of the relevant authority from the scope of the Convention, refers, according to the *Implementation Guide* to the Convention,[75] to the acts issued by Parliaments (whose members are accountable to the electorate) or by the courts. The Court of Justice has interpreted this provision (transposed in Directive No. 4/2003 on access to environmental information) in the same sense[76] on the basis that the procedure through which these acts are formed and issued grants sufficient transparency and public scrutiny on the objects and the contents of the norms.[77]

Now, as already stated, EU Commission's activity in the environmental sector consists, for a relevant part, in the issuing of acts which can be considered either general or normative, their function being the integration or derogation of EU legislation.[78] These acts have, therefore, the normative character of the sources of law – albeit their *second level* status – but this does not mean that they can always be considered *legislation*. On the point, the Court has actually held that, depending on the case, either they fall within the executive capacity of the Commission (if they integrate or implement legislation) [79] or they share the same nature of the legislation they are derogating.[80]

Furthermore, if the argument of the nature of the act is raised, another problem comes to light. The general act, which is also normative (that is, it is a source of law) is actually taken into account by the Aarhus Convention but in a different provision: no longer Art. 9, but Art. 8, according to which Parties "*shall strive to promote effective public participation at an appropriate stage*, *and while options are still open*, *during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment*".

---

74 Regulation (EC) No. 1907/2006 of the European Parliament and the Council of 18 December 2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC. See Opinion, point 129.

75 UNECE, *The Aarhus Convention: an Implementation Guide*, 2nd ed., 2014. 49. Available at https://www.unece.org/env/pp/implementation_guide.html (10.9.2018).

76 C-515/11, *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, Judgment of 18 July 2013, ECLI:EU:C:2013:523.

77 See, on the point, Advocate General *Sharpston*'s Opinion (*Deutsche Umwelthilfe*).

78 Legislation is intended here as *secondary legislation*, according to the EU law terminology – as only Treaties are considered primary legislation – but, in a broader sense, it is referred to primary sources of law.

79 See, for example, *Stichting Natuur* case, point 65, where the Court denies that Commission regulation (EC) No. 149/2008 through which the Commission amends Regulation (EC) n. 365/2005 of the European Parliament and of the Council.

80 T-685/14, *European Environmental Bureau v European Commission*, Order of 17 July 2015, ECLI:EU:T:2015:560, point 41.

This might mean that, as far as normative acts (adopted by public authorities – the executive regulations) are concerned, the protection provided by the Convention is *anticipated* to the procedural stage (through participation) rather than expected *after* the adoption, through the tool of justice. In this perspective, the limitation to individual acts having legally binding and external effects, stated in Art. 10 of the Aarhus regulation does not appear incompatible with the Convention at all, not even with the so-called *spirit* of it.

Now, the actual opportunity for the environmental organisation to participate in the making of the Commission's regulations (apart from the access to information, according to Regulation No. 1049/2001) is all but certain. Some suggestions on the point could be retrieved from Communication No. 704/2002: here the Commission recognised the need of wide consultation, especially where proposals for legislation were concerned:

> "[*b*]*y fulfilling its duty to consult*, *the Commission ensures that its proposals are technically viable*, *practically workable and based on a bottom-up approach. In other words*, *good consultation serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large. A further advantage is that transparent and coherent consultation processes run by the Commission not only allow the general public to be more involved*, *they also give the legislature greater scope for scrutinising the Commission*'*s activities* (*e.g. by making available documents summarising the outcome of the consultation process*)".[81]

In any case, the crucial point of the issue shifts to the *dialogue* that the Commission is willing to open with the *civil society*'*s organisations* during the formation of environmental (general or normative) acts. The dialogue (either in the form of consultations or other forms of participation) is actually in the hands of the Commission itself and though the participation outcomes "*should be taken into account as far as possible*",[82] they are not legally binding and they are subject to the principle of proportionality, according to which

> "[*t*]*he method and extent of the consultation performed must* (…) *always be proportionate to the impact of the proposal subject to consultation and must take into account the specific constraints linked to the proposal*." [83]

In the end, even approaching the problem from the *participation* side, the outcome is not satisfying. Especially considering the practical results, the approach does not appear in line with the objective of an effective environmental protection, as outlined by the Aarhus Convention.

[81] See, EU Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 def, of 11 December 2002. 5. http://ec.europa.eu/governance/docs/comm_standards_en.pdf (10.9.2018.) This document is explicitly recalled by art. 2 of the Annex to Commission Decision No. 401/2008, amending Decision No. 50/2008 on the application of the Aarhus Regulation, despite reference is made to article 9 of the Regulation and not article 8.

[82] See the last paragraph of Art. 8 of the Convention.

[83] EU Commission, 2002. 18.

IV.2. The international dispute and the intervention of the Aarhus Convention Compliance Committee: The problem of the NGOs' standing.

Proceedings before the ACCC have been another occasion to examine the problematic relationship between international and EU law.

The ACCC was established in 2002, following Art. 15 of the Convention which provided for the Meeting of the Parties to "*establish*, *on a consensus basis*, *optional arrangements of a non-confrontational*, *non-judicial and consultative nature for reviewing compliance with the provisions of this Convention*."

Leaving aside any consideration about the structure and the functioning of the Committee, it is worth focusing on case C/2008/32, the ten-year long litigation that opposed the Committee – triggered by the communication of the NGO *ClientEarth* as a *member of the public* – to the EU and that never came to a real conclusion.[84]

The case was so long and complex that the Committee had to divide its findings in two parts. The first adopted in 2011, was interlocutory about the EU compliance, while awaiting the General Court's judgment on the case T-338/08. The other part was issued on 17 March 2017: here the Committee definitely found for EU non-compliance in relation to Art. 9 par. 3 of the Convention.

The procedure before the Committee involved a wide exchange of documentation, communications and replies, between the EU Commission and the interested NGO. In particular, after the issuing of the two aforementioned judgments by the Court of Justice,[85] the communicant NGO complained about the persistence of critical points in the Aarhus Regulation.

Firstly, in the NGO's opinion, the Court had adopted a restrictive interpretation of the Convention and the Regulation both in relation to the object of the internal review and to the access to such review. In addition, the choice of the administrative procedure would have raised some doubts on the side of impartiality.

Secondly, the NGO insisted on the absence of any referral to the type of reviewable acts in the Convention, therefore implying that the Aarhus Regulation's choice to limit the review to individual acts – and to exclude the acts resulting from *contentious* procedures – was invalid. The further requisites established for the reviewable acts by Regulation's Art. 2, par. 1 (g), namely, the fact that the act must be adopted under environmental law and has to have binding and external also appeared incompatible with the Convention's Art. 9 par. 3.[86]

---

[84] ACCC/C/2008/32. http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (20.6.2018). For a discussion of the case see also Fasoli, Elena – McGlone, Alistair: The Non-Compliance Mechanism of the Aarhus Convention as a Soft Enforcement of International Law: Not So Soft After All!. In: *Netherlands International Law Review*, 65 (2018) 1, 42.

[85] Cfr. ClientEarth Communication ACCC/C/2008/32. Update on Court of Justice rulings in cases C-401/12 P to C-405/12 P, 23 February 2015. https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/frCommC32_23.02.2015/frCommC32_comments_on_CJEUs_ruling_of_15.01.15.pdf (10.9.2018)

[86] ClientEarth Communication ACCC/C/2008/32. Update on Court of Justice rulings in cases C-401/12 P to C-405/12 P, points 60 and 69 respectively. Notice that the first argument could be overcome by the recent judgment of the General Court which adopted a wide interpretation of the concept of environmental law (*above*, III.2.).

Thirdly, the statement of the Court of Justice according to which Art. 9 par. 3 of the Convention did not have direct effects since it required further implementation by the Parties – and therefore it could not constitute a parameter to assess the validity of EU legislation –, was also criticised by the communicant. Following the Advocate General's opinion (not shared by the Court of Justice) the NGO assumed that Art. 9 par. 3 was actually unconditional: no obligation to lay down specific requisites for the members of the public to meet could be retrieved by the provision.[87]

Fourthly, in the NGO's opinion, the Court of Justice missed the opportunity to reaffirm a principle already stated in *Lesoochranarske zoskupenie VLK* in relation to the national courts: here the Court, whilst denying direct effect to Art. 9 par. 3, had prompted the national courts to interpret the national "*procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9*(*3*) *of the convention*".[88]

Finally, the communication contains some general observations as to the standing of environmental NGOs. This topic is a crucial one, it has been considered by the ACCC as well and it could possibly lead to some change in the EU courts' future case-law.

To better understand the issue, it might be useful to start from the previously mentioned Art. 263 par. 4 TFEU, according to which natural and legal persons can institute proceedings against an act addressed to that person or which is of direct and individual concern to them – where both the requisites are assessed through the *Plaumann* test,[89] and also against *regulatory acts* that are of direct concern for the person and do not require any further implementation measure.[90] Natural and legal persons are thus considered *non-privileged applicants* whose position (*locus standi*) differs from the one enjoyed by Member States

[87] Obviously, this interpretation would open to an actio popularis and this is also recognised in the Communication. On this topic see also the Background Paper issued by the Task Force on Access to Justice (established by the MoP during its first meeting, in 2002), in view of its eighth meeting, in June 2015: "*the Parties may not take the clause* '*where they meet the criteria*, *if any*, *laid down in its national law*' *as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act* [*sic*] *or omissions that contravene national law*. *Accordingly*, t*he phrase* '*the criteria*, *if any*, *laid down in its national law*' *indicates a self-restraint on the Parties not to set too strict criteria*. *Access to such procedures should thus be the presumption*, *not the exception*".

[88] "*The Court thus adopted different standards in the implementation of Article 9*(*3*) *of the Convention*, *one for Member States*' *courts in which access to courts must be granted*, *and one for itself barring access to justice*". See ClientEarth Communication, 23 February 2015, point 28.

[89] In the famous *Plaumann* case (C-25/62, *Plaumann & Co v Commission of the European Economic Community*, Judgment of 15 July 1963, ECLI:EU:C:1963:17) the Court defined the meaning of the two requisites, stating that an act is of individual concern if it affects the person as an individual (and not as a member of a group or category). An act is of direct concern whenever it does not require any implementation for its effects to produce. For a reconstruction of the theoretical framework behind the restrictive interpretation of the Court, see van Wolferen, Matthijs: The Limits of the CJEU's Interpretation of Locus Standi, A Theoretical Framework. *Journal of Contemporary European Research*, 12 (2016) 4, 914–930.

[90] It is widely acknowledged that Art. 263 TFEU, amending art. 230 TEC, extended the types of challengeable acts (formerly only *decisions* and *regulations*) and eliminated the requisite of the *individual concern* for regulatory acts, where the term *regulatory* refers to all general acts. This implies that natural and legal persons have standing even if the act is not addressed to them, as long as it is of direct concern and does not require any implementation measure. For what concerns the term *regulatory acts*, the Court of Justice (C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, Judgment of 3 October 2013, ECLI:EU:C:2013:625) held that they form a narrower category than the acts contained in the first part of art. 263 par. 4 TFEU, since the former do not include *legislative acts*.

and the EU institutions named in pars. 2 and 3 of Art. 263. These latter are *privileged applicants* in that they are not subject to the same restrictions.

Article 263 should be paired with Art. 277 TFEU, stating the possibility to institute proceedings, on the same grounds provided in Article 263, against the act of *general application* adopted by the EU institutions and bodies "*in order to invoke before the Court of Justice of the European Union the inapplicability of that act*".

The issue of the NGOs' standing is probably one of the most controversial ones in the context of the relationship between international and EU law. Despite the rules for access to justice for private (natural and legal) persons have become less restrictive (especially after the Lisbon Treaty) the framework of the standing resulting from the TFEU is still rather narrow and this narrowness constituted one of the most relevant arguments of the dispute examined here.

In many occasions the environmental NGOs have complained about the fact that if, on the one hand, the internal review of a general act is not admissible, then on the other access to judicial review is also precluded due to the requisites provided by art 263, par. 4 TFEU: for legal persons, 'direct and individual concern', or direct concern and no measures of implementation for regulatory acts.

The EU courts have always adopted a strict interpretation of the rule: in case T-312/14 concerning a Commission's action plan on Fisheries, for example, the General Court held that

> "*the condition that the decision forming the subject-matter of the proceedings must be of direct concern to a natural or legal person requires the disputed act to affect directly the applicant*'*s legal situation and leave no discretion to its addressees*, *who are entrusted with the task of implementing it*."[91]

If this is not the case, the applicant could only institute proceedings against an act which is of direct and individual concern where the latter requisite implies either personal qualities or circumstances specifically referred to the person.[92]

These rules also apply to the environmental NGOs for which no measure adopted from EU institutions in environmental matters could ever be of direct concern:

> "[*a*]*n EU institution's decision in an environmental matter does not restrict the rights of an environmental NGO nor does it impose obligation on them* (…). *The environment is a diffuse interest that is the concern of millions of people not of a* '*closed circle of people determined at the moment*' *of the adoption of a Commission*'*s decision*."[93]

In its reply, the Commission rejected most of the communicant's arguments. In the draft findings sent to the former, however, the ACCC seems to share the communicant's view expressing criticism both on the side of the *individuality* of a measure to be a reviewable

---

91 T-312/14, *Federcoopesca & Others v European Commission*, Judgment of 7 July 2015, ECLI:EU:T:2015:472 point 33 [*Federcoopesca* case]. See also T-37/04, *Região autónoma dos Açores v Council of the European Union*, Judgment of 1 July 2008, ECLI:EU:T:2008:236, where the Court held that a the fact that a regional authority is entitled to specific protection under Community law (i.e. the special position enjoyed by the outermost regions in art. 349 – former art. 299 – TFUE) is not sufficient to give it standing to bring proceedings for the purposes of the fourth paragraph (former art. 230) of art. 263.

92 *Federcoopesca* case, point 63. On this issue see also, T-262/10, *Microban International Ltd & Microban Europe Ltd v European Commission*, Judgment of 25 October 2011, ECLI:EU:T:2011:623.

93 See ClientEarth, Communication to the ACCC of 12 August 2015 – Update case T-312/14. 2. https://www.unece.org/fileadmin/DAM/env/pp/compliance/C200832/communication/frCommC32_judgement_24.07.2015.pdf (8.9.2018).

one – when no such restriction can be found in the Convention – and on the side of the NGOs standing, where a strict interpretation of Art. 236, par. 4 of the Treaty on the part of the judiciary leaves no room for a direct access to the Courts on their part.

Recommendations to the EU Commission by the ACCC followed, either to amend the Aarhus Regulation, rendering it more adherent to the Convention, or to suggest the judiciary a more flexible interpretation of the rules of standing for the environmental NGOs.[94]

IV.3. The EU Commission reply and following developments.

By the end of October 2016, the EU Commission sent its comments to the ACCC draft findings, contesting the Committee's conclusions on different perspectives. Beyond the specific replies to the complaints raised in the document, some preliminary, general considerations by the Commission on the peculiarities of the EU legal system are of great interest.

Firstly, the EU legal system cannot be compared with those of the national Parties (to which the Aarhus Convention is mainly directed) since the former does not share the same features with the others. The difference is clearly highlighted in the European Community Declaration made at the moment of signing the Convention and re-affirmed at the moment of its approval.

According to the Commission,

> "*the EU Declaration implies that the Union adhered to the Convention in full respect of all sources of international law*, *including*, *first of all*, *the EU Treaties. Any modification of the Aarhus Regulation or adoption of new implementing legislation can thus only take place within the boundaries and in full compliance with the institutional balance and the specific role conferred by the TFEU and TEU on each EU institution*, *including the CJEU in its jurisdictional role*, *and both the Parliament and the Council in their legislative functions*."[95]

An amendment to the Aarhus Regulation in potential contrast with the rules of standing established in the TFEU was therefore out of question. And an extension of the internal review mechanism to general acts could lead – in case of rejection of the request – to access to the judiciary regardless of the requisites provided by Art. 263, par. 4 TFEU.

However, on this point, the Commission's reply is not convincing, since Art. 12 of the Regulation, in providing access to the Court of Justice, expressly recalls the *accordance with the relevant provisions of the Treaty*. An amendment of the Treaty had, anyway, never been proposed by the ACCC.

For what concerns a possible amendment of Regulation's Art. 2 par. 1 (g), the Commission raises again an unconvincing argument, that is, there is no Convention's provision imposing a review of general acts "(…) *nor it is clear to which extent such a review can meaningfully take place for this particular category of acts*."[96]

---

[94] ACCC, Draft Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, points 117 and 118. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

[95] Comments by the European Commission, on behalf of the European Union, to the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32, point 21. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

[96] European Commission, Proposal for a Council decision on the position to be adopted, on behalf of the European

Secondly, the Commission fully rejects the idea that the jurisprudence and the way the Courts interpret the law can be "*modulated following compliance findings*. *Certainly*, *its case-law may evolve and become more comprehensive* (…). *However*, *any such development is decided by the Union judicature itself*".[97] In other words, the Commission could never suggest how to interpret the law to the courts, since this would not respect the principle of separation of powers. In the Commission's opinion, in the end, the ACCC's recommendation would raise a 'constitutional' issue. A negative vote by the EU representative on the document would result at the following Meeting of the Parties (MoP) which was held in September 2017.

The Council, however, adopted a somewhat *softer* position, stating the Union "*should explore ways and means to comply with the Aarhus Convention*" on the condition that the Committee's findings are amended eliminating any reference to 'making recommendations' to the Courts. According to the Council's position, the EU representatives proposed that the MoP did not – as it usually does – *endorse* the Committee's findings but *took note* of them with regard to the case.

Due to the opposition of a number of parties to the EU position,[98] consensus (the ordinary rule, in the spirit of the United Nations) on the adoption of the Committee's draft decision could not be reached. But as the MoP had to take a unanimous decision an agreement had to be found. It was eventually agreed that, this being an exceptional circumstance, the decision-making on case 32/2008, would be postponed to the next ordinary session to be held in 2021. However, the EU confirmed the will to explore solutions to grant compliance with the Convention and the MoP asked the ACCC to keep monitoring any further developments.

V. Concluding remarks

The next three years could actually give the EU a chance to find new ways for a substantial compliance with the Aarhus Convention, taking into account the ACCC proposals. At present, however, the chance of an amendment of Art. 2, par. 1 (g) of the Aarhus Regulation seems quite far off, being the relevant EU institutions unwilling to do it.

The second route, that is, a judicial interpretation which is more consistent with the Convention and therefore more flexible in applying the rules of Art. 263 of the Treaty, is apparently undesirable because any intervention of the executive on the judiciary would be in contrast with the separation of powers principle.

From a practical perspective, however, this second route could be the most feasible: the EU Courts can exercise wide interpretative action on the Treaties' provisions. If, on the one hand, the Court of Justice held that it could not state on the validity of Articles 10 and 2, par. 1 (g) of the Aarhus Regulation,[99] on the other hand, the same Court seems to

Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32. 5–6. https://www.unece.org/environmental-policy/conventions/public-participation/meetings-and-events/public-participation/2017/fifty-eighth-compliance-committee-meeting-under-the-aarhus-convention/doc.html. (10.9.2018).

[97] Comments by the European Commission, point 22.

[98] Namely, Norway, Switzerland, Georgia and Ukraine. A report of the positions of the Parties can be found in the Report of the Sixth session of the Meeting of the Parties, Budva, Montenegro, 11–13 September 2017. 13. https://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ece.mp.pp.2017.2_aec.pdf. (10.9.2018)

[99] See Schoukens, Hendrik: Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13

have moved towards an *interpretative solution*, where it held that the national courts had a *duty* to interpret, as far as possible, their domestic procedural rules in accordance to the objectives of the convention. This *recommendation* could actually work for the Court itself.[100]

So far, the EU judiciary has been reluctant to follow this direction. In the recent case *Mellifera eV*[101] the General Court held that the ACCC draft findings of March 2017 contained just a proposal and were issued after the contested decision had already been taken by the Commission. In any case, the conformity of EU legislation to international law cannot result in an interpretation of the latter which is *contra legem*:[102] the Aarhus Convention thus cannot serve as a pretext to interpret Art. 10 of the Aarhus regulation as referring to general acts.

On the applicants' side, however, new challenges seem to arise on the interpretation of Art. 263, par. 4, TFEU. In a recent application for annulment to the General Court, a group of people (thirty-six individuals and a youth organisation[103]) claim that EU legislation on greenhouse gas emissions is unlawful in that it fails to prevent climate change.[104] They argue, in particular, the inadequacy of the traditional interpretation (through the *Plaumann* test) of the *individual concern* criterion when legislation is challenged. This interpretation would "*lead to an obvious gap in judicial protection*" *and to the* "*intolerable paradox that the more serious the ham and thus the higher the number of affected persons is*, *the less legal protection is available*".[105] Moreover, in the Court of Justice's stringent interpretation of the standing for non-privileged applicants, a violation of right to an effective legal protection (Art. 47 of the EU Charter of Fundamental Rights) is envisaged.

January 2015: Kafka Revisited? In: *Utrecht Journal of International and European Law*, 31 (2015) 81, 46.

[100] The ACCC, in its Findings of 17 March 2017 (point 83) writes: "*the Committee regrets that despite its findings with respect to the national courts*, *the CJEU does not consider itself bound by this principle*". Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018). This is also an aspect of what is said to be the *Janus face* of the Court: "*very positive and affirming concerning legal challenges to administrative decision-making in national courts on the one hand*, *but very strict and of a rejecting nature when dealing with direct action on the other*". See Darpö, Jan: On the Bright Side (of the eu's Janus Face). The EU Commission's Notice on Access to Justice in Environmental Matters. *Journal for European Environmental & Planning Law*. 14 (2017) 3–4, 373–398.

[101] T-12/17, *Mellifera e.V.*, *Vereinigung für wesensgemäße Bienenhaltung v European Commission*, Judgment of 27 September 2018, ECLI:EU:T:2018:616. For a first comment on the case, see Berthier, Anaïs: Article 9(3) of the Aarhus Convention remains a dead letter in the European Union legal order. https://www.clientearth.org/article-93-of-the-aarhus-convention-remains-a-dead-letter-in-the-european-union-legal-order (27.12.2018).

[102] *Mellifera*, point 87.

[103] The applicants (families adversely affected by the climate change) are from different EU and non-EU countries. The litigation action has a dedicated website: https://peoplesclimatecase.caneurope.org where the applicants have published their pleadings. The action has been brought on 23 May 2018, T-330/18, *Carvalho and Others v Parliament and Council*.

[104] See Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814; Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No. 525/2013; Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision 529/2013/EU.

[105] Application for annulment pursuant to article 263 TFEU. https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf (27.12.2018).

It might be too early for an evaluation of the last MoP decision's effects on the EU jurisprudence and there is still room, in the forthcoming years, for a change. Some signals in this perspective might be found in the setting up, at the beginning of the present year, of an Environmental Compliance and Governance Forum,[106] a group of experts with the aim to

> "*assist the Commission in the coordination and monitoring of the implementation of the actions to improve environmental compliance and governance as well as in the preparation of legislative proposals or policy initiatives in the field of environmental compliance and governance*", *also in relation to* "*access to justice in environmental matters*".[107]

This seems, at the moment, the main way to guarantee, at the EU level, that conscious involvement of people in environmental protection that the Convention requires. An alternative route might involve the Member States (also Parties to the Convention), extending access to the EU judicature.[108]

The discussion of the next cases brought to the General Court will probably shed some light on the EU judiciary's intentions and possible new lines of interpretation of the legal standing in environmental matters.

References

Berthier, Anaïs: Article 9(3) of the Aarhus Convention remains a dead letter in the European Union legal order. https://www.clientearth.org/article-93-of-the-aarhus-convention-remains-a-dead-letter-in-the-european-union-legal-order (27.12.2018)

Caranta, Roberto: Environmental NGOs (eNGOs) or: Filling the Gap between the State and the Individual under the Aarhus Convention. In Caranta, Roberto – Gerbrandy, Anna – Müller, Bilun, *The Making of a New European Culture: the Aarhus Convention*, Europa Law Publishing, Groningen, 2018. 407–440

Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No.1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts.

Commission Decision of 18 January 2018, setting up a group of experts on environmental compliance and governance.

Commission Regulation No. 149/2008 (of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto.

Craig, Paul: *EU Administrative Law*, 3rd ed., Oxford University Press, Oxford, 2018.

Craig, Paul: *UK*, *European and Global Administrative Law*. *Foundation and Challenge*s, Cambridge University Press, Cambridge, 2015.

---

[106] See Commission Decision of 18 January 2018, in http://ec.europa.eu/environment/legal/pdf/C_2018_10_F1_COMMISSION_DECISION_EN_V13_P1_959398.pdf (30.12.2018)

[107] See Art. 2(a)(ii) of the Commission Decision of 18 January 2018.

[108] As suggested by Pánovics, Attila: Case ACCC/C/2008/32 and the Non-compliance of the EU with the Aarhus Convention. *Pécs Journal of International and European Law*, 6 (2017) 2, 18.

Darpö, Jan: On the Bright Side (of the EU's Janus Face). The EU Commission's Notice on Access to Justice in Environmental Matters. *Journal for European Environmental & Planning Law*, 14 (2017) 3 and 4. 373–398.

Directive (EC) No. 50/2008 of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

Directive (EC) No. 87/2003 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814.

Directive (EU) No. 75/2010 of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

Dolmans, Maurits J.F.M.: *Problems of Mixed Agreements: Division of Powers within the EEC and the Right of Third States*, Asser Instituut, The Hague, 1985.

Eeckhout, Piet: *External Relation of the European Union*, *Legal and Constitutional Foundations*, Oxford University Press, Oxford, 2004.

EU Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704.

Fasoli, Elena – McGlone, Alistair: The Non-Compliance Mechanism of the Aarhus Convention as a Soft Enforcement of International Law: Not So Soft After All!. *Netherlands International Law Review*, 65 (2018) 1. 27–53.

Fasoli, Elena: Apportioning the Obligations Arising Under the UNECE Aarhus Convention Between the EU and its MSs: the Real Scope of the 'Community Law in Force'. *Diritto Pubblico Comparato ed Europeo*, 20 (2018) 1. 177–198.

Granvik, Lena: Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness. In: Koskenniemi, Martti (ed.): *International Law Aspects of the European Union*, Kluwer, The Hague/London/Boston, 1998. 255–271.

Hedemann-Robinson, Martin: EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1 and Part 2. *European Energy and Environmental Law Review*, 23 (2014) 3 and 4. 102–114; 151–170.

Heliskoski, Joni: *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States*, Kluwer, The Hague/London/New York, 2001.

Heliskoski, Joni: The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements, in *Nordic Journal of International Law*, 69 (2000). 4. 395–412.

Hillion, Christophe – Koutrakos, Panos (eds.): *Mixed Agreements Revisited*, *The EU and its Member States in the World*, Hart Publishing, Oxford, 2010.

Hoops, Björn: The Interpretation of Mixed Agreements in the EU after Lesoochranárske zoskupenie, *Hanse Law Review*, 10 (2014) 1. 322.

Koutrakos, Panos: *EU International Relations Law*, Hart Publishing, Oxford/Portland, 2015.

Neframi, Eleftheria: Mixed Agreement as a Source of European Union Law. In: Cannizzaro, Enzo – Palchetti, Paolo – Wessel, Ramses A. (eds.): *International Law as Law of the European Union*, Martinus Nijhoff Publishers, Leiden, 2012. 325–349.

O'Keeffe, David – Schermers, Henry G. (eds.): *Mixed Agreements*, Kluwer, Deventer, 1983.

Pallemaerts, Marc: Access to Environmental Justice at EU Level: Has the 'Aarhus Regulation' Improved the Situation? In Pallemaerts, Marc (ed.), *The Aarhus Convention at Ten. Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Europa Law Publishing, Groningen, 2011. 273–312.

Pánovics, Attila: Case ACCC/C/2008/32 and the Non-compliance of the EU with the Aarhus Convention. *Pécs Journal of International and European Law*, 6 (2017) 2. 618.

Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

Regulation (EC) No. 1907/2006 of the European Parliament and the Council of 18 December 2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision 529/2013/EU.

Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No. 525/2013.

Rosas, Allan: Mixed Union – Mixed Agreements. In: Koskenniemi, Martti (ed.): *International Law Aspects of the European Union*, Kluwer, The Hague/London/Boston, 1998. 125–148.

Schoukens, Hendrik: Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited? In *Utrecht Journal of International and European Law*, 31 (2015) 81. 46–67.

Schwarze, Jürgen: *European Administrative Law*, 1st ed. revisited, Sweet & Maxwell, London, 2006.

UNECE – ACCC, Draft Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union: https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

van Wolferen, Matthijs: The Limits of the CJEU's Interpretation of Locus Standi, A Theoretical Framework. *Journal of Contemporary European Research*, 12 (2016) 4. 914–930.

Anna Piszcz*
Dr. hab., Professor of the University of Bialystok
Department of Public Economic Law, Faculty of Law
University of Białystok
piszcz@uwb.edu.pl

PUBLICISATION AS THE TRANSFER OF COMPETENCES FROM CIVIL JUSTICE TO PUBLIC ADMINISTRATION: AN ATTEMPT OF CLASSIFICATION AND RECENT EXAMPLES FROM POLAND**

I. Introductory remarks

Taking on themes such as the prohibition of unfair trading business-to-business practices, the abstract control of standard forms of agreements concluded with consumers and the prohibition of anti-consumer practices, this paper shows the phenomenon of the publicisation of some civil (private) matters as the transfer of competences from civil justice to public administration in Poland. The publicisation of civil matters does not seem a unique phenomenon that does not exist in the other EU countries; to the contrary, from time to time various national legislatures decide to '*publicise*' a given category of civil matters for various reasons. However, in Poland it happened to a few categories of civil matters within a quite short period of time and, as such, made me reflect on whether perhaps it is already a tendency (trend) regarding the relationship between private and public enforcement of law. The division of law enforcement into private enforcement and public enforcement should be a point of departure for further considerations. This division follows the *Ulpian*'s (who was a jurist in ancient Rome) division of law into two fundamental branches: private law (relating to the interest of individuals) and public law.[1] The border between them does not seem as clear as it used to be, since contemporary commentators identify phenomena such as privatisation of public law and publicisation of private law.[2] Private enforcement of law is carried out under private (civil) law and one can realise the crucial role of civil

* ORCID 0000-0001-7163-3292.

** This paper is to large extent re-printed in International and Comparative Law Review (2019) under the title "Attempt of Classification of the Publicisation of Civil Matters Based on Recent Examples from Poland". The paper was presented, first, at the Pázmány Péter Catholic University on 01.06.2018 and, second, at the University of Szeged on 25.09.2018.

[1] For example, see: Watson, Alan: *The State, Law, and Religion: Pagan Rome*. University of Georgia Press, Athens and London, 1992. 2129.

[2] Among others, Michelon, Claudio: The Public, the Private, and the Law. In: Mac Amhlaigh, Cormac – Michelon, Claudio – Walker, Neil (eds): *After Public Law*. Oxford University Press, Oxford, 2013. 83–100; Helios, Joanna: Publicyzacja prawa prywatnego – prywatyzacja prawa publicznego w kontekście rozważań nad prawem europejskim [Publicisation of private law – privatisation of public law in the context of considerations on European law]. *Przegląd Prawa i Administracji*, 92 (2013) 11 36.

courts therein. Public enforcement of law is carried out by other authorities. For a given category of legal provisions, it may be decided by national laws that they are enforced both privately and publicly (*dual system*) or only in one way (*non-dual system*). Dual systems seem particularly challenging. On one hand, they may bring more efficiency into the law enforcement but, on the other hand, there are particular needs inherent in them, such as the need for effective interaction of private enforcement and public enforcement as well as for their coordination in a coherent manner.[3]

Four interrelated questions need to be asked here. The first is conceptual: what is publicisation and how can it be classified? For the purposes of this paper the publicisation shall be understood as the introduction of public enforcement for matters that so far have been enforced (or have been able to be enforced) privately. In practice one can observe the following categories of the publicisation:

1.) *de iure* publicisation (statutory publicisation), that is the introduction of legal bases for public enforcement by legislature for matters that so far have been enforced privately or have been able to be enforced privately (legal bases for private enforcement have already existed) – as such it can be divided into:
    a) publicisation *largo sensu*,
    b) publicisation *stricto sensu* (de-privatisation), and
2.) *de facto* publicisation.

The second question is an abstract normative question: what can be regarded as examples of the publicisation (its proposed categories) against the background of the current Polish legislation and the practice observed? Each of the three main parts of the paper shall present one example of each type of the publicisation. They are related to phenomena occurring with regard to the prohibition of unfair trading business-to-business practices, the abstract control of standard forms of agreements concluded with consumers and the prohibition of anti-consumer practices.

These two questions are instrumental and ancillary to the next two question. That is to say, they respectively provide the analytical and evaluative frameworks on the basis of which a concrete description and a concrete assessment will be done.

The third question is purely descriptive: what are the features of each of recent phenomena employed in this paper as examples of the publicisation (including whether there are growing numbers of decisions taken in each category outlined in the paper)?

The fourth question, finally, is a contextualised question: how the discussed phenomena can be assessed taking into account, among others, what their introduction is driven by.

Not coincidentally, each of the three examples is related to the Polish competition authority, that is the President of the Office of Competition and Consumer Protection.[4] It was the development of the UOKiK President's competences that inspired the contents and title for this paper.

---

[3] For example, see: Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014. 119.

[4] In Polish: *Prezes Urzędu Ochrony Konkurencji i Konsumentów* [UOKiK President]

II. Publicisation *largo sensu*

In brief, publicisation *largo sensu* may be understood as *adding* legal bases for public enforcement of given provisions by the legislature *to already existing* legal bases for their private enforcement. This puts the *dual model* of enforcement into force. The assumption which has to be made here is that there have been no legal bases for public enforcement of these provisions directly prior to the introduction of these new legal bases, so such publicisation equals to *regulation* or *re-regulation* (after a period of the lack of regulation) of a given category of matters.

There has been a key example of this phenomenon in Poland in recent years at which one may look for the purposes of this analysis. The prohibition of the unfair abuse of bargaining power (unfair trading practices, UTPs) between entrepreneurs in business-to-business food supply chains, that previously could have been enforced only before civil courts (but in fact it hardly was, so this paper does not discuss the issue of the practical application of its private enforcement), from 12th July 2017 may be combatted – in addition or alternatively – in administrative proceedings conducted on the basis of a new statute, i.e. 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products.[5] Pretty coincidentally, the adoption of the Polish statute was followed by the EU development in the field, i.e. the draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain[6] that was published on 12th April 2018.[7]

The public enforcement of the UTPs' prohibition is currently tested by the Polish enforcement authority. It is now nearly October 2018, and not much has been heard: the latest update is that only one "pilot" case has been concluded with a decision that was adopted on 5th March 2018[8] and over twenty new proceedings are pending.[9] In 2018, inspections at 77 purchasing centres and processing plants have led to only four proceedings initiated by the enforcement authority (around 5 per cent).[10]

---

[5] Act of 15.12.2016 on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. Journal of Laws of the Republic of Poland 2017, item 67 as amended.

[6] Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, 2018/0082 (COD).

[7] In the "Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain" of 29.01.2016, the Commission concluded that at this stage there was no need for EU legislative measures in the field of unfair trading practices (as if there was a possibility the markets would "sort itself out" naturally through the normal market forces) and, consequently, regulatory initiatives in the discussed field were left to Member States. However, within one year from the publication of the Commission's report, the European Parliament (resolution of 07.06.2016 on unfair trading practices in the food supply chain, No. P8_TA(2016)0250), the European Economic and Social Committee (opinion of 30.09.2016 on report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, No. NAT/680) and the Council (conclusions of 12.12.2016 on strengthening the position of farmers in the food supply chain and tackling unfair trading practices, No. 15508/16) all called for actions to be taken at the EU level.

[8] Decision of 05.03.2018, No. RBG-3/2018. In Polish at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf (17.12.2018)

[9] UOKiK, UOKiK dla rolnictwa – każdy sygnał od rolnika jest ważny [UOKiK for agriculture – every signal from a farmer is important]. In Polish at: https://uokik.gov.pl/aktualnosci.php?news_id=14634&news_page=2 (17.12.2018)

[10] UOKiK, Fruit market – UOKiK diagnosis. In English at: https://uokik.gov.pl/news.php?news_id=15031b (17.12.2018)

In order to probe on reasons of the adoption of the Act, it is necessary to analyse the explanatory notes[11] accompanying the draft Act and performing a largely justificatory function. Judging from this document, inefficiency of private enforcement was one of the main reasons for the *largo sensu* publicisation. Provisions of the 1993 Act on Combating Unfair Competition,[12] to the extent that they cover the unfair use of superior bargaining power, have been, *de facto*, considered difficult to enforce and ultimately ineffective. Weaker parties to commercial transactions have often been afraid of retaliation and/or compromising an existing commercial relationship with the stronger party (the so-called "fear factor").[13] Owing to this, they have not been willing to seek redress before a court of civil law even till the end of the relationship. This has not translated into a lack of such civil cases, since from time to time, after the termination of the relationship, the weaker party has indeed pursued a so-called "divorce case" and sought redress (even though in practice civil proceedings might have been long-lasting and expensive).[14]

Under the 2016 Act administrative proceedings are initiated by the enforcement authority *ex officio*.[15] In fact, it means that, due to limited resources of the enforcement authority, less troublesome practices have to be sifted out and the other practices have to be selected for more detailed investigation from the entire cross-section of practices. What the authority can also do in investigated cases is the imposition of fines of up to 3% of annual turnover of the infringer.[16] The provisions providing for the high statutory maximum of fines offer an opportunity to reflect upon whether or not under the new status quo a fiscal function is performed by public law provisions. There are not sufficient sources, however, to effectively examine a phenomenon from this perspective, since – as it has been mentioned – there has been only one decision of the enforcement authority so far and it has not imposed any fine on the alleged infringer (commitment decision). It is difficult (if not impossible) to figure this challenging conundrum out due to a general lack of experience of the enforcement authority.

The efficiency of the new legal framework might have been significantly affected by the scope of the legislation. In its first version, the 2016 Act provided for the narrow jurisdiction *ratione personae*. The jurisdiction relied on quite high turnover thresholds intended to minimise the risk of less significant matters being caught by the administrative proceedings. As a result, the majority of small entrepreneurs such as farmers might have been left without protection. Second, pursuant to the very complex statutory definition, the superior bargaining power was determined by various factors (not limited to significant

[11] Sejm Rzeczypospolitej Polskiej, Druk nr 790. Rządowy projekt ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi [Print No. 790. Governmental dratf Act on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. In Polish available at: http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=790 (17.12.2018).

[12] Act of 16.04.1993 on Combating Unfair Competition, consolidated text Journal of Laws of the Republic of Poland 2018, item 419.

[13] Explanatory Memorandum to the draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (note 6), 2, 5 –6, 10.

[14] Piszcz, Anna: The EU 2018 Draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. *Yearbook of Antitrust and Regulatory Studies*, 11 (2018) 17, 149.

[15] Article 10 of the 2016 Act.

[16] Article 33 of the 2016 Act.

disparities between the parties' economic potentials), including the lack of sufficient and actual opportunities to sell or buy products. Third, the enforcement authority cannot act by way of complaints, but a notification of suspicion that prohibited practices have taken place may be filed to the UOKiK President. However, only an alleged victim of an infringement was able to do so in writing. Moreover, it was not clearly stated in the 2016 Act that both the identity of such a victim and the notification were kept secret by the enforcement authority. Consequently, the question has arisen as to what could be done to make the 2016 Act play a key role in protection against UTPs. With the 2018 Amendment Act,[17] the most inefficient solutions have been changed as of 11 December 2018, even though the majority of previous provisions have been maintained. However, the scope *ratione personae* of the 2016 Act has been broadened and the concept of superior bargaining power has been simplified. As now everybody is able to notify the authority of their suspicions in any form and there is an explicit legal basis for their data protection, the new solutions may contribute to the enforcement efficiency measured with the number of initiated proceedings. As a result, it seems there are some prospects for improved efficiency of enforcement of the prohibition of UTPs.

III. Publicisation *stricto sensu*

The publicisation *stricto sensu* of civil matters is understood as their *de-privatisation*, i.e. *moving them by the legislature from civil proceedings to administrative proceedings*. Here, the abstract control of standard forms of agreements concluded with consumers – that used to be a competence of a civil court, i.e. the Regional Court of Warsaw XVII Division called Court of Competition and Consumer Protection – will be reviewed concisely as an example of the publicisation *stricto sensu*.[18] One of the assumptions which have to be made here is that there have been legal bases (in Civil Procedure Code[19]) for private enforcement of given provisions beforehand, regardless of the range and quality of their application. Then, in place of them the legal bases for public enforcement have been introduced. This new model shows features of the *non-dual model*.

The new provisions were added to 2007 Act on Competition and Consumer Protection[20] on 17 April 2016[21] and have not been further refined. With the new legislation, the administrative proceedings initiated *ex officio* by the UOKiK President have been introduced instead of private enforcement.[22] The fact that the new legislation does not give the right

[17] Act of 4.10.2018 Amending the Act on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. Journal of Laws of the Republic of Poland 2018, item 2203.

[18] The introduction into domestic legal systems of rules that enable control of terms used in contracts concluded with consumers by sellers or suppliers is required by Council Directive 93/13/EEC of 05.04.1993 on unfair terms in consumer contracts, OJ L 95, 21.04.1993. 2934.

[19] Act of 17.11.1964 – the Civil Procedure Code, consolidated text: Journal of Laws of the Republic of Poland 2018, item 1360 as amended.

[20] Act of 16.02.2007 on Competition and Consumer Protection, consolidated text Journal of Laws of the Republic of Poland 2017, item 229 as amended.

[21] Act of 5.08.2015 Amending the Act on Competition and Consumer Protection and Some Other Acts, Journal of Laws of the Republic of Poland 2015, item 1634.

[22] Article 49 sec 1 of the 2007 Act.

to initiate abstract control proceedings (and to be the party to those proceedings) to any other entity constitutes a major change – raising concerns related to the right to a fair trial – in comparison to the previous court proceedings model, where a lawsuit brought by an authorized entity initiated the civil proceedings.[23]

As for decisions adopted under the new provisions there must be emphasised that in the quite short period of their application there have not been plenty of decisions issued. The number of them is only nine for around 2.5 years.[24] And, characteristically, the first decision was adopted by the authority on 5 June 2017, that is more than one year after the entry of the new provisions into force.

The main reason behind the new legislation was the flood of actions that the only competent Polish court suffered from. Those civil cases were free of court registration fees. On the other hand, a winning party represented by a professional lawyer (an advocate or an attorney-at-law) could have received the costs of legal aid resulting from the tariffs provided for by law[25] and not from the actual expenditure. This resulted in cost pathologies. The consumer organisations being in fact "factories" of such actions appeared in Poland; they used to copy the same template of an action regarding the same clauses from the same standard form of agreements concluded with different, numerous consumers in order to win as much lawyers' fees "reimbursement" from the infringer as possible at a very low "price". The information announced by the Ministry of Justice every year[26] (based on data available from the court) makes it clear that from 2008 to 2013 the number of filed actions was growing very fast; the information shows its increase in 2008–2010 from 325 to as many as 3,909 actions and the further growth to 41,016 actions in 2013. It was reduced for the first time in 2014 to 3,109 actions, thanks to a reduction in lawyers' fees in those proceedings, which took place in 2013[27] and, in figures released recently, the number of actions amounted to 1,859 in 2016. One can realise, first, so much of civil justice for so little money (no court registration fee!) and, second, making money on the reimbursement of lawyers' fees at which actions from the "factories" were aimed. So, the main reason behind the change was inefficiency too, like in the first example shown in the part II of

[23] See also Korycińska-Rządca, Paulina: Review of the New Polish Model of Abstract Control of Standard Forms of Agreements Concluded with Consumers. *Yearbook of Antitrust and Regulatory Studies*, 9 (2016) 14, 253.

[24] UOKiK. Decyzje Prezesa UOKiK [Decisions of the UOKiK President]. In Polish at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf (17.12.2018)

[25] The Ordinance of the Minister of Justice of 22.10.2015 on legal advisors' fees, consolidated text Journal of Laws of the Republic of Poland 2018, item 265; and the Ordinance of the Minister of Justice of 22.10.2015 on advocates' fees, Journal of Laws of the Republic of Poland 2015, item 180.

[26] Ministerstwo Sprawiedliwości, Tabl. I. Ewidencja spraw według działów prawa w sądach powszechnych w 2015 i 2016 roku [Table I. Records of cases per law branches in ordinary courts in 2015 and 2016]. http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2016/download,3369,4.html (17.12.2018); Ministerstwo Sprawiedliwości, Tablice statystyczne z ewidencji spraw i orzecznictwa w sądach powszechnych oraz więziennictwie w 2014 r. [Statistical tables from the register of cases and case-law in ordinary courts and prisons in 2014]. http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2014/download,2834,10.html (17.12.2018); Ministerstwo Sprawiedliwości, Ewidencja spraw z zakresu ochrony konkurencji, regulacji energetyki, telekomunikacji i transportu kolejowego w sądach okręgowych w latach 2008–2012 [Records of cases regarding competition protection, energy regulation, telecommunications and rail transport in regional courts in 2008–2012]. http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2577,5.html (17.12.2018).

[27] Korycińska-Rządca, 2016. 263.

this paper. The details on how that inefficiency looked like were, however, different. The most basic difference was that in the first example private actions had been quite rare and here, to the contrary, the right to trial before the civil court had been significantly abused.

Under the new legislation, the enforcement authority has the possibility to impose fines of up to 10% of the infringer's annual turnover on the infringer. Again, a look at whether this provision performs or is to perform a fiscal function can be taken. Interestingly, fines for the usage of prohibited clauses in standard forms of agreements have been imposed on entrepreneurs in four out of nine cases. They amounted to around thousand Euro,[28] over 40 thousand Euro[29] and over 1,300 thousand Eur.[30] It must be explained that their amounts were dependant on a given entrepreneur (its turnover) and the gravity of practices in question. The legal bases for public enforcement have been in force with regard to the discussed type of practices for only around 2.5 years now and, so far, the system has not shown any sign of considerable severity of fines confirming their fiscal function.

In general, however, it may be that improving the efficiency of the enforcement does not need severe fines, but it begins with the very assumption that, as a rule, the UOKiK President's decision may combine the prohibition of the use of a clause at issue and the imposition of a fine. It is a new design different from that of the provision binding earlier which has not been maintained. Before the amendment, the clause prohibited by the Court of Competition and Consumer Protection was entered into a special register and the UOKiK President was able to impose a fine only on an entrepreneur who afterwards applied the clause present in the register. So, the UOKiK needed to prove that the clause at issue had been applied after its introduction into the register. The new solution is designed in a way which supports the aim of prevention to a larger extent.

Second, the UOKiK President initiates proceedings only on his own initiative (not on a complaint) which contributes to efficiency and overall performance significantly. The Court has needed to handle each filed statement of claim in proceedings, whereas cases do not come to the UOKiK President via such a route and he exercises his discretion to determine that the initiation of proceedings is or is not appropriate for particular clauses. Each of these features seems to be designed to reduce costs and improve efficiency.

IV. *De facto* publicisation

The categories of publicisation range from the statutory publicisation – either *largo sensu* or *stricto sensu* – to the *de facto* publicisation that appeared in Poland in consumer matters. Anti-consumer practices may be combatted both before civil courts and in administrative proceedings (in this last case – anti-consumer collective practices regulated by the 2007 Act on Competition and Consumer Protection). The existing *dual* system is a concoction of private enforcement and public enforcement. In fact, however, when those two elements provided for in the legal provisions come together, it does not result in an efficient system of enforcement. There are not many civil cases regarding unfair B2C practices; empowered persons are usually passive even though it results in that consumers remain uncompensated

[28] Decision of 22.12.2017, No. RBG-8/2017 and decision of 22.12.2017, No. RBG-9/2017.

[29] Decision of 28.12.2017, No. RŁO-9/2017.

[30] Decision of 12.12.2017, No. RWR-10/2017.

(or at least undercompensated). However, during some administrative proceedings (initiated *ex officio*[31]) the UOKiK President as a competent enforcement authority tends to oblige an entrepreneur to offer to individual consumers the so-called *public compensation* (within a broader and quite imprecise competence to impose obligations on entrepreneurs[32]). By this, in fact the administrative authority is a "mixed bag" of regulatory competences and adjudicative function in its private (civil) sense.

The notion of the public compensation and the new practice of the Polish competition and consumer protection authority appeared in 2015.[33] Again, one of the reasons for this new decision-making practice has been inefficiency of private enforcement that could be seen in particular in the passivity of consumers. Another prominent reason openly discussed in the UOKiK has been the repeated relaxation of imposed fines by the Court of Competition and Consumer Protection as a specialized court of the first instance dealing with appeals from the UOKiK President's decisions and the Court of Appeals of Warsaw as a court of the second instance.[34] Whatever the reasons of those reductions were, they have been an important incentive for the UOKiK President, on the one hand, to modify the fining policy, and on the other hand, to look for other instruments aimed at the sustained elimination of anti-consumer practices. The public compensation has been employed by the UOKiK President as such an instrument used in commitment decisions and/or in infringement decisions without fines or combined with lower fines. If the public compensation implies a lower fine (or no fine at all), then it is unlikely to perform a fiscal function. However, it is believed by the UOKiK President that the public compensation, either alone or in combination with a fine, fulfils a repressive function (as it requires the infringer to bear financial burden of practices), but also makes consumers to benefit directly from the UOKiK President's proceedings.[35]

From 2015 until the end of September 2018 there have been at least 38 decisions of the UOKiK President providing for public compensation (including 31 commitment decisions, three infringement decisions without fines and four decisions with fines of various amounts[36]). To consumers such decisions mean they will be compensated and will not need to go – for

---

[31] Article 49 sec 1 of the 2007 Act.

[32] Article 26 sec 2 and Article 27 sec 4 of the 2007 Act. In the case of commitment decisions see Article 28 of the 2007 Act.

[33] See UOKiK, Public compensation in UOKiK's decisions, https://uokik.gov.pl/news.php?news_id=12159 (17.12.2018)

[34] UOKiK, Rekompensata publiczna w orzecznictwie UOKiK [Public compensation in the UOKiK President's case-law]. In Polish at https://www.uokik.gov.pl/aktualnosci.php?news_id=12156 (17.12.2018). On reductions see e.g. Bernatt, Maciej: Czy Polska oferuje więcej niż wymaga Konwencja? O konwencyjnym wymogu pełnej jurysdykcji i polskim modelu sądowej kontroli kar nakładanych przez Prezesa UOKiK [Does Poland offer more than the Convention requires? On the conventional requirement of full jurisdiction and the Polish model of judicial control of fines imposed by the UOKiK President]. In: Jasiński, Wojciech (ed). *Między prawem administracyjnym a prawem karnym. Standardy rzetelności postępowania w sprawach ochrony konkurencji i konsumentów* [Between administrative law and criminal law. Standards of fairness of proceedings in cases of competition and consumer protection]. Wolters Kluwer, Warszawa, 2016. 131153.

[35] See note 30.

[36] Decision of 30.12.2015, No. DDK-28/2015, *T-Mobile*, over 1 million Euro; decision of 30.12.2015, No. DDK-30/2015, *Multimedia Polska*, over 1.1 million Euro; decision of 29.07.2016, No. RBG-5/2016, *UPC Polska*, over 190 thousand Euro; decision of 30.12.2016, No. DDK-26/2016, *Orange Polska*, over 6.6 million Euro. Due to public compensation those fines were reduced by 25 to even 90 per cent.

this purpose – to civil courts, either individually or in group proceedings.[37] In the UOKiK President's view, a decision providing for public compensation not only has an effect for the future (consumers will not be exposed to an anti-consumer practice and will no longer suffer harm), but also acts "retroactively", thereby leading to direct compensation of the consumers' harm suffered so far.[38] The UOKiK Vice-President said to media that public compensation made consumers benefit directly from administrative decisions.[39] There is something to it, though, as e.g. subscribers to T-Mobile network will readily agree, as one of the UOKiK President's decisions required T-Mobile to pay customers PLN 65 (EUR 14,5) for informing them unduly that it was raising monthly subscription charges for cell phones by PLN 5 (EUR 1,1).[40] In the absence of this decision, if the service provider did not agree for consensual means of the dispute resolution (settlements), for many of those subscribers the pursuit of actions claiming from the service provider to pay PLN 65 would not have any chance to happen because of many various reasons including the small amount of claim, the time and knowledge needed to conduct the case on their own and costs that would need to be paid to a lawyer in case of professional representation. Thus, the public compensation may be viewed as the gateway to compensation in the case of small dispersed claims of consumers.

Polish commentators' concerns related to the public compensation are all about its nature.[41] This remedy as a new additional element of administrative decisions is considered to be getting closer to fines, whereas civil (and not administrative) proceedings have always been the right means to obtain compensation by consumers.[42] That is why in mid-2018 the Polish government criticised[43] Article 6(1) of a draft directive of the European Parliament and of the Council on representative actions for the protection of the collective interests

---

37 On Polish group proceedings see e.g. Piszcz, Anna: Has class-action culture already hit Poland? In: Etel, Maciej – Kraśnicka, Izabela – Piszcz, Anna (eds). *Court Culture – Conciliation Culture or Litigation Culture*? Temida2, Białystok, 2014. 147.

38 See: Informacja Prezesa UOKiK o działaniach służących wzmocnieniu ochrony konsumentów, jednocześnie wpisujących się w realizację „Polityki ochrony konkurencji i konsumentów" [Information from the UOKiK President on measures to strengthen consumer protection, at the same time entering into the enforcement of the "Competition and consumer protection policy"] 9., in Polish at: http://orka2.sejm.gov.pl/INT8.nsf/klucz/283B8401/ % 24FILE / z03345-o1.pdf (17.12.2018.)

39 Public compensation in UOKiK´s decisions. https://www.uokik.gov.pl/news.php?news_id=12159 (17.12.2018.)

40 See decision of 30.12.2015, No. DDK-28/2015; in Polish at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf (17.12.2018.). The decision is being proceeded by the Court of Competition and Consumer Protection to which it was appealed by the party. The service provider's misstep came at a price also in the other way, as the authority also fined the provider PLN 4,5 million (EUR 1,01 million).

41 See, Sieradzka, Małgorzata: Rekompensata publiczna a inne środki usunięcia trwających skutków naruszenia zbiorowych interesów konsumentów [Public compensation against the background of other means of the elimination of lasting effects of the infringement of collective consumer interests]. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 6 (2018) 7, 83 et seq.

42 See note 38.

43 On this criticism see Sejm Rzeczypospolitej Polskiej, Opinia w sprawie wniosku dotyczącego dyrektywy Parlamentu Europejskiego i Rady w sprawie powództw przedstawicielskich w celu ochrony zbiorowych interesów konsumentów i uchylającej dyrektywę 2009/22/WE (COM(2018) 184 final) [Opinion on the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018) 184 final)]. In Polish at: orka.sejm.gov.pl/SUE8.nsf/Pliki-zal/1124-18.rtf/%24File/1124-18.rtf (17.12.2018.)

of consumers, and repealing Directive 2009/22/EC[44] providing for a redress order issued also by administrative authorities. It is believed by the government that the proposed procedure cannot replace group proceedings. Furthermore, in their opinion draft provisions providing for the combination of injunctions and collective redress in respect of civil claims are doubtful, since such combination is unacceptable under the Polish legal system where civil claims can be resolved only by courts. The government did not manage to see that this system already operates quite efficiently in the case of decisions issued by the UOKiK President (the central governmental authority). Some UOKiK President's decisions providing for public compensation have been appealed to the Court of Competition and Consumer Protection. It remains to look ahead to what approach to the UOKiK President's new decision-making practice will be taken by the courts of the first and second instance (and eventually the Supreme Court).

V. Concluding remarks

On the one hand, those three examples of the publicisation show that this phenomenon has been driven by efficiency reasons in all of them, and even though the effect is nevertheless small now, it can reasonably be expected that the publicisation will lead to a better law enforcement. The first and third examples are direct instances of the "helpful hand" addressed to weaker injured parties. In the third example the context of the administration of justice plays an important role. Additionally, in this case the de-privatization allows for being fair in procedures even vis-à-vis those (allegedly) unfair. Not only does this mean the de-privatization can offer the elimination of case backlogs, but it is also able to block the previously existing cost pathologies. Moreover, no real signs of fiscal functions of the publicisation have been seen so far (in particular in the first example where there have been no fining decisions yet and in the third example where the public compensation has been combined with lower fines or there have been no fines at all) but it must be remembered that more practice is needed to gain complete information in this regard and draw conclusions.

On the other hand, the publicisation continues to raise concerns. The second example may lead to the question of whether the right to a fair trial is or not unduly restricted in the case of the de-privatization understood as the elimination of legal bases for private enforcement and replacing them with legal bases for public enforcement in administrative proceedings which are initiated only *ex officio*. The third example conveys the exciting potential of the innovative approach for including the public compensation in administrative decisions; however, it is accompanied by concerns around whether the resolution of civil claims can be deployed to private or public enforcement, wherever decision-makers consider it more seamless and cost-effective.

It may be that we will see even more successful examples of the publicisation of civil matters. There should be, however, not only a growing emphasis on regulatory impact assessments essential to the policy-making in particular from the perspective of cost-

[44] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final – 2018/089 (COD).

efficiency, but also on the compatibility of new solutions with fundamental rights and principles.

References

Act of 15.12.2016 on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. Journal of Laws of the Republic of Poland 2017, item 67 as amended.

Act of 16.02.2007 on Competition and Consumer Protection, consolidated text Journal of Laws of the Republic of Poland 2017, item 229 as amended.

Act of 16.04.1993 on Combating Unfair Competition, consolidated text Journal of Laws of the Republic of Poland 2018, item 419.

Act of 17.11.1964 – the Civil Procedure Code, consolidated text: Journal of Laws of the Republic of Poland 2018, item 1360 as amended.

Act of 4.10.2018 Amending the Act on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. Journal of Laws of the Republic of Poland 2018, item 2203.

Act of 5.08.2015 Amending the Act on Competition and Consumer Protection and Some Other Acts, Journal of Laws of the Republic of Poland 2015, item 1634.

Bernatt, Maciej: Czy Polska oferuje więcej niż wymaga Konwencja? O konwencyjnym wymogu pełnej jurysdykcji i polskim modelu sądowej kontroli kar nakładanych przez Prezesa UOKiK [Does Poland offer more than the Convention requires? On the conventional requirement of full jurisdiction and the Polish model of judicial control of fines imposed by the UOKiK President]. In: Jasiński, Wojciech (ed). *Między prawem administracyjnym a prawem karnym. Standardy rzetelności postępowania w sprawach ochrony konkurencji i konsumentów* [Between administrative law and criminal law. Standards of fairness of proceedings in cases of competition and consumer protection]. Wolters Kluwer, Warszawa, 2016. 131–153.

Conclusions of the Council of 12.12.2016 on strengthening the position of farmers in the food supply chain and tackling unfair trading practices, No. 15508/16.

Council Directive 93/13/EEC of 05.04.1993 on unfair terms in consumer contracts, OJ L 95, 21.04.1993. 29–34.

Decision of UOKiK President of 05.03.2018, No. RBG-3/2018.

Decision of UOKiK President of 12.12.2017, No. RWR-10/2017.

Decision of UOKiK President of 22.12.2017, No. RBG-8/2017.

Decision of UOKiK President of 22.12.2017, No. RBG-9/2017.

Decision of UOKiK President of 28.12.2017, No. RŁO-9/2017.

Decision of UOKiK President of 29.07.2016, No. RBG-5/2016.

Decision of UOKiK President of 30.12.2015, No. DDK-28/2015.

Decision of UOKiK President of 30.12.2015, No. DDK-30/2015.

Decision of UOKiK President of 30.12.2016, No. DDK-26/2016.

Directive 2014/104/EU of the European Parliament and of the Council of 26.11.2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014. 119.

Explanatory Memorandum to the draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain.

Helios, Joanna: Publicyzacja prawa prywatnego – prywatyzacja prawa publicznego w kontekście rozważań nad prawem europejskim [Publicisation of private law – privatisation of public law in the context of considerations on European law]. *Przegląd Prawa i Administracji*, 92 (2013). 11–36.

Informacja Prezesa UOKiK o działaniach służących wzmocnieniu ochrony konsumentów, jednocześnie wpisujących się w realizację „Polityki ochrony konkurencji i konsumentów" [Information from the UOKiK President on measures to strengthen consumer protection, at the same time entering into the enforcement of the "Competition and consumer protection policy"] 9., in Polish at: http://orka2.sejm.gov.pl/INT8.nsf/klucz/283B8401/ % 24FILE / z03345-o1.pdf (17.12.2018)

Korycińska-Rządca, Paulina: Review of the New Polish Model of Abstract Control of Standard Forms of Agreements Concluded with Consumers. *Yearbook of Antitrust and Regulatory Studies*, 9 (2016) 14. 247–264.

Michelon, Claudio: The Public, the Private, and the Law. In: Mac Amhlaigh, Cormac – Michelon, Claudio – Walker, Neil (eds). *After Public Law*. Oxford University Press, Oxford, 2013. 83–102.

Ministerstwo Sprawiedliwości: Ewidencja spraw z zakresu ochrony konkurencji, regulacji energetyki, telekomunikacji i transportu kolejowego w sądach okręgowych w latach 2008–2012 [Records of cases regarding competition protection, energy regulation, telecommunications and rail transport in regional courts in 2008–2012]. http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2577,5.html (17.12.2018)

Ministerstwo Sprawiedliwości: Tabl. I. Ewidencja spraw według działów prawa w sądach powszechnych w 2015 i 2016 roku [Table I. Records of cases per law branches in ordinary courts in 2015 and 2016]. http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2016/download,3369,4.html. (17.12.2018)

Ministerstwo Sprawiedliwości: Tablice statystyczne z ewidencji spraw i orzecznictwa w sądach powszechnych oraz więziennictwie w 2014 r. [Statistical tables from the register of cases and case-law in ordinary courts and prisons in 2014]. http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2014/download,2834,10.html (17.12.2018)

Opinion of European Economic and Social Committee of 30.09.2016 on report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, No. NAT/680.

Ordinance of the Minister of Justice of 22.10.2015 on advocates' fees, Journal of Laws of the Republic of Poland 2015, item 180.

Ordinance of the Minister of Justice of 22.10.2015 on legal advisors' fees, consolidated text Journal of Laws of the Republic of Poland 2018, item 265.

Piszcz, Anna: Has class-action culture already hit Poland? In: Etel, Maciej – Kraśnicka, Izabela – Piszcz, Anna (eds). *Court Culture – Conciliation Culture or Litigation Culture*? Temida2, Białystok, 2014. 137–147.

Piszcz, Anna: The EU 2018 Draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. *Yearbook of Antitrust and Regulatory Studies*, Vol. 11(17), 11 (2018) 17. 143–167.

Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final – 2018/089 (COD).

Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, 2018/0082 (COD).

Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain of 29.01.2016.

Resolution of European Parliament of 07.06.2016 on unfair trading practices in the food supply chain, No. P8_TA(2016)0250).

Sejm Rzeczypospolitej Polskiej. Druk nr 790. Rządowy projekt ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi [Print No. 790. Governmental dratf Act on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. In Polish available at: http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=790 (17.12.2018)

Sejm Rzeczypospolitej Polskiej. Opinia w sprawie wniosku dotyczącego dyrektywy Parlamentu Europejskiego i Rady w sprawie powództw przedstawicielskich w celu ochrony zbiorowych interesów konsumentów i uchylającej dyrektywę 2009/22/WE (COM(2018) 184 final) [Opinion on the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018) 184 final)]. In Polish at: orka.sejm.gov.pl/SUE8.nsf/Pliki-zal/1124-18.rtf/%24File/1124-18.rtf (17.12.2018)

Sieradzka, Małgorzata: Rekompensata publiczna a inne środki usunięcia trwających skutków naruszenia zbiorowych interesów konsumentów [Public compensation against the background of other means of the elimination of lasting effects of the infringement of collective consumer interests]. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 6 (2018) 7. 77–87.

UOKiK: Decyzje Prezesa UOKiK [Decisions of the UOKiK President]. In Polish at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf. (17.12.2018)

UOKiK: Fruit market – UOKiK diagnosis. In English at: https://uokik.gov.pl/news.php?news_id=15031b. (17.12.2018)

UOKiK: Public compensation in UOKiK's decisions, https://uokik.gov.pl/news.php?news_id=12159. (17.12.2018)

UOKiK: Rekompensata publiczna w orzecznictwie UOKiK [Public compensation in the UOKiK President's case-law]. In Polish at https://www.uokik.gov.pl/aktualnosci.php?news_id=12156. (17.12.2018)

UOKiK: UOKiK dla rolnictwa – każdy sygnał od rolnika jest ważny [UOKiK for agriculture – every signal from a farmer is important]. In Polish at: https://uokik.gov.pl/aktualnosci.php?news_id=14634&news_page=2. (17.12.2018)

Watson, Alan: *The Stat*e, *Law*, *and Religion: Pagan Rome*. University of Georgia Press, Athens and London, 1992.

Eylem Apaydin
Assistant Professor
Civil Law Department,
Kocaeli University, Faculty of Law
eyapaydin@yahoo.com

THE APPLICATION OF THE PRINCIPLE OF GOOD FAITH ON ADMINISTRATIVE CONTRACTS FROM THE TURKISH LAW PERSPECTIVE

I. Introduction

The principle of good faith has been recognized as a general principle in contract law in most of the modern legal systems including German, French and American's. Black's Law Dictionary defines good faith as "*a state of mind consisting in* (*1*) *honesty in belief or purpose*, (*2*) *faithfulness to one*'*s duty or obligation*. (*3*) *observance of reasonable commercial standards of fair dealing in a given trade or business*, *or* (*4*) *absence of intent to defraud or to seek unconscionable advantage*.".[1] Good faith is usually defined by these notions; as unconscionability, fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness, honesty in fact.[2]

Pacta sund servanda is regarded as the main principle that governing contracts since the Roman times. *Pacta sunt servanda* requires that the parties to a contract must keep their words and perform the contract as agreed before. However, sometimes, changing in the circumstances, which are not attributable to one of the parties, may make performance of the contracts as promised very difficult for one party. In these circumstances, it is not honest to expect this party to perform the contract as agreed. Due to the *clausula rebus sic stantibus*, changing of the circumstances amends the provisions of contract. Another principle governing the contracts in Roman law is freedom of contract. Freedom of contract requires parties to enter into contract and lay down the conditions of contract freely. Parties to a contract can determine the conditions of the contract freely as long as they acted in good faith.

The principle of good faith requires parties to act in good faith, which means, in fair and decent manner by taking into account the other party's expectations. Good faith restrains the abovementioned principles because under some circumstances, the contract may be changed, modified, or even terminated if the changing circumstances obviously disturb the balance between the parties. Furthermore, where a party is acting contrary to good

---

1 Garner, Brayn A. (Editor in Chief): *Black's Law Dictionary.* 8th ed. Thomson West. St. Paul. 2004. 713.

2 Keily, Troy: Good Faith and the Vienna Convention on Contracts for the International Sale of Goods [CISG]. *Vindobona Journal of Commercial Law and Arbitration Issue*. 3 (1999) 1, 15–40.

faith, this party may have to pay the losses of the aggrieved party, which caused his behaviour.[3]

Public entities establish legal relationships with private law persons and other public law persons to conduct public services and for the public interest. For this, while fulfilling their duties and using their powers, they take unilateral decisions and make transactions.[4] Sometimes, the public entities conclude contracts with private law persons to acquire necessary goods or services in order to run public administration and public services. At first sight, these contracts are all called as administrative contracts. However, regarding some legal systems, including the Turkish one, one should distinguish the concept of *administrative contracts* from the concept of *administration*'*s contracts*. In these legal systems, all the contracts, whose one of the parties is a public entity, cannot be regarded as *administrative contracts* automatically. There are some criteria to qualify a contract as *an administrative contract*. In *administrative contracts*, the public entity holds a favourable position than the other party and hence, it is usually deemed that these contracts are subject to different rules, namely administration law, rather than the private contract law rules. On the other hand, some contracts of public entities are concluded as a result of their capacity to make legal transactions. These contracts, which are not qualified as *administrative contracts*, are named as *administration*'*s contracts*. These contracts are purely governed by private law and the public entity is also subject to private law rules and principles. Moreover, these contracts to subject to civil judiciary whereas *administrative contracts* are subject to judicial review of administrative courts.[5]

This paper, primarily, deals with the question whether a private law concept, the principle of good faith, applies to government contracts as a general principle from a comparative law perspective. In this paper, after presenting the private law principle of good faith and general information about administrative contracts in comparative law, a discussion will be made whether good faith can be regarded as a general principle on administrative contracts with respect to Turkish law. Finally, two public law legal institutions will be mentioned demonstrating the role of the principle of good faith in administrative contracts.

II. Good faith in general

II.1. Meaning of good faith

Good faith is originally one of basic principles of private law. Good faith and fair dealing represents the modern expression of the old Latin term *bonus pater familias* or even *bona fides*.[6]

---

[3] It is possible to come across two kinds of good faith principles in law. First, subjective good faith, which has to do with knowledge and provides a person to acquire ownership even if the property has been transferred by a non-owner. Second, objective good faith constituting a standard of conduct which the behaviour of a party has to conform to, and by which it may be judged. Apaydin, Eylem: *The Principle of Good Faith in Contracts*. Leges, İstanbul, 2014. 1. The focus of this paper is objective good faith.

[4] Günday, Metin: *İdare Hukuku*. İmaj, Ankara, 2015. 183.

[5] Günday, 2015. 183–184.

[6] The Association of European Administrative Judges (AEAJ): Principles of Good Faith and Fair Dealing and Legitimate Expectations in tax proceedings. https://www.aeaj.org/page/Principles-of-Good-Faith-and-Fair-Dealing-and-Legitimate-Expectations-in-tax-proceedings. (10.09.2018.)

The sources of good faith go back to Roman law.[7] The latin maxims, *venire contra factum proprium*, *fides servanda est*, *bonae fidei negotium*, *ex iniuria ius non oritur*, *fraus et ius nunquam cohabitant*, *clausula rebus sic stantibus*, *ex aequo et bono*, *bona fidem in contractibus considerari aequum est*, *nemo auditur propriam turpitudinem allegans*, explains the general notion of good faith.

Good faith, deemed as a necessity in contractual relations, is a basic element, which is widely accepted and incorporated with many international agreements, besides the national legislations. The widest concept of good faith requires parties to act in good faith in negotiations, performance of contract, exercising of rights and breach of contract, moreover, in the interpretation of contracts.[8] In addition to this concept, good faith has been used as a basis of many doctrines on transformation of contract as '*doctrine of imprevision*' in French law, '*doctrine of foundation of transaction*' in German law and '*clausula rebus sic stantibus*' in other civil law countries. '*Clausula rebus sic stantibus*' is a doctrine which has been internationally recognized as an objective rule of law of nations.[9] Where there has been a fundamental change of circumstances which has occurred and which was not foreseen by the parties at the time of concluding their agreement, it is regarded to force the parties to obey the clauses of the contract as contrary to good faith.[10] The principle of good faith is also the source for pre-contractual liability. For instance, *Jhering*'s theory of '*culpa in contrahendo*' provides that contracting parties are under a duty to negotiate in good faith.[11]

II.2. Good faith in modern legal systems

There is no general requirement of good faith in English contract law as understood in civil law systems. *Goode* states that "*London is thought that is the world's leading financial centre*, *the predictability of the legal outcome of a case is more important than absolute justice. It is necessary in a commercial setting that businessmen at least should know where they stand*."[12] *Bridge* states, "good faith and fair dealing is an imperfect translation of an ethical standard into legal ideology and legal rules" and, "good faith is an invitation to judges to abandon the duty of legally reasoned decisions and to produce an unanalytical incantation of personal values."[13]

---

7 See for details Schermaier, Martin Josef: Bona Fides in Roman Contract Law. In: Reinhard Zimmermann – Simon Whittaker (eds): *Good Faith in European Contract Law*. Cambridge University Press, Cambridge, 2000.

8 For good faith in contract performance and enforcement see Speidel, Richard: The Duty of Good Faith in Contract Performance and Enforcement. *Journal of Legal Education* 46 (1996) 4, 537.

9 Maniruzzaman, A. F. M.: State Contracts with Aliens the Question of Unilateral Change by the State in Contemporary International Law. *Journal of International Arbitration*. 9 (1992) 4, 141–171. 158.

10 Apaydin, 2014. 8.

11 Public international law recognises it and United Nations Charter specifically refers to it. Similarly, it is regulated in UNIDROIT Art. 1.7, 2.15/2,3; CISG Art. 7(1); PECL Art. 2:301. Apaydin, 2014. 4.

12 Goode, Roy: The Concept of "Good Faith" in English Law. Centro di studi e ricerche di diritto comparato e straniero diretto da M.J. Bonell Saggi, conferenze e seminari 2. w3.uniroma1.it/idc/centro/publications/02goode.htm-20k (10.09.2004.)

13 Bridge, Michael: Does Anglo-Canadian Law Need a Doctrine of Good Faith. *Canadian Journal of Business*, 9 (1984) 385–425; 412.

A debate is going on whether English law should adopt a general good faith requirement in contract law. This debate has been heated recently. After the EC Directives in consumer law, inevitably, the English law faced the general requirement of the good faith in contracts.[14] This made some unhappy. Say, *Teubner* expresses his thoughts saying that "good faith is irritating British law".[15]

In *Director-General of Fair Trading* (*DGFT*) *v. First National Bank plc*[16] the Court of Appeal held that the assessment of unfairness was to be done purely by reference to the legislative scheme. This decision confirms that English law at present seems to be developing a good faith requirement.[17] In *Yam Seng Pte Ltd v International Trade Corporation Ltd*[18] Justice *Leggatt* expresses that: "*the traditional English hostility towards a doctrine of good faith in the performance of contracts*, *to the extent that it still persists*, *is misplaced*".[19] In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*[20] the court made clear that the obligation to act in good faith under a particular provision in a contract did not extend to all conduct under the contract and "if the parties want to impose a duty they must do so expressly."[21] In *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [22] Lord Justice *Moore-Bic*k stated that: "recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences". The judgment makes it clear that there is still no general organising principle of good faith in English law.[23]

Contrary to English law, American law has adopted the principle of good faith as a general principle governing the contracts. The Uniform Commercial Code Section 1–203 of the Code provides that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Uniform Commercial Code has two definitions of good faith that apply to contracts for the sale of goods: One general definition; in Section 1–201(19), "'*Good Faith*' *means honesty in fact in the conduct or transaction concerned*." Another one; the special definition, in Section 2–103, "'*Good Faith*' ... *means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade*." Section 205 of the Restatement (Second) of Contracts provides that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

---

[14] Brownsword, Roger: Good Faith in Contracts Revisited. *Current Legal Problems*, 49 (1996) 2 111–157. 112

[15] Teubner, Gunther: Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences. *The Modern Law* Review, 61 (1998) 11. 11.

[16] Director-General of Fair Trading (DGFT) v. First National Bank plc. *The Weekly Law Reports.W.L.R*. 2. 2000. 1353.

[17] Twigg-Flesner, Christian: A Good Faith Requirement for English Contract Law? *Nottingham Law Journal* 9 (2000) 1, 80. 84. http://www.nls.ntu.ac.uk/clr/PDF/nlj9_1/080.pdf (10.09.2018.)

[18] Yam Seng Pte Ltd v International Trade Corporation Ltd. *High Court of England and Wales Decisions* (*Queen*'*s Bench Division*) *EWHC*. (*QB*). 2013. 111.

[19] Mahmud, Sana: Is There a General Principle of Good Faith under English Law? 2016–2017. https://www.fenwickelliott.com/research-insight/annual-review/2016/principle-good-faith-english-law. (10.09.2018.)

[20] Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd. *Court of Appeal of England and Wales Decisions* (*Civil Division*) *EWCA Civ*. 2013. 200.

[21] Mahmud, 2016–2017.

[22] MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt. *Court of Appeal of England and Wales Decisions* (*Civil Division*) *EWCA Civ*. 2016. 789.

[23] Mahmud, 2016–2017.

The principle of good faith is a general principle in German Law. It is regulated in the sections 157 and 242 of the German Civil Code, the *Burgerliches Gesetzbuch* (BGB), which provide that: "*Contracts shall be interpreted according to the requirements of good faith*, *ordinary usage being taken into consideration*." (s.157) "The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration." (s.242). This provision has been called a "king" in the Civil Code. It has been used to provide a moralisation of the entire German law.[24] Good faith serves three basic purposes in German law; to particularize an incomplete contractual obligation by imposition of secondary duties, to serve as a general internal limitation of legal rights in case of their illegitimate exercise, and to be used as a tool to interfere in contractual relations in order to avoid grave injustice.[25]

The modern version of the '*clausula rebus sic stantibus*', *Oertmann*'s theory of '*the foundation of the transactions*' based on BGB 242 owes its origin to this corrective function of good faith.[26] According to this theory, the transaction can be modified or cancelled if its foundation has changed or disappeared, if the conditions that form the basis of the parties contractual relationship cease to exist or the party which would be detrimentally affected by the change in circumstances.[27]

The German concept of good faith includes the negotiation stage of the transaction. Under German law, a party may be liable under the doctrine of *culpa in contrahendo*.[28]

Article 1134 of the French Civil Code provides that a contract should be performed in good faith. Groves states that concept of good faith or '*bonne foi*' in French law has three main functions.[29] Firstly, good faith is the legal basis for the rules relating to the French doctrine of abuse of rights. Secondly, the courts are developing different types of duties or obligations based on the general obligation of good faith, that are specific to certain categories of contracts. Thirdly, good faith has been applied to contracts governed by public law.[30]

Italian law contains a general clause on good faith in article 1175 Codice Civile, and specific clauses on good faith in negotiations (art. 1337) and in performance (art. 1375). This results in duties of disclosure, of cooperation, of protection of the other party's rights and things. These duties are stem from the general principle of good faith.[31]

---

[24] Lando, Ole: Some Features of the Law of Contract in the Third Millennium http://www.scandinavianlaw.se/pdf/40-13.pdf (10.09.2018.) 395.

[25] Ebke, Werner F – Steinhauer, Bettina M: The Doctrine of Good Faith in German Contract Law. In: Jack Beatson – Daniel Friedmann (eds): *Good Faith and Fault in Contract Law*. Clarendon Press, Oxford, 1995. 171.

[26] Whittaker, Simon – Zimmermann, Reinhard: Good Faith in European Contract Law: Surveying The Legal Landscape. In: Jack Beatson – Daniel Friedmann (eds): *Good Faith and Fault in Contract Law*. Clarendon Press, Oxford, 1995. 25.

[27] Ebke–Steinhauer, 1995. 180.

[28] Apaydin, 2014. 21.

[29] Groves, Kelda: The Doctrine of Good Faith in Four Legal Systems. *Construction Law Journal*, 15 (1999) 4, 265–287.

[30] Groves, 1999. 265–287.

[31] Cordero, Giuditta: Moss Lectures on Comparative Law of Contracts. https://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf (10.09.2018.)

III. Administrative contracts

III.1. Meaning of administrative contracts

There is no doubt that contract is originally a private law concept. On the other hand, it is obvious that public administration must resort to contractual arrangements in order to acquire necessary goods or services. Thus, contract constitutes a form of administrative action, from which the parties' obligations and rights arise.[32] At this point, *Langrod* states that

> "*all obligations originate in the area of private law and are* "*transposed*" *or* "*loaned*" *to the administrative sphere*, *either unchanged or with specific modifications required by the particular needs of public administration.*"[33]

It is well expected that the concept of contract is adopted with necessary changes and modifications by administrative law. In a rough definition, administrative contracts are the contracts where at least one of the parties is a public entity. As a result of the material distinction between *administrative contracts* and *administration*'*s contracts*, the doctrine developed some criteria to differentiate *administrative contracts* from *administration*'*s contracts*.

> "*In order for a contract to be considered as an* "*administrative*" *one*, *it must fulfil the following conditions*: *1. One of the parties thereto must be a public authority. 2. The administrative judicial authorities must have jurisdiction to look into such contracts. 3. It must be related to a public service or be classified by the law as an administrative contract. 4. It must include an* "*onerous*" *clause or condition from the public law*."[34]

These are the generally accepted criteria for a contract to be regarded as administrative contracts.

We, first, witness the concept of administrative contracts in French law.

> "*The French administration can enter into both administrative contracts* (*contrats administratifs*) *and private law contracts* (*contrats de droit privé*). *The two basic criteria for the former are that the contract relates to a public service and that the contract reserves exceptional powers to the administration* (*it contains clauses exorbitantes du droit commun*). *Either criterion may suffice to make a contract* '*administrative*' *in character*."[35]

In France, administrative contracts are created either directly by legislation or by the administrative court (*Conseil d*'*Etat*) taking into consideration the subject matter or the object in each case.[36] In French law, the administration can conclude administrative and private law contracts.

> "*The French juridical literature argues that*, *unlike public law contracts*, *private law contracts of the administration have two distinctive features*: *on the one*

---

[32] Langrod, Georges: Administrative Contracts: A Comparative Study. *The American Journal of Comparative Law*, 4 (1955) 3, 325–364. 326.

[33] Langrod, 1955. 327.

[34] Seif, Marie Grace: The Administrative Contract. https://www.tamimi.com/law-update-articles/the-administrative-contract/ (10.09.2018.)

[35] Bell, John – Boyron, Sophie – Whittaker,, Simon: *Principles of French Law*. Oxford University Press, Oxford, 2008. 195–196.

[36] Langrod, 1955. 330.

> *hand, they are not related to a public service and thus don't tackle public interest, and, on the other hand, they do not include exorbitant terms, and the administration acts like an owner.*"[37]

Hence in French law, public procurement contracts on the construction works such as roads, bridges, dams and buildings are categorically deemed as administrative contracts and are subject to administrative law.

French administrative law has inspired many foreign systems. Emerging from French system, we observe a kind of dual legal system in European continent.[38] It is evident that administrative law has developed a parallel system to private law in European legal systems. As a result of this approach, we observe a separate courts system, which have been dealing with either administrative disputes or other legal disputes. In many European countries, administrative courts establish a separate judiciary for instance, France, Germany, Turkey, and Hungary etc.

The French administration law has a great influence on the Turkish administration law too.

> "*At the time of late Ottoman Empire and early Turkish Republic era, Turkish administrative law was formed by the penetration of continental French administrative law institutions, concepts, codes and doctrine. Turkish state structure and administrative judicial system was highly affected by the French system. Even today, Turkish administrative law keeps its tie with French law. The French layer of Turkish administrative law includes the Conseil d'Etat, the Cour des Comptes, the Tribunal des Conflits, some financial organisations, the system of autonomous provincial and local administration and administrative tutelage.*"[39]

In Turkey, there is a duality between judicial (law and criminal) courts and administrative courts like it is in France. Differently from ordinary courts, Turkish administrative courts deal only with the problem of legality of public administrations' acts and actions.

In the Turkish administration law, some contracts are directly qualified as administrative contract by an Act or a regulation. Where there is no such clarity,[40] there are three main criteria to qualify a contract as an administrative contract. Firstly, at least one of the parties to the contract must be a public entity. Indeed, if the other requirements are fulfilled, there is no reason to classify the contracts between two public entities as administrative contracts.[41] Secondly, subject of the contract must be about the conduct of a public service. Finally, the contract may give powers to the public entity which includes exorbitant terms and exceeds the boundaries of a private law contract. [42]

---

[37] Pascariu, Liana: The Distinction of the Administrative Contract from other Types of Contracts. *The Annals of the "Ştefan cel Mare" University of Suceava. Fascicle of The Faculty of Economics and Public Administration*, 10, (2010) 408413; 408. On the page 409 of the paper, the author lists twelve criteria which identifies the nature of administrative contracts characteristics.

[38] Langrod, 1955. 344.

[39] Örücü, Esin: Conseil d'Etat: The French Layer of Turkish Administrative Law. *The International and Comparative Law Quarterly*, 49 (2000) 3, 679–700; 679.

[40] Örücü claims that the both the administrative courts and the Constitutional Court have always been eager to expand the definition of the term "administrative contracts." Örücü, 2000. 692.

[41] Gözübüyük, Şeref – Tan, Turgut: *İdare Hukuku Cilt I Genel Esaslar*. Turhan, Ankara, 2016. 484.

[42] Günday, 2015. 185–187. Gözler, Kemal – Kaplan, Gürsel: *İdare Hukuku Dersleri.* Ekin, Bursa, 2017. 456.

Administrative contracts grant some extraordinary rights to the public entity, which cannot be usually seen in a private law contract. For instance, the public entity has a right to control and direct the contractor. Moreover, the public entity has a right to impose a sanction on the contractor. Furthermore, the public entity has a right to make changes or modifications on the contract by its own unilateral decisions. Finally, the public entity may have a right to terminate the contract for the sake of public interest.[43]

Before explaining the types of administrative contracts, one must remember the discussion on the administrative contracts and administration's contracts distinction. On the latter, the public entities are on the equal terms with the other party contrary to the former.

Differing from the French Law, in Turkish law, public procurement contracts on the construction works such as roads, bridges, dams and buildings are categorically deemed as administration's contracts and hence, naturally private law contracts.[44] They are not regarded as administrative contracts. As a result of this understanding, such contracts are governed by private law, specifically Turkish Civil Code and Turkish Code of Obligations. Gözler and Kaplan lists of these contracts as: public procurement contracts, subscription contracts such for gas, electricity or water, build-operate-transfer contracts and public-private co-operation contracts for health institutions.[45] These contracts are listed among the Turkish government and public entities' private law contracts.

Administration's contracts have three different features than the administrative contracts. Firstly, they are not governed by the administrative law but by the private law. Second, where there is a dispute arising from these contracts, it is tried before the civil courts and not before the administrative courts. Finally, in administration's contracts, public entity and private law persons are on equal terms, whereas, in administrative contracts, public entities are given powers by the contracts containing exorbitant terms rather than the rules of private law.[46]

III.2. Types of administrative contracts

III.2.1. Public service concession agreements

Public service concession agreement is a contract concluded between a public legal entity and a private law person, which requires and entitles a private law person to establish and run for a determined period of a public service in return for the payment of the service users to their own profit and loss.[47] The *concessionaire* makes investment to run the public service given to himself, runs at his own risk, collects the fees from the users of this service and hands over the facilities to the government at the end of the contract term. Usually, the contract term lasts about fifty years. The public service is run on the terms defined by the contract and the charter drafted by the government's unilateral

[43] Gözler–Kaplan, 2017. 502–507. Gözübüyük–Tan, 2016. 536–539.

[44] Gözler–Kaplan, 2017. 456.

[45] Gözler–Kaplan, 2017. 456–457.

[46] Gözübüyük–Tan, 2016. 482–495.

[47] Gözler–Kaplan, 2017. 460.

will. The *concessionaire* either accepts the terms and conclude contract or refuses the concession.[48]

French doctrine defined the concession contract as having as main objective the assignment of the public service to the concessionaire. The object of the contract, however, can be the performing of operations required for that service, these being considered public works, "as they are performed on property meant to ensure the functioning of the public service".[49]

III.2.2. Public borrowing contracts

Public borrowing contracts means a contract concluded for taking loans from private law persons and issuing government securities in order to cover budget deficit, liquidity deficit and public debt refinancing and investment project financing; as well as issuing guaranties and counter-guaranties. This can be done by issuing bonds and stocks. These contracts are considered as administrative contracts as they give some rights and powers to the public entity, which can be deemed as exorbitant terms rather than the rules of private law. For instance, these bonds are non-sizable. Under some certain circumstances, these bonds and stock may function as money.[50]

III.2.3. Administrative Employment Contracts

Usually, the public legal entities conduct their duties with civil servants and there would not be a contract between the civil servants and the public entity. It is not a contractual relationship but a statutory one.

On the other hand, the public entity may need employing workers in order to run a public service. Hence, employment contracts are concluded between a public legal entity and a person in order to enable the public authority to employ a person as a contracted worker. If the regulation which empowers the public entity to make such contracts qualifies these contracts as administrative contracts, they are called as administrative employment contracts and subject to administrative law.

IV. Good faith in administrative contracts

IV.1. General overview

An administrative contract has at least two parties; a public entity and a private law person or persons. It is well established that the private law person has a duty to act in good faith

[48] Gözler–Kaplan, 2017. 460.

[49] In French doctrine, the classification of administrative contracts distinguishes between public works and public services concession contracts, indicating that the remuneration of the exploiting entrepreneur is ensured from the taxes received by the users of the work. Matei, Cătălina G.: Differences between the Concession Contract of Public Services and other Contracts. *Bulletin of the Transilvania University of Braşov Series VII: Social Sciences Law*, 6 (2013) 55, 158. http://webbut.unitbv.ro/BU2013/Series%20VII/BULETIN%20VII%20PDF/26%20Matei.pdf (10.09.2018.)

[50] Gözler–Kaplan, 2017. 462.

while using the rights or performing the undertakings as mentioned above. The discussion on the matter is focussed whether the public entity is under such duty when using the rights or performing the undertakings arising from a contract.

A strong assertion is witnessed in Shalev's article, which reads that the public authorities are also under the duty to act in good faith. She states that

> "*The duty of a public authority to act in good faith towards the citizen is unquestioned. The State, its authorities and its employees are trustees of the public*, *and as such they are obligated to treat the citizen fairly and in good faith*, *and to refrain from behaving arbitrarily towards him. The duty to act in good faith applies to the public authorities at all times*, *in all places*, *in every capacity in which it acts whether as sovereign or fiscus and in every sphere of its activity*, *whether private or public.*"[51]

"The public authority at all times acts under the uniform substantive law that governs its activity, and this law undoubtedly includes the authority's duty to act in good faith towards the citizen."[52]

The governments are also under the implied duties originated from the principle of good faith. The implied duties of the government include the implied duties not to hinder performance and to cooperate, the implied duty to provide adequate specifications, the implied duty to disclose superior knowledge, and the implied duty to terminate with reasonable discretion.[53] Some authors specifically states that every government contract contains implied duties, such as the duty to cooperate and the duty of good faith and fair dealing.[54]

IV.2. In comparative law

It is also observed that it is well accepted that the public authorities have to act in good faith in the EU law. Having explained that "t*he European Courts have developed a number of general principles of EU law which have their origin in private law*. *They have been developed in a public law context*." Hartkamp mentions the principle of good faith as a part of primary EU law.[55] In the EU law, the Council Directive 2014/24 on public procurement article 72 (Modification of contracts during their term) is an indication of good faith in this document. Similarly, Article 42 (Modification of contracts during their term) of the Directive 2014/23 on the award of concession contracts is an example of the good faith applications in the EU law. In this context, *Pascariu* suggests that the principles of freedom

---

51 Shalev, Gabriela: Good Faith in Public Law. *Israel Law Review*, 18 (1983) 127–134; 127.

52 Shalev, 1983.131.

53 Toomey, Daniel E. – Fisher, William B. – Curry, Laurie F.: Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law. *Public Contract Law Journal*, 20 (1990) 1, 87–125. 109.

54 Neeley, Steven A.: Can The Government Contract around the Duty of Good Faith and Fair Dealing? https://www.contractorsperspective.com/contract-administration/contracting-around-good-faith-and-fair-dealing/ (10.09.2018.)

55 Hartkamp, Arthur S.: The General Principles of EU Law and Private Law: Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel. *Journal of Comparative and International Private Law*, 75 (2011) 2, 241–259; 255–256.

of contract and good faith should be adaptive in the administrative contract as general principles, composed of negotiated clauses and regulatory clauses, as long as the public interest prevails.[56]

A research group called as ReNEUAL issued 'Model Rules on EU Administrative Procedure' which includes a general duty of good faith for the public authorities in administrative contracts. Its fourth Book headed as Contracts states that "Section 2: EU contracts governed by EU law Subsection 1: Execution and performance IV–26 Good faith and fair dealing (1) The contracting parties have a duty to act in accordance with good faith and fair dealing when performing an obligation, exercising a right to performance, pursuing or disputing a remedy for non-performance, or when exercising a right to terminate an obligation or the contractual relationship. (2) The duty under paragraph (1) may not be excluded or limited by contract."[57]

While Groves lists the functions of good faith in French law, she states

> "*differing from other systems' concept of good faith, good faith has been applied to contract governed by public law, which applies to contracts between a private entity and a public body…. This is based on the ideal of the continuity of public service which justifies the variation of a contract to enable its continued performance, albeit under altered circumstances.*"[58]

Here, she mentions the *theory of imprevision*. It is clear that good faith applies to administrative contracts in French law.

In Hungary, the public authorities are clearly under the duty to act in good faith. Hungary Act CXLIII of 2015 on Public Procurement, Article 2. 1.[59] states that "…*3. In the course of procurement procedures, contracting authorities and economic operators shall act in compliance with the principle of good faith and fair dealing. The abuse of rights is prohibited….*"

In Greece, Kaltsa and Kourtesi, while discussing if the private law principles apply to the administrative contracts, they state

> "*Despite the existence of specific statutory provisions, courts often have recourse to private law principles when the need arises to intervene in public contracts. This is achieved by using Articles 197, 200, 288 and 388 of the Civil Code, which define the general principles of private law transactions. The general principles are that good faith and transactions usage (i.e. established commercial practice) should be shown in the negotiation phase (Article 197), during execution of the contract (Article 288) and also in interpreting the contract (Article 200). Article 388 provides for a specific application of the above-mentioned provisions in*

---

[56] Pascariu, Liana: The Opportunity of a European Administrative Contract Law. *European Journal of Law and Public Administration*, 3 (2016) 1, 105–113; 110.

[57] Auby, Jean-Bernard – Mirschberger, Michael – Schröder, Hanna – Stelkens, Ulrich – Ziller, Jacques: *ReNEUAL Model Rules on EU Administrative Procedure Book IV – Contracts*. 2014.168 http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf (10.09.2018.)

[58] Groves, 1999. 265–287.

[59] In Hungary, in accordance with the Act I of 2017 on the Code of Administrative Litigation Section 4. par. 7. 2. "*administrative contract means a contract, or an agreement concluded by and between Hungarian administrative organs to perform a public function, as well as contracts defined as such by an Act or government decree.*" The public procurement contracts concluded under the Act CXLIII of 2015 on Public Procurement are not classified as administrative contracts. In our classification, they are deemed to be as administration's contracts.

case of an unexpected change of circumstances, following the conclusion of the contract, which would endanger the proper functioning of the contract…. Following this line of argument, courts have transposed and applied these private law provisions in administrative contracts, primarily in disputes concerning the revision and re-evaluation of contractual consideration. The way in which the above – mentioned principles are implemented in administrative contracts is none the less on a different and constantly evolving basis."[60]

Later Act 1414/1984 was introduced in Greece, which specifically excludes the revision of contracts by recourse to Articles 288 and 388. However, this did not prevent the Greek judges from applying the good faith on the administrative courts.

"*Despite this new law, the courts continued to apply the private law rules, on the ground that it would be contrary to the constitutional principle of equality not to do so. Thus the courts intervened to revise contracts, even where the terms of the contract specifically excluded this, where good faith and transactions usage required a revision in the event of an unforeseeable change of circumstances.*"[61]

In common law,

"*taken together the Commonwealth cases show that in circumstances typical of construction procurement, the process is regulated by contract law. The implied terms include a term that the owner must treat all tenders equally and fairly, that the tender process will be conducted honestly and not unconscionably, which collectively may be described as an obligation of good faith or fair dealing.*"[62]

For instance, the government must exercise termination for convenience clauses in good faith.[63]

In American law, the federal common law recognizes the implied duty of good faith and fair dealing in government contracting. It is said that "the norm of good faith and fair dealing is valid and binding on government actors or corporate office holders in the same way that a constitutional norm or a rule of corporate law does."[64] As in one of the Supreme Court's decision stated "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[65] The principle of good faith and fair dealing prohibits unreasonable exercises of contractual discretion by the government.[66] Moreover, the implied duty of good faith and fair dealing requires the parties to cooperate in performance and not

---

60 Kaltsa, Anastasi – Kourtesi Thomi: The Implementation of Private Law Principles in Administrative Contracts. *European Public Law*, 6 (2000) 3, 322–325; 323.

61 Kaltsa–Kourtesi, 2000. 324.

62 Craig, R.W.: Good Faith or Fair Dealing in Construction Procurement https://www.irbnet.de/daten/iconda/CIB3526.pdf (10.09.2018.)

63 Claybrook, Frederick W. Jr.: Good Faith in the Termination and Formation of Federal Contracts. 1997. https://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_481.pdf (10.09.2018.)

64 Macmahon, Paul: Good Faith and Fair Dealing as an Underenforced Legal Norm LSE Law, *Society and Economy Working Papers* 22/2014. 5. http://eprints.lse.ac.uk/60567/1/WPS2014-22_MacMahon.pdf. (10.09.2018.)

65 Claybrook, 1997.

66 Macmahon, 2014. administrative contract means a contract or an agreement concluded by and between Hungarian administrative organs to perform a public function, as well as contracts defined as such by an Act or government decree;

act in a way that destroys the other party's reasonable expectations of the benefits provided by the bargain.[67]

In Canadian Law, the requirement of good faith is a general principle in public law[68] and the public authorities have to act in good faith regarding the public procurement contracts. *Brindle* states that "*a bid contract will invariably contain an implied term that the owner must act fairly and in good faith in the tendering process. The duty is one of procedural good faith*." [69] In Canadian Law, the duty to act in good faith and in a manner that maintains and promotes the integrity of the public tendering system is mentioned as an interest considered by courts.[70] In *Boulis v. MMI* decision, the duty to act in good faith is mentioned as one of the restrictions on the use or non-use of discretionary powers in administrative law.[71] In *Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority*,[72] the Newfoundland and Labrador Supreme Court reviewed two separate tender projects and noted that the duty to act in good faith, which in a manner maintains and promotes the integrity of the public tendering system, is among the competing interests and then found that Eastern Health breached its good faith performance of contractual obligations.[73]

In Australia, if the contract does not include an express provision, the case law that has developed that the duty of good faith will be implied since the landmark decision of *Renard Constructions* (*ME*) *Pty Ltd v Minister for Public Works*.[74] In this case, the court considered that there was a strong case for accepting a good faith obligation similar to that in Europe and the United States. It is concluded that the requirement to act reasonably and honestly was implied because the rules laid down for implication of terms had been satisfied.[75] In some contracts, the government includes an express provision to its contracts to a requirement for both parties to act in good faith.[76] It is apparent that objective standards of fairness and reasonableness now exist in Australian administrative law unlike in the United Kingdom.[77] In Australia, with a simple explanation, good faith requires that administrative

[67] Tucker, James: A. O Ye of Little Faith: Breaching the Duty of Good Faith and Fair Dealing While Complying with the Express Terms of a Government Contract. https://www.lexology.com/library/detail.aspx?g=21a8f20f-bd94-425c-b353-1172081e9b43 (10.09.2018.)

[68] Grey, J. H.: Discretion in Administrative Law. *Osgoode Hall Law Journal*. 17 (1979) 1, 107–132; 128.

[69] Brindle, Derek A.: Procurement and the Duty of Good Faith. http://www.jml.ca/wp-content/uploads/publications/Procurement_DutyGoodFaith.pdf 3–4. (10.09.2018.)

[70] Public Sector Procurement Law Newsletter May 2013. https://www.keelcottrelle.com/assets/files/pdf/archive/public-sector-procurement/Procurement%20Law%20Newsletter.pdf. (10.09.2018.)

[71] *Boulis v. MMI The Supreme Court Reports* (1974) 875.

[72] Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority. *Supreme Court of Newfoundland and Labrador*, 2013. 4.

[73] Public Sector Procurement Law Newsletter May 2013. 34. https://www.keelcottrelle.com/assets/files/pdf/archive/public-sector-procurement/Procurement%20Law%20Newsletter.pdf (10.09.2018.)

[74] Renard Constructions (ME) Pty Ltd v Minister for Public Works. *New South Wales Law Reports. NSWLR*. 1992. 26. 234.

[75] Nolen, Sue: Managing Good Faith Requirements in Government Contracts. (2004) https://www.vgso.vic.gov.au/sites/default/files/publications/Managing%20Good%20Faith%20Requirements%20in%20Government%20Contracts.pdf. 1. (10.09.2018.)

[76] Nolen, 2004. 1.

[77] Buchan, Jenny – Gunasekara, Gehan: Administrative Law Parallels with Private Law Concepts: Unconscionable Conduct, Good Faith And Fairness In Franchise Relationships *Adelaide Law Review*. 36 (2015) 541–575;

decisions are made honestly and conscientiously in the administrative law,[78] as the result of the policies including the requirement that government act with fairness, integrity and impartiality in its commercial dealings.[79]

IV.3. Turkish law perspective

Initially, it is essential to remember that public entities in Turkish law may conclude contracts subject to the private law called as administration's contracts including public procurement contracts. These contracts are subject to the rules and principles of private law. It is well established by court decisions that the Turkish Code of Obligations should apply to these contracts.[80] Hence, both parties, the public entity and the contractor, are doubtlessly under the duty to act in good faith as required by the article 2 of the Turkish Civil Code. It reads as follows

"*B. Scope and limits of legal relationships*
I. Acting in good faith
1 Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.
2 The manifest abuse of a right is not protected by law."

As for the administrative contracts, whether the principle of good faith applies on the administrative contracts subject to administrative law is to some extent ambiguous in Turkish law. Whether a public authority is under a duty to act in good faith under these contracts has almost never been thoroughly discussed so far. It is a fact that there is not an explicit rule in Turkish law requiring the public authority to act in good faith and fair dealing. Indeed, in Turkish administrative law, there is an assumption that every single administrative act, process or conduct is legal as long as it is challenged at the administrative court and decided the otherwise by the administrative court.

In administrative contracts, the public legal entity has a right to alter the other party's obligations under the contract by its unilateral decisions. It is a well-established principle in administrative law.[81] On the contrary, this is completely unacceptable in private law. Consequently, where the public legal entity is in default, the private law person does not have a right to refuse to submit its performance. In other words, it cannot make a plea for the non-performance.[82] The private law person can only claim for the loss. Moreover, the public legal entity has a right to impose a sanction on the private law person including a pecuniary penalty, force for the performance and termination of the contract. These rights and powers are inexplicable with the duty to act in good faith.

Gözler and *Kaplan*, when listing the administration's obligations arising from the administrative contracts, state that the administration should protect the other party of

547. https://www.adelaide.edu.au/press/journals/law-review/issues/36-2/alr-36-2-ch09-buchan-gunasekara.pdf (10.09.2018.)

[78] Buchan–Gunasekara, 2015. 559.

[79] Nolen, 2004. 3.

[80] Gözler–Kaplan, 2017. 456.

[81] Giritli, İsmet – Berk, Kahraman – Bilgen, Pertev – Akgüner, Tayfun: *İdare Hukuku*. Der, İstanbul, 2015. 1343.

[82] Giritli–Berk–Bilgen–Akgüner, 2015. 1343.

the contract and comply with the financial balance of the contract.[83] *Kaplan* writes that in case of a breach of an administrative contract, only the party who has acted in good faith may claim the termination of the contract.[84] On the other hand, *Alamur* states that in administrative contracts only the other party is under the duty of performance in good faith, not the public authority.[85] When she lists the private law principles applying the administrative contracts such as *theory of imprevision* and *force majore*, she does not mention the principle of acting in good faith particularly.

Public legal entity's privileges come with a price indeed as a result of the *principle of the Fait du Prince*. Every single amendment in the administrative contracts called as *Fait du Prince*. However, if the public legal entity aggravates the contract for the other party and impairs the financial balance of the contract, it should pay for the difference caused by its actions, orders and decisions. However, if the financial balance of the contract is impaired by the unforeseen causes, the *theory of imprevision* applies in French and Turkey, doctrine of foundation of transaction applies in German legal families as a result of *clausula rebus sic stantibus*.

In conclusion, in the light of the above explanations, it may be inferred that although the good faith may have some specific applications in Turkish administrative law, the public entity is not a general duty to act in good faith with respect to administrative contracts in Turkish law.

IV.4. Functions of good faith in administrative contracts

IV.4.1. The presumption of good faith

It is widely accepted principle that where questioned, the government is presumed to act in good faith in the performance of its contractual duties unless the otherwise is proved by a court decision.[86] *Toomey*, *Fisher and Curry* assume that the presumption of a governmental higher standard of conduct is viewed, perhaps, as a necessary barrier against an avalanche of indiscriminate claims.[87]

IV.4.2. The theory of imprevision

The maxim of *omnis conventio intellegitur rebus sic stantibus*, according to which all conventions are considered valid if the circumstances under which they were concluded

---

[83] Gözler–Kaplan, 2017. 502. The authors mentions a French Conseil d'Etat's decision stating that when examining the illegality of the contract, the judge should take the parties' duty to act in good faith into account. 525.

[84] Kaplan, Gürsel: Fransız İdare Hukukunda İdari Sözleşmelerden Kaynaklanan Uyuşmazlıkların Çözümü İle İlgili Yeni Hukuki Gelişmeler. *Dicle Üniversitesi Hukuk Fakültesi Dergisi*. 21 (2016) 1–35; 16.

[85] Alamur, Seher: *Türk Hukuku'nda İdari Sözleşmeler.* İstanbul, 2013. Unpublished LLM Thesis. https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp (10.09.2018.). The same approach Çakrak, Recep – İldeş, Samet: Kamu Hukuku ve Özel Hukuk Açısından Dürüstlük Kuralı ve Uygulama Alanı. https://www.jurix.com.tr/article/4373# 24/27 (10.09.2018.)

[86] Macmahon, 2014.

[87] Toomey–Fisher–Curry, 1990. 91.Toomey–Fisher–Curry lists the court decisions expressing this principle in US case law on the same page footnote 13.

remain unchanged is the origin of the *theory of impresivision*.[88] This theory originated form the French law has affected many legal systems all over the world. Here, we will make our explanations regarding the Turkish law, the writer of this paper's home country.

The *theory of impresivision* has been generally recognised in administrative law since the well-known '*Gaz de Bordeaux*' decision. In Turkey, the administrative courts have consistently recognised a revision of the contract on the basis of unpredictability.[89] On the other hand, Turkish Code of Obligations art. 138 regulates excessive onerosity, the legal institution for the adaption of contract upon the unforeseen changed circumstances. TCO art. 138 says

> "*the parties during conclusion of the contract arises due to a reason not caused by the obligor and if the present conditions during conclusion of the contract are changed to the detriment of the obligor to such an amount as to violate principal honesty and if the obligor has not discharged his debt yet or has discharged his debt by reserving his rights arising from excessive difficulty of performance, the obligor shall be entitled to demand from the judge the adaptation of contract to new provisions*, *and to withdraw from the contract when such adaptation is impossible. In contracts including continuous performance*, *the obligor shall*, *as a rule*, *use his right to termination instead of right to withdraw. This provision shall also apply to the debts in foreign currencies.*"

This article does not apply to administrative contracts.

In Turkish administration law, there is no such explicit regulatory rule in the Codes about the *theory of imprevision*. It is formed and applied by the decisions of the Council of State. In accordance with the principles set by this court, there are three conditions for the application of the *theory of imprevision*. Firstly, during the formation of the contract, the parties to a contract should not foresee or expect the incident that changes the financial situation of the contract. In general, these circumstances can be listed as natural disasters, such as drought, flood, earthquake; administrative measures such as the prohibition or restriction of imports or exports; and other restrictions of trade, changes in the system of prices, tariff changes and administered prices, changes in standards, and economic changes such as an extremely large and sudden fall or jump in prices.[90] Secondly, these incidents must be beyond the will of the parties and is of temporary nature. Otherwise, parties to a contract might claim the termination of the contract due to the application of force majeure administrative. Finally, these unforeseen incidents should change the circumstances regarding performance of the contract severely.[91] Unless, the performance of the obligation would be "excessively onerous for one party or if under such

---

[88] Ciongaru, Emilian: Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice. https://ac.els-cdn.com/S1877042814048599/1-s2.0-S1877042814048599-main.pdf?_tid=fda7de14-42a8-4746-bb6a-e22aa44679f3&acdnat=1543494415_1278ebe64f538021106965ac36cdbf22. (10.09.2018.)

[89] Serozan, Rona: General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision. In: Başoğlu, Başak (ed.): *The Effects of Financial Crises on the Binding Force of Contracts*: *Renegotiation*, *Rescission or Revision*. Springer, 2016. 13.

[90] Puvača, Maja Bukovac – Mihelčić, Gabrijela – Grgić Iva Tuhtan: Can Financial Crisis Lead to the Application of the Institute of Changed Circumstances Under Croatian Law? In: Başak Başoğlu (ed.): *The Effects of Financial Crises on the Binding Force of Contracts*: *Renegotiation*, *Rescission or Revision.* Springer, 2016. 90.

[91] Giritli–Berk–Bilgen–Akgüner, 2015. 1347.

circumstances a party would suffer an excessive loss”,[92] amendment of the contract cannot be claimed.

With the fulfilment of these requirements, the contract is no longer applicable as agreed. Where the parties cannot reach an agreement between themselves, the court determines the rules which would apply on the contract during these unforeseen incidents. However, differing from the private law, that does not mean that the administrative contract has been terminated. The essence of the contract is still in force and is functional. The private law person has to continue to submit its performance of contract and the public authority should preserve the balance of the financial structure of the contract and compensate the loss. This is the consequences of the principle of *Fait du Prince*.[93]

In Turkish private law, in case of such incidents, the obligor shall be entitled to demand from the judge the adaptation of contract, and to withdraw from the contract when such adaptation is impossible.

V. Conclusion

Since Roman times, the principle of good faith is regarded as a requirement in contractual relations. It is widely accepted and incorporated with the legal systems all over the world.

As shown above, the recent approach in administrative law clearly states that the public entities should act in good faith in every act, conduct and contract. However, whether the principle of good faith applies to administrative contracts stirs controversy.

Firstly, it is apparent that in some legal systems including Turkish law some certain public administration’s contracts are subject to private law. It is unquestioned that both parties whether public entity or private law person have to act in good faith in these types of contracts.

Secondly, regarding the administrative contracts subject to administrative law and administrative judiciary, the answer is still not straightforward. The comparative law reveals that the recent approach in the administrative contract validates that the principle of good faith applies on the both parties to an administrative contract. Mostly, this is done by court decisions. However, some latest legislation evidently includes provisions setting the good faith as a principle in administrative contracts. On the other hand, the classic approach requires only the private law persons to act in good faith. That is also true regarding the current Turkish law. Regardless of the approaches, the principle of good faith has two mostly accepted applications in administrative contracts: the presumption of good faith and *theory of imprevision*.

It should not be forgotten that instituting a uniform government standard of good faith and fair dealing in parity with the private law standard has the advantage of bringing the contractual duties of the government into balance with those of private parties.[94]

However, if the classical view is accepted, which is well explained by *Mewett* as

“*The administration is the guardian of the interests of the public and every contract entered into by it*, *which is administrative in nature*, *has*, *for its objects*,

[92] Puvača–Mihelčić–Grgić, 2016. 93.

[93] Giritli–Berk–Bilgen–Akgüner, 2015. 1348., Gözler–Kaplan, 2017. 513.

[94] Toomey–Fisher–Curry,1990. 125.

the performance of some service in the interests of the public. But no contract can ever deprive the administration of the power and the duty to take any steps which are necessary for the protection of the public interest. Although, therefore, an administrative contract contains all the terms of the contract, and all the rights and duties which are contractual in nature, the terms of the contract alone are not sufficient to determine all the rights and duties which are imposed upon the parties. (...) *From the regulatory Powers of the administration arises its right to act in the interests of the public and, where necessary, terminate the contract, direct the mode of performance, or modify the contractual specifications in some way*."[95]

it would be difficult to defend that principle of good faith applies to the public entities party to an administrative contract unquestionably. The classical dominance of public authorities may seem to overrule the principle of good faith in order to serve the public interest best.

To sum up, the discussion on this paper requires the acceptance of the fact that "t*he theory of administrative contracts remains vague, irresolute, even at times erroneous*."[96] In this context, it is anticipated that the principle of good faith keeps extending its application area over the administrative contracts.

References

Alamur, Seher: *Türk Hukuku'nda İdari Sözleşmeler*. İstanbul, 2013. Unpublished LLM Thesis. https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp (10.09.2018.).

Apaydin, Eylem: *The Principle of Good Faith in Contracts*. Leges, İstanbul, 2014.

Auby, Jean-Bernard – Mirschberger, Michael – Schröder, Hanna – Stelkens, Ulrich – Ziller, Jacques: *ReNEUAL Model Rules on EU Administrative Procedure Book IV – Contracts*. 2014. http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf (10.09.2018.)

Bell, John – Boyron, Sophie – Whittaker, Simon: *Principles of French Law*. Oxford University Press, Oxford, 2008.

Boulis v MMI *The Supreme Court Reports* (1974) 875.

Bridge, Michael: Does Anglo-Canadian Law Need a Doctrine of Good Faith. *Canadian Journal of Business*, 9 (1984) 385–425.

Brindle, Derek A.: Procurement and the Duty of Good Faith. http://www.jml.ca/wp-content/uploads/publications/Procurement_DutyGoodFaith.pdf 34. (10.09.2018.)

Brownsword, Roger: Good Faith in Contracts Revisited. *Current Legal Problems*, 49 (1996) 2. 111–157.

[95] Mewett, Alan W.: The Theory of Government Contracts. *Mcgill Law Journal*, 5 (1958) 4, 222–246; 225.

[96] Langrod, 1955. 330.

Buchan, Jenny – Gunasekara, Gehan: Administrative Law Parallels with Private Law Concepts: Unconscionable Conduct, Good Faıth And Fairness in Franchise Relationships *Adelaide Law Review*. 36 (2015) 541–575.https://www.adelaide.edu.au/press/journals/law-review/issues/36-2/alr-36-2-ch09-buchan-gunasekara.pdf (10.09.2018.)

Çakrak, Recep – İldeş, Samet: Kamu Hukuku ve Özel Hukuk Açısından Dürüstlük Kuralı ve Uygulama Alanı. https://www.jurix.com.tr/article/4373# 24/27 (10.09.2018.)

Ciongaru, Emilian: Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice. https://ac.els-cdn.com/S1877042814048599/1-s2.0-S1877042814048599-main.pdf?_tid=fda7de14-42a8-4746-bb6a-e22aa44679f3&acdnat=1543494415_1278ebe64f538021106965ac36cdbf22. (10.09.2018.)

Claybrook, Frederick W. Jr.: Good Faith in the Termination and Formation of Federal Contracts. 1997. https://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_481.pdf (10.09.2018.)

Cordero, Giuditta: Moss Lectures on Comparative Law of Contracts. https://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf (10.09.2018.)

Craig, R.W.: Good Faith or Fair Dealing in Construction Procurement https://www.irbnet.de/daten/iconda/CIB3526.pdf (10.09.2018.)

Director-General of Fair Trading (DGFT) v First National Bank plc. *The Weekly Law Reports.W.L.R*. 2. 2000. 1353.

Ebke, Werner F – Steinhauer, Bettina M: The Doctrine of Good Faith in German Contract Law. In: Jack Beatson – Daniel Friedmann (eds): *Good Faith and Fault in Contract Law*. Clarendon Press, Oxford, 1995.

Garner, Brayn A. (Editor in Chief): *Black*'*s Law Dictionary*. 8th ed. Thomson West, St. Paul, 2004.

Giritli, İsmet – Berk, Kahraman – Bilgen, Pertev – Akgüner, Tayfun: *İdare Hukuku*. Der, İstanbul, 2015.

Goode, Roy: The Concept of "Good Faith" in English Law. Centro di studi e ricerche di diritto comparato e straniero diretto da M.J. Bonell Saggi, conferenze e seminari 2 w3.uniroma1.it/idc/centro/publications/02goode.htm-20k (10.09.2004.)

Gözler, Kemal – Kaplan, Gürsel: *İdare Hukuku Dersleri*. Ekin, Bursa, 2017.

Gözübüyük, Şeref – Tan, Turgut: *İdare Hukuku Cilt I Genel Esaslar*. Turhan, Ankara, 2016.

Grey, J. H.: Discretion in Administrative Law. *Osgoode Hall Law Journal*, 17 (1979) 1, 107–132.

Groves, Kelda: The Doctrine of Good Faith in Four Legal Systems. *Construction Law Journal*, 15 (1999) 4, 265–287.

Günday, Metin: *İdare Hukuku*. İmaj, Ankara, 2015.

Hartkamp, Arthur S.: The General Principles of EU Law and Private Law: Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel. *Journal of Comparative and International Private Law*, 75 (2011) 2, 241–259.

Kaltsa, Anastasi – Kourtesi Thomi: The Implementation of Private Law Principles in Administrative Contracts. *European Public Law*, 6 (2000) 3, 322–325.

Kaplan, Gürsel: Fransız İdare Hukukunda İdari Sözleşmelerden Kaynaklanan Uyuşmazlıkların Çözümü İle İlgili Yeni Hukuki Gelişmeler. *Dicle Üniversitesi Hukuk Fakültesi Dergisi*. 21 (2016) 135.

Keily, Troy: Good Faith and the Vienna Convention on Contracts for the International Sale of Goods [CISG]. *Vindobona Journal of Commercial Law and Arbitration Issue*. 3 (1999) 1, 15–40.

Lando, Ole: Some Features of the Law of Contract in the Third Millennium http://www.scandinavianlaw.se/pdf/40-13.pdf (10.09.2018.)

Langrod, Georges: Administrative Contracts: A Comparative Study. *The American Journal of Comparative Law*, 4 (1955) 3, 325–364.

Macmahon, Paul: Good Faith and Fair Dealing as an Underenforced Legal Norm LSE Law, *Society and Economy Working Papers* 22/2014. 5. http://eprints.lse.ac.uk/60567/1/WPS2014-22_MacMahon.pdf. (10.09.2018.)

Mahmud, Sana, Is There a General Principle of Good Faith under English Law? 2016–2017. https://www.fenwickelliott.com/research-insight/annual-review/2016/principle-good-faith-english-law. (10.09.2018.)

Maniruzzaman, A.F.M: State Contracts with Aliens the Question of Unilateral Change by the State in Contemporary International Law. *Journal of International Arbitration*. 9 (1992) 4, 141–171.

Matei, Cătălina G.: Differences between the Concession Contract of Public Services and other Contracts. *Bulletin of the Transilvania University of Braşov Series VII*: *Social Sciences Law*, 6 (2013) 55. http://webbut.unitbv.ro/BU2013/Series%20VII/BULETIN%20VII%20PDF/26%20Matei.pdf (10.09.2018.)

Mewett, Alan W.: The Theory of Government Contracts. *Mcgill Law Journal*, 5 (1958) 4, 222–246.

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd. *Court of Appeal of England and Wales Decisions* (*Civil Division*) *EWCA Civ*. 2013. 200.

MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt. *Court of Appeal of England and Wales Decisions* (*Civil Division*) *EWCA Civ*. 2016. 789.

Neeley, Steven A.: Can the Government Contract around the Duty of Good Faith and Fair Dealing? https://www.contractorsperspective.com/contract-administration/contracting-around-good-faith-and-fair-dealing/ (10.09.2018.)

Nolen, Sue: Managing Good Faith Requirements in Government Contracts. (2004) https://www.vgso.vic.gov.au/sites/default/files/publications/Managing%20Good%20Faith%20Requirements%20in%20Government%20Contracts.pdf. 1. (10.09.2018.)

Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority. *Supreme Court of Newfoundland and Labrador*, 2013. 4.

Örücü, Esin: Conseil d'Etat: The French Layer of Turkish Administrative Law. *The International and Comparative Law Quarterly*, 49 (2000) 3, 679–700.

Pascariu, Liana: The Distinction of the Administrative Contract from other Types of Contracts. *The Annals of the "Ştefan cel Mare" University of Suceava. Fascicle of the Faculty of Economics and Public Administratio*n, 10, (2010) 408–413.

Pascariu, Liana: The Opportunity of a European Administrative Contract Law. *European Journal of Law and Public Administration*, 3 (2016) 1, 105–113.

Public Sector Procurement Law Newsletter May 2013. https://www.keelcottrelle.com/assets/files/pdf/archive/public-sector-procurement/Procurement%20Law%20Newsletter.pdf (10.09.2018.)

Public Sector Procurement Law Newsletter May 2013. https://www.keelcottrelle.com/assets/files/pdf/archive/public-sector-procurement/Procurement%20Law%20Newsletter.pdf. (10.09.2018.)

Puvača, Maja Bukovac – Mihelčić, Gabrijela – Grgić Iva Tuhtan: Can Financial Crisis Lead to the Application of the Institute of Changed Circumstances Under Croatian Law? In: Başak Başoğlu (ed.): *The Effects of Financial Crises on the Binding Force of Contracts*: *Renegotiation*, *Rescission or Revision* Springer, 2016.

Renard Constructions (ME) Pty Ltd v Minister for Public Works. *New South Wales Law Reports. NSWLR*. 1992. 26. 234.

Schermaier, Martin Josef: Bona Fides in Roman Contract Law. In: Reinhard Zimmermann – Simon Whittaker (eds): *Good Faith in European Contract Law*. Cambridge University Press, Cambridge, 2000.

Seif, Marie Grace: The Administrative Contract. https://www.tamimi.com/law-update-articles/the-administrative-contract/ (10.09.2018.)

Serozan, Rona: General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision. In: Başoğlu, Başak (ed.): *The Effects of Financial Crises on the Binding Force of Contracts*: *Renegotiation*, *Rescission or Revision*. Springer, 2016.

Shalev, Gabriela: Good Faith in Public Law. *Israel Law Review*, 18 (1983) 127–134.

Speidel, Richard: The Duty of Good Faith in Contract Performance and Enforcement. *Journal of Legal Education* 46 (1996) 4, 537–545.

Teubner, Gunther: Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences. *The Modern Law Review*, 61 (1998) 1, 11–32.

The Association of European Administrative Judges (AEAJ): Principles of Good Faith and Fair Dealing and Legitimate Expectations in tax proceedings. https://www.aeaj.org/page/Principles-of-Good-Faith-and-Fair-Dealing-and-Legitimate-Expectations-in-tax-proceedings. (10.09.2018.)

Toomey, Daniel E. – Fisher, William B. – Curry, Laurie F.: Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law. *Public Contract Law Journal*, 20 (1990) 1, 87–125.

Tucker, James: A. O Ye of Little Faith: Breaching the Duty of Good Faith and Fair Dealing While Complying with the Express Terms of a Government Contract. https://www.lexology.com/library/detail.aspx?g=21a8f20f-bd94-425c-b353-1172081e9b43 (10.09.2018.)

Twigg-Flesner, Christian: A Good Faith Requirement for English Contract Law? *Nottingham Law Journal* 9 (2000) 1, http://www.nls.ntu.ac.uk/clr/PDF/nlj9_1/080.pdf (10.09.2018.)

Whittaker, Simon – Zimmermann, Reinhard: Good Faith In European Contract Law: Surveying The Legal Landscape. In: Jack Beatson – Daniel Friedmann (eds): *Good Faith and Fault in Contract Law*. Clarendon Press, Oxford, 1995.

Yam Seng Pte Ltd v International Trade Corporation Ltd. *High Court of England and Wales Decisions* (*Queen*'*s Bench Division*) *EWHC*. (*QB*). 2013. 111.

Maria Karcz-Kaczmarek[1]
Assistant Professor
Department of Administrative Law and Administrative Science
Faculty of Law and Administration
University of Lodz
mkaczmarek@wpia.uni.lodz.pl

PUBLIC FORMS OF DISSEMINATION AND PROTECTION OF MUSICAL INHERITAGE OF CULTURE

I. Cultural issues in legal regulations – general information

Issues related to culture are taken into consideration both at the level of national, international and European Union law. It is worth to emphase that, in accordance with the introduction to the EU Treaty, the initiative to create the European Union (EU) was inspired by, among others, the cultural inheritage of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law[2]. In turn, the Treaty on the Functioning of the European Union[3] under title *XIII Culture* in Article 167 proclaims that the EU shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. European Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. Accorting to those provision of the Treaty on the Functioning of the EU, action shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

It should be emphasized, that in the process of constitutionalisation of EU law, which aims at adopting the "Constitution for Europe" there are references to EU symbols such as: anthem, flag and motto. Not ratified by all UE Member States, Treaty establishing a Constitution for Europe[4] in

---

1 ORCID No:0000-0002-4786-4872.

2 Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012.13–390.

3 Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 47–390.

4 The Treaty establishing a Constitution for Europe was adopted by the European Council on 18th June 2004 and signed in Rome on 29th October 2004. OJ C 310/1, 16.12.2004. Also look at: Projekt Traktatu ustanawiającego

Article I–8 "Symbols of the Union" states, that anthem of the Union comes from "Ode to Joy" from the 9th Symphony of Ludwig van Beethoven. In turn, in the ratified Treaty of Lisbon of 13rd December 2007[5], provisions on the common european anthem are contained in Declaration No. 52 on the symbols of the EU. In this Delegation, countries such as: Belgium, Bulgaria, Germany, Greece, Spain, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and Slovakia declared that, the anthem "Ode to Joy" from the 9th Symphony by Ludwig van Beethoven, is for them symbol that express the sense of community of EU citizens and their relationship with the Union.

What is more, EU as well as the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe. Broadly understood cultural issues are taken in diverse EU legal acts[6] and various types of international conventions. To the basic international legal acts – in this respect belong

- include, among others:
- European Cultural Convention drawn up in Paris on 19th December 1954[7];
- UNESCO Convention on the Protection of Intangible Cultural Heritage drawn up in Paris on 17th October 2003[8];
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, drawn up in Paris on 20th October 2005.[9]

The concept of the term "culture" does not have a legal definition. This term derives from Latin (*cultura*) and was originally referred to farming or animal husbandry. The term was supposed to indicate transformation of the natural state of nature itself into a more useful condition for man. The term *cultura* for identification of intangible phenomena was used for the first time by Cicero in his work of *Disputationes Tusculanae*. The thinker defined term *cultura animi* (cultivation of the mind) as a nurturing and perfecting higher idea. In modern meaning this concept was used in 1688 by *Samuel Pufendorf* in his work *De iure naturae et gentium*. The term *cultura* and *cultura animi* used by him concerned all inventions introduced by man, eg. social institutions, language, morality. Generalizing, one can assume, after *Jan Pruszyński*, that "*culture is both the whole of spiritual, intellectual and material achievements created by the effort of individuals and human communities, preserved and perpetuated, as well as the attitude to its elements*"[10]. The basic construction element of the terms: 'cultural heritage', 'national, European and world cultural heritage' is the concept of culture. It should be noted, that these concepts are interrelated in such a

Konstytucję dla Europy (nieratyfikowany). http://www.europarl.europa.eu/about-parliament/pl/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe (10.10.2018).

[5] Journal of Laws of 2009/203, item no 1569.

[6] Regulation of the European Parliament and Council (EU) No 1295/2013 of 11th December 2013 on "The Creative Europe (2014–2020) program" OJ L 347, 20.12.2013. 221–237; Decision No. 445/2014/EU of the European Parliament and Council of 16th April 2014 on the Union action for European Capitals of Culture for 2020–2033. OJ L 132, 3.5.2014.1–12.

[7] Journal of Laws of 1990/8, item no 44.

[8] Journal of Laws of 2011/172, item no 1018.

[9] Journal of Laws of 2007/215, item no 1585.

[10] Pruszyński, Jan: *Dziedzictwo kultury Polski – jego straty i ochrona prawna*, V. 1, Kantor Wydawniczy Zakamycze, Kraków 2000. 400.

way, that the Polish cultural heritage contributes to the common European heritage, which in turn is a part of the world's cultural heritage. The concept of heritage, as well as the concept of culture, is a very broad concept with an indeterminate semantic scope. It can be stated, that the concept of heritage consists of all material and spiritual achievements of a given nation. It means all goods created or accepted as their own by a given nation. The heritage of national culture is an important element in shaping the national identity. The *Constitution of the Republic of Poland* (Constitution)[11] refers to cultural values and the public duty to take care of national heritage. According to the Constitution, national heritage (national cultural heritage) and cultural goods, which are the source of national identity, are subject to special legal protection and should be disseminated on special terms. According to the introduction of the Constitution the culture of the Polish Nation is rooted in the Christian legacy and human values. Poland has pledged to pass on to future generations all that is valuable for over a thousand years of polish achievements. This public-law obligation regarding cultural goods, which are the source of the Polish Nation's identity, its duration and development, refers to citizens living both in the country and abroad. The basis for activities aimed at safeguarding national heritage indicated in the Constitution of the Republic of Poland, as well as creating conditions for dissemination and equal access to cultural goods, is to ensure safety and appropriate state of preservation of historical relics. In the opinion of *Paweł Sarnecki*, "*the relevant undertakings should be considered as primary goals and with the highest significance*, *exceeding in general terms even the introduction to the Constitution*."[12]

The provision of Article 5 of the Constitution pointing to the requirement to "protect national heritage" is a program-based provision, that requires all public authorities to participate in the indicated activities, by means of all their competences. This provision of the Constitution, due to its generality, appoints only a nationwide responsibility of public authorities. The obligation to "protect national heritage" is understood in literature as a requirement to protect all material and spiritual factors in the history of the Polish state and society, testifying to its identity, an equal position among other nations, as well as a source of further development. National heritage consists of elements of history, from which Polish society can be proud, but also those elements that are not cherished if they can contribute to social education. The legacy of previous generations is now becoming a common element, not only for the Polish Nation, but for an increasingly integrated European and international community. Guarding of this heritage, in the meaning of 'preservation, security', allows for joint participation in civilizational and cultural achievements.[13] The activities of public authorities aiming to preserve valuable achievements of the past must be varied, so that they meet the needs of contemporary recipients of culture, and also take into account economic conditions existing at a given moment.

It should not raise any doubt, that music is an important element of intangible national heritage. To the national, european and world heritage resources belongs primarily an official anthem of individual countries. Musical compositions that are an official anthems (hymns)

---

[11] Act of 2nd April 1997 the Constitution of the Republic of Poland, Journal of Laws of 1997/78, item no 483.

[12] Sarnecki, Paweł: Komentarz do art. 5 Konstytucji RP. In: Garlicki, Leszek, Zubik, Marek (eds.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, Wydawnictwo Sejmowe, Warszawa 2016. 230.

[13] Sarnecki, 2016. 230–235.

are subject to special legal protection.[14] According to the Polish Code of Misdemeanours (Petty Offenses), the violation of the authority of the national anthem is punishable by detention from 5 to 30 days or a fine from 20 up to 5,000 PLN.[15] Cultural values are also other musical works, that are inextricably associated with specific states or historical events. For instance, Cantata of the IX symphony of Ludwig van Beethoven *Ode to joy*, which is the anthem of United Europe, both the Council of Europe and the European Union,[16] undoubtedly forms part of the European cultural heritage. It can even be stated, that this work is currently associated primarily with the EU as an international organization, not with the composer and the country of his origin. Certain cultural heritage assets, including musical works, can not be easily and unambiguously assigned to one nation.[17] These works, due to their complex origin or universal value, are part of the European and world heritage. The Council of Europe makes recordings of various interpretations and versions of the European Anthem. These recordings are "*Rhapsody on the theme of the European Anthem*" by French composer Christoph Guyard. This "Rhapsody" has copyrights since registering at Sacem (France). To satisfy every European's musical taste, the Council of Europe provides olso other versions of the hymn, e.g. Hip-hop, Techno,Roma and Pipe Organ[18] version. All of these versions are available to radio, television and other media and the general public. The service is free but as these different works are protected their use and/or public broadcasting is subject to the payment of performing rights.[19]

Their unambiguous assignment to the national heritage of a given nation is problematic, like in the case of Fryderyk Chopin's heritage. This composer has a complex identity. He came from a family of Polish-French origin, was born and lived in his youth in part of Poland under Russian occupation, but in his adult life lived and died in France. Music legacy of this artist is an important element of Polish national heritage, but also an element of European heritage. Chopin's legacy was – and still is – the link between Polish culture and European culture. Development and dissemination of culture, including musical culture, belongs both to the tasks of government administration bodies and to the tasks of local government units. In the literature on the subject, it was noted, that the division of these competences into individual bodies and units results primarily from the

---

[14] According to Article 28.4 the Polish Constitution the Polish anthem "*Dąbrowski's Mazurka*" is protected by law. In turn, Act of 31*st* January 1980 on the coat- of -arms, colors and anthem of the Republic of Poland and state seals provides that the Polish national anthem shall be performed or reproduced in a way that ensures their due respect. Journal of Laws of 2018, item no 441.

[15] Act of 30th May 1971. Journal of Laws of 2018, items no 618, 911, 2077.

[16] The Parliamentary Assembly of the Council of Europe in 1971 proposed the acceptance the *Ode to joy* as the anthem of Europe. This idea was accepted by the Committee of Ministers of the Council of Europe in January 1972. For the first time, the European anthem was officially performed in 1972 on Europe Day. In 1986, this piece of music was also adopted by the European Community and later by the EU as its anthem. Currently, the Council of Europe and the EU have a common anthem and a European flag. *Hymn europejski*, https://www.coe.int/pl/web/about-us/the-european-anthem; Hymn europejski, https://europa.eu/european-union/about-eu/symbols/anthem_pl (10.11.2018)

[17] Zeidler, Kamil: Pojęcie "dziedzictwa narodowego" w Konstytucji RP i jego prawna ochrona. In: *Zabytki. Prawo i praktyka*, Wydawnictwo Uniwersystetu Gdańskiego, Wolters Kluwer, Gdańsk Warszawa 2017. 19.

[18] Pipe Organ of the Béla Bartók National Concert Hall, Palace of Arts – Budapest, Hungary; entirely virtualised by Inspired Acoustics. Hymn Europejski. https://www.coe.int/pl/web/about-us/the-european-anthem (20.11.2018).

[19] *The European anthem*, https://www.coe.int/pl/web/about-us/the-european-anthem (23.11.2018).

character and systemic role of these bodies, as well as from detailed provisions specifying their tasks.[20]

II. Institutional form of dissemination and protection of musical heritage in Poland

II.1. Celebration of heritage of outstanding artists. General remarks

In Poland at the level of government administration functions the department of culture and protection of national heritage. Pursuant to the Act of 4th September 1997 on government administration departments,[21] such unit covers issues of development and protection of material and intangible national heritage, as well as cultural activities. Mentioned Act does not directly point to protection of musical heritage, but this public task can be derived by way of interpreting the general provisions of of applicable laws and the Constitution. Public activities in the field of music in Poland are taken, as a rule, on the basis of general statutory authorization to conduct cultural activities. Under the current legal status, this authorization is included in Act of October 25, 1991 on the organization and conduct of cultural activities.[22]

According to mentioned Act Ministers, heads of central offices and self-government units organize cultural activities by creating (state or self-government) cultural institutions for whom conducting such activity is the basic statutory aim. State institutions whose activity is focused on the sphere of music are: Institute of Music and Dance, Polskie Wydawnictwo Muzyczne (Polish Music Publishers) and National Center for Culture. These institutions are organisationally and financially subjected to the Minister of Culture. Their tasks concern the dissemination of culture, maintaining national and state traditions, promoting Polish national heritage and publishing activity. Furthermore, under the 1991 Act, the public's task is to patronage over cultural activities. This patronage includes also care and support of musical activity. Important public form of dissemination and protection of musical heritage are programs of Minister of Culture and National Heritage. They are implemented on the basis of Minister of Culture and National Heritage's regulation of 27th September 2017 on detailed conditions for obtaining funding for the implementation of tasks in the field of culture, the procedure for submitting applications and transferring funds from the Culture Promotion Fund.[23] In 2019 in Poland, in the sphere of music, are implemented two programs: *Muzyka* (Music) and *Muzyczny ślad* (Music Track). The strategic goal of the programs is to raise the level of musical culture and supporting valuable phenomena in Polish and world music culture. The programs are also to support the cultivation and protection of the centuries-long heritage of Polish musical culture. In general, financial support from the state concerns non-commercial activities or tasks that combine high substantive value with commercial potential. Support from the minister must fall within the permissible public aid limits.

[20] Wytrążek, Wojciech: *Działalność artystyczna w sferze muzyki w ujęciu prawa publicznego*, Katolicki Uniwersytet Lubelski, Lublin 2013. 189.

[21] Journal of Laws of 2018, item no 762.

[22] Journal of Laws of 2017, item no 867.

[23] Journal of Laws of 2017, item 1808.

With respect to musical heritage of eminent Polish creators, the law provides a specific kind of protection and dissemination. Form of it is the appointment by Sejm and Senat the chosen artist as the patron of a given year. During such a year, public administration authorities pay special attention to organizing cultural events concerning chosen artist. This applies to organizations, both at home and abroad, concerts, festivals, lectures, as well as publishing and popularizing activities. The Polish Sejm[24] and Senat[25] establishment, among other, the 2019 as a Moniuszko Year. Stanisław Moniuszko (1819–1872) was the founder of the Polish national opera. He composed patriotic music to encourage Poles in difficult times when Poland was under partition. He composed the "Home Songbook" covering over 200 songs. The term "home" had a deeper meaning, to avoid Russian censorship, in a veiled way, it emphasized the national character of the songs contained in the song. The composer's genius consisted in the ability to combine Polish folklore with elements of the European opera (Italian, French and German). Due to the 200th anniversary of his birth, the public administration authorities decided to take action to bring close the composer life and rich work. Public actions also draw Poles' attention to patriotic attitudes among artists and the need to create art that draws inspiration from Polish culture.The institutional expression of these activities was the appointment in 2017 the Plenipotentiary of the Minister of Culture and National Heritage for the organization of the celebration of the 200th anniversary of the birth of Stanisław Moniuszko.[26] In connection with the establishment the 2019 as a Moniuszko Year, a special pool of funds for publications dedicated to Stanisław Moniuszko has been separated in ministerial grant program *Muzyczny ślad*.

II.2. Legal regulations regarding exclusively protection of Chopin's heritage

Actions of public authorities in the field of music as an element of national heritage concern primarily protected legacy of Fryderyk Chopin and folk music as an important factor enabling the preservation of national and local identity. Considering the artistic value and significance of Fryderyk Chopin's work for the Polish Nation, it should be undeniably stated, that the composer's legacy is an important element of the Polish cultural heritage. Due to this, it is worth paying attention to the institutional forms of protection and cultivation by the public authority of the legacy of Chopin. An analysis of Polish legislation indicates, that activities of public authorities regarding Fryderyk Chopin's legacy are undertaken both on the basis of general statutory authorizations and a specific authorization contained in Act of 03th February 2001 on the protection of Fryderyk Chopin's heritage.[27] The music of Fryderyk Chopin, created in times particularly difficult for the Polish Nation, has already shaped national identity in the artist's assumptions.[28] The composer's output, its undeniable

[24] Monitor Polski 2018, item 731.

[25] Monitor Polski 2018, item 34.

[26] Ordinance of Minister of Culture and National Heritage of 31st October 2017 (Journal of the Minister of Culture and National Heritage 2017, item no 72).

[27] Journal of Laws of 2001/16, item no 168.

[28] At the time, when Fryderyk Chopin composed, Poland was under partitions. The patriotic motifs are visible, for example, in the Etude in C minor, Op. 10 No. 12, called "*the Revolutionary Etude*" (that piece of music was inspirated by the failed Polish National Uprising from 1831). Chopin, Fryderyk: Etude in C minor, Op.

artistic and patriotic value, were appreciated in Polish territory relatively soon after the artist's death. The value of this music perfectly reflects the words of friend of Chopin, Robert Schumann, who stated, that "*if a powerful self-serving monarch from the north knew*, *how dangerous the enemy threatens him in Chopin*'*s works, in simple melodies of his mazurkas*, *he would forbid this music. Chopin*'*s works are cannons hidden in flowers*."[29] Drawing from the sources of native culture made the music of this genius artist very quickly and permanently settled in the hearts of Poles. Certainly, the commemoration of his outstanding activity was hampered by political situation at the time. In the nineteenth and early twentieth centuries the partitioning authorities were not interested in spreading the artist's output – a Pole of choice, which in his music reflected patriotism, the tragic fate of his Nation, and a longing for Polish culture, including folk music. Initially, the Warsaw Musical Society was involved in commemorating the person and Chopin's work. An important achievement of the Society was founding a memorial plaque to memory of Chopin. This plaque was placed in the church of Saint Cross in Warsaw, that is the resting place of the urn with the composer's heart.[30] In addition, the Warsaw Music Society led to unveiling of the first monument of Fryderyk Chopin on Polish territories.[31] The monument stood in Żelazowa Wola, the place of the artist's birth. The indicated Society also contributed to giving the composer's name for one of the newly-established streets of Warsaw. As part of the Society, on the initiative of a Polish ethnographer, musicologist, linguist and folklorist Jan Karłowicz, in May 1899 a separate section was established, whose task was to disseminate Chopin's works and collect memorabilia after him. An important achievement of the Warsaw Music Society was the inauguration in 1927 the I*nternational Fryderyk Chopin Piano Competition* [IFCPC] in Warsaw.[32] The indicated Competition has become a permanent part of the cultural calendar not only for Poles, but for music lovers from all over the world. Organized regularly every 5 years,[33] the IFCPC is the oldest monographic music competition in the world. The participation itself is treated prestigiously and often shapes the fate of young pianists. IFCPC is an institutional way of disseminating the music of his patron. It can even be said, that the Competition itself is an instrumental value and is an important element of Polish culture and national identity. It serves the realization of basic value, which is the cultivation and providing access to the heritage of Chopin's creativity, which is a recognizable fragment of the culture and identity of the Polish Nation almost

10 (*the Revolutionary*) No. 12, Wydawnictwo Muzyczne. Poznań, 1948; Hoesick, Ferdynad: *Chopin. Życie i twórczość, vol 3*. Księgarnia F. Hoesick, G. Gebethner, Warszawa – Kraków, 1911. 268–270.

[29] Einstein, Alfred: *Music in the Romantic Era*. W. W. Norton & Company, Inc., New York 1947. 230. Polist translation: Jarocińscy, Michalina i Stefan, *Muzyka w epoce romantyzmu*. Polskie Wydawnictwo Muzyczne, Kraków, 1983. 231.

[30] The ceremonial unveiling of the memorative plaque took place on 5th March 1880. *Historia Warszawskiego Towarzystwa Muzycznego*, http://www.wtm.org.pl/historiaw.htm (20.11.2018); *Najważniejsze daty w historii kościoła Sw. Krzyża w Warszawie*, http://www.swkrzyz.pl/index.php/historia/najwazniejsze-daty (10.10.2018).

[31] Unveiling of the first monument of Fryderyk Chopin on Polish territories in Żelazowa Wola took place in 1894. *Pomnik Fryderyka Chopina z 1894 r*.; http://www.wtm.org.pl/historiaw.htm. (20.11.2018). The history of the construction of the monument in Warsaw covers the years 1901–1926. Siemieńska, Halina: *Historia budowy pomnika Fryderyka Chopina w Warszawie*. Komitet Budowy Pomnika Fr. Chopina, Warszawa, 1929. 3.

[32] *Historia Warszawskiego Towarzystwa Muzycznego*, http://www.wtm.org.pl/historiaw.htm (20.11.2018).

[33] For obvious reasons, the International Fryderyk Chopin Piano Competition in Warsaw did not take place during the Second World War. *Międzynarodowy Konkurs Pianistyczny im. Fryderyka Chopina*, http://pl.chopin.nifc.pl/institute/chopincompetition/info. (30.09.2018)

throughout the world. The ever-present phenomenon of this event proves, that chopinaria not only have significant aesthetic value, but are manifestation of a universal and timeless good.[34] It should be remembered, that during the Second World War, the performing of Fryderyk Chopin's music was punished by imprisonment in the German Nazi concentration camp.[35] Removing from the public message and social awareness of Poles the works and information about the great Countryman indicates, that the German Nazi invaders noticed "*cannons hidden in flowers*". During summer of 1940, the material expression of Chopin's memory, his monument in Warsaw, was also destroyed.[36] Echoes of this bestial act have been preserved in Polish literature. Expression of indignation was even given to those, who do not professionally engage in literature. An example is, among others, a poem by *Ludwik Straszewicz*, later a long-time professor at the University of Lodz (Poland), who was an eyewitness of the events of that time.[37] Severe punishments, including a direct threat to life and health, did not manage to erase Chopin's cultural heritage from the universal memory of Poles. German occupiers, therefore, undertook a different form of "struggle" with his legacy. Namely, they wanted to falsify the truth about Artist's origin. The information about the supposedly German origin and German cultural affiliation of the composer was disseminated. In this way, the Nazis wanted to undermine the patriotic value of Chopin's music.[38] In the other hand the propaganda action consisted in handing over to Polish hands, at the instigation of the chaplain of the German army, pastor Schulz, the urn with Chopin's heart in order to protect it from destruction during the Warsaw Uprising (1944). The urn was handed over to the Polish bishop Szlagowski on 4th September 1944 and was kept in Milanówek, which was documented in the German film chronicles.[39] This action, however, paradoxically contributed to the preservation of important mementoes of Polish culture. Occupation authorities did not manage to remove from the Poles' awareness the values of Fryderyk Chopin's music. Winner of the 2nd International Fryderyk Chopin Competition in Warsaw in 1932 stated, that during the occupation

> "*the first thing that was forbidden was playing Chopin*. (...) *The Germans did not even realize*, *how much they contributed to his ennoblement*. (...) *After the*

---

34 Karcz-Kaczmarek, Maria: Dziedzictwo Fryderyka Chopina jako wartość w prawie administracyjnym.In.: Zimmermann, Jan (ed.): *Aksjologia prawa administracyjnego*. V. 2 Wolters Kluwer, Warszawa, 2017. 763– 779.

35 Budrewicz, Olgierd: *Polska dla początkujących*, Wydawnictwo Naukowe PWN, Warszawa 1976. 54.

36 Łazienki bez Chopina? Niemcy nie mieli problemu z wysadzeniem pomnika, https://www.polskieradio.pl/39/156/Artykul/854658,Lazienki-bez-Chopina-Niemcy-nie-mieli-problemu-z-wysadzeniem-pomnika (15.11.2018).

37 Poem: *Pomnik Szopena*. In: Straszewicz, Ludwik: *1940–1944. Szkopskie lata, Wydawnictwo L. Straszewicz* Wrocław, 1946. 61.

38 During World War II, the occupation authorities prohibited the performance of Chopin's works and began to disseminate the thesis about the German origin of the Artist, because Chopin's family came from the duchy of Lorraine located on the Franco-German border. In 1943, in Kraków, Hans Frank opened an exhibition dedicated to Chopin, collection included items related to the artist, such as: Chopin's posthumous mask, Chopin's piano brand Pleyel, correspondence and the library of Chopin's teacher Józef Elsner. Wroński, Paweł: *Fortepian Schoppinga*, http://wyborcza.pl/duzyformat/1,127290,7867801,Fortepian_Schoppinga.html; Majewski, Jerzy: *Pomnik Fryderyka Chopina w Warszawie. Od 59 lat ponownie zdobi Łazienki Królewskie*, http://warszawa.wyborcza.pl/warszawa/1,34862,20055585,pomnik-fryderyka-chopina-od-59-lat-ponownie-zdobi-lazienki.html (03.11.2018).

39 Bilica, Krzysztof: „Ktokolwiek by wiedział...", *Ruch Muzyczny*, 2008/17–18. 53.

> *war, people reminding themself of these concerts, they said, you know, thanks to your music I managed to survive the occupation.*"[40]

Examples from history show the deep roots of Fryderyk Chopin's work in national identity and its significance for the duration and development of the Polish Nation.

In the Polish legal system, idea of commemorating the person and work of Fryderyk Chopin appears systematically on the occasion of the artist's birthday or death anniversary. One of the first forms of honoring and at the same time using the artist's image, was introducing, pursuant to the circulation of postage stamps with the image of Fryderyk Chopin. The indicated postage stamps were introduced by the ordinance of the Minister of Post and Telegraph from February 28, 1927.[41] The artist's image was also used by the National Bank of Poland, which issued coins[42] and banknotes[43] commemorating the artist's birthday or death, as well as the next International Fryderyk Chopin Piano Competition in Warsaw.[44]

II.2.1. Statutory scope of protection of Fryderyk Chopin's heritage

At present-day, detailed rules concerning forms of protection and tasks of public authorities in the discussed area are regulated by law. This underlines the importance of indicated problem. Pursuant to the Act of 3th February 2001, the works of Fryderyk Chopin and related subjects are under a special legal protection. The indicated elements of material and immaterial culture were considered to be nationwide by virtue of this Act. Also, the birthplace of Fryderyk Chopin, a manor house in Żelazowa Wola along with the historic park surrounding it, according to Article 2 of the mentioned Act, are considered to be the good of national culture. The use by the legislator two separate definitions, namely the "nationwide good" and the "good of national culture" seems unjustified. These concepts have in practice the same meaning. Therefore, this legal state introduces interpretation doubts. In the literature on the subject, it was indicated, that enough term would be: "national good", although this term on the basis of indicated *act* "*is difficult to consider as momentous* (...) *perhaps it was supposed to fulfill only a function*."[45] The use of term 'national good' should emphasize the importance, that legislator grants to the person and work of the artist.

---

[40] Bilica, 2008. 53.

[41] Journal of Laws of 1937/24, item no 191.

[42] Ordinance of the President of the National Bank of Poland of 4.08.1999 regarding the determination of samples, alloy, sample, weight and volume of issue of nominal value of 2 zlotys, 10 zlotys and 200 zlotys and the date of putting them into circulation. Monitor Polski 1999/28, item no 431. This ordinance on the occasion of the 150th anniversary of Chopin's death, introduced jubilee coins with the artist's image on the market.

[43] Ordinance of the President of the National Bank of Poland from 16th February 2010 regarding the design and size of issue of a banknote with a nominal value of PLN 20. This banknote was introduced on the occasion of the 200th anniversary Fryderyk Chopin's birth. Monitor Polski 2010/9, item no 81.

[44] Ordinance of the President of the National Bank of Poland of 21th September 1995 regarding the determination of the sample, sample and weight of the nominal coin of PLN 200 and the date of its entry into circulation. Monitor Polski 1995/49, item no 557.

[45] Mazurkiewicz, Jacek: *Non omnis moriar. Ochrona dóbr osobistych zmarłego w prawie polskim*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław 2010. 719.

The legislator's intentions regarding the special legal protection of Chopin's legacy were clearly expressed in the draft of Act on the Protection of Chopin's Heritage of 1999.[46] Initially, the Act began with an introduction, that constituted the role of Fryderyk Chopin's music for the preservation and development of Polish cultural identity, but also stressed the universal values of this music. The draft introduction to the Act stressed, that special obligations exist on the Nation and the Polish State. In the indicated project, all objects related to Chopin were defined as the '*inalienable good of the Polish Nation*', which meant, that they could not be sold outside of Poland. Finally adopted in 2001 Act does not have a preambule, that would be clearly disclose the normatization of this legal act. The legal doctrine indicates, that the preface (preamble, arenga) preceding the basic part of the act is "*somewhat ex definitione predestined to expose the axiological basis of the act*."[47] The applicable Act does not contain a preamble, which would be clearly specify motivations (*ratio legis*) to adopt it. Nevertheless, analysis of the provisions allows to formulate an assessment as to the attitude of legislature to the values protected by this legal act. This assessment is indicated by the terms "national good" and "nationwide good" used in relation to the object of its protection. In the current legal status, protection and custody over Fryderyk Chopin's heritage is *expressis verbis* a public task. However, the mentioned Act does not contain a definition of the legal concept of 'heritage'. Taking into account the provisions of article 1 and article 3, it can be stated, that the heritage of Fryderyk Chopin and, at the same time, the national good, are subject to special legal protection to his works and objects related to him, the place of birth of the artist together with the historic park surrounding it, as well as his name and image. The minister competent for culture and protection of national heritage is in charge of listed heritage.

The concept of 'custody' in Poland is not only a statutory[48] concept, but also a constitutional[49] one. In dictionary terms, custody is related to care for someone or something.[50] On the other hand, according to administrative law[51], care is given to the positive functions of public administration focused on direct or indirect satisfaction of public needs. In the present case, public need justifying the existence of custody provided by the minister competent for culture and protection of national heritage is the need for protection indicated in Article 1 of the Act on the protection of Fryderyk Chopin's heritage of nationwide goods. According to Stanisław Duszniak, the concept of care, 'custody' in public law was taken from the terminology of private law, in which its meaning was established by Roman law (*tutela*, *cura*, *curatela*) and developed in modern law. In the opinion of these author, indicated in

[46] Official Project no 1414, Sejm of the Republic of Poland for the 3rd Term. http://orka.sejm.gov.pl/Rejestrd.nsf/wgdruku/1414/$file/1414.pdf (10.12.2018)

[47] Boć, Jan – Lisowski, Piotr: Normatywizacja wartości w prawie administracyjnym. In: Zimmermann, Jan (ed.): *Wartości w prawie administracyjnym*, Wolters Kluwer Polska, Warszawa 2015. 27.

[48] The term 'custody' is used, among others: in the Act of 9th June 2011 on supporting families and the foster care system. Jurnal of Laws of 2016, item no 575, Act of 2nd December 2009 on Medical Chambers. Jurnal of Laws of 2018, item no 168.

[49] The provision of Article 17.1 of the Constitution of the Republic of Poland determines the custody held by professional self-governments over professions in which the public repose confidence.

[50] Szymczak, Maciej (ed.): *Słownik języka polskiego*, Vol. II, Państwowe Wydawnictwo Naukowe, Warszawa 1978. 648.

[51] Kasznica, Stanisław: *Polskie Prawo Administracyjne. Pojęcia i instytucje zasadnicze*. Księgarnia Akademicka, Poznań, 1947.152–153.

public law, the care was associated mainly with the police state, in which "*the state – the carer overwhelmed* [*the municipality*] *with its watchful care until it was deprived of all independence*".[52] Indicated negative connotations contributed to the slow elimination of custody from terminology and legislation. The restoration of custody (care) concept can be observed in the latest legislation. This phenomenon seems to be justified, the use of the term 'custody' is intended to strengthen the emphasis on "*duty of care*, s*upervision over given matters*". *Entrusting public administrations with the duty to exercise custody contributes to the fact*, *that supervision is not only a* "*mechanical function deprived of the expression of life*."[53]

The 2001 Act gave – on principles regarding to protection of personal interests – protection for surname and image of Fryderyk Chopin. The minister competent for the matters of culture and protection of national heritage is the entity entitled to claim protection of the indicated personal rights. Principles of *personal interest*'*s protection*, as well as property and non-proprietary claims in the event of their violation, are regulated by the Civil Code.[54] Legal protection also applies to trademarks registered and used on the day of entry into force of the Act using the surname or image of Fryderyk Chopin. It is worth noting, that the wording of Article 1 point 3 of the said Act indicates, that the pursuit of claims does not concern only illegal activities. The basis for starting the minister's custody may be legal action, but "disgraceful", in other words, not counting with dignity of the legacy of Fryderyk Chopin as a nationwide good. At the same time, it should be emphasized, that the term 'disgraceful' used in the provision leaves the minister a certain scope of freedom of interpretation and discretion as to the scope and basis for pursuing claims related to the protection of Fryderyk Chopin's heritage. For actions, that could be "disgraceful" to the kind of culture indicated in the Act, should be considered actions taken to ridicule the artist's activity or use his achievements in an unworthy or socially unacceptable manner. The indicated statutory provision should be assessed positively, as it

---

[52] Duszniak, Stanisław: Terminologia z zakresu czynności nadzorczych i kontrolnych. *Gazeta Administracji* 1948/1–2. 51–64.

[53] Duszniak, 1948. 63.

[54] The Civil Code of 23th February 1964 (Journal of Law of 2018, item no 1025) regulates the protection of personal interests, mainly, in Articles 23–24 and Article 448. According to Article 23 of Civil Code The personal interests of a human being, in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements are protected by civil law, independently of protection under other regulations. Article 24 of Civil Code indicates means of protection. Paragraph 1 provides that any person whose personal interests are threatened by another person's actions may demand that the actions be ceased unless they are not unlawful. In the case of infringement, he may also demand that the person committing the infringement perform the actions necessary to remove its effects, in particular that the person make a declaration of the appropriate form and substance. On the terms provided for in this Code, he may also demand monetary recompense or that an appropriate amount of money be paid to a specific public cause. Paragraph 2 provides that if, as a result of infringement of a personal interest, financial damage is caused, the aggrieved party may demand that the damage be remedied in accordance with general principles. Paragraph 3 provides that the above provisions do not prejudice any rights provided by other regulations, in particular by copyright law and the law on inventions. In turn, Article 448 of Code Civil concers infringement of personal interests. According to this provision in the event of infringement of one's personal interests the court may award to the person whose interests have been infringed an appropriate amount as monetary recompense for the harm suffered or may, at his demand, award an appropriate amount of money to be paid for a social cause chosen by him, irrespective of other means necessary to remove the effects of the infringement.

emphasizes importance of the legacy of the artist in question, not only as an artistic value, but also as a public-law value. The Act on the protection of the Fryderyk Chopin heritage obliges the minister competent for culture and national heritage protection not only to take care of the goods related to the artist's person, but also to protect his heritage. Both the statutory term "custody over heritage" and the "protection of heritage" is an undefined and vague concept. An exemplary list of activities comprising the protection of Fryderyk Chopin's heritage is contained in Article 3 of mentioned 2001 Act. Pursuant to the aforementioned provision, this protection includes, in particular, the cultivation of knowledge and memory about Fryderyk Chopin, as well as conducting research and cooperation in developing knowledge about his work and person. In addition, protective measures are based on popularizing the works of this outstanding artist, in particular by undertaking or co-financing issues of recordings, music and other publications, organizing or co-financing concerts, undertaking or financial support of competitions or other initiatives aimed at presenting works and popularizing knowledge about Fryderyk Chopin. Protection over Fryderyk Chopin's heritage means also cooperation in supporting and developing the performance of his work in Poland and abroad. Pursuant to legal regulation, the protection of heritage also consists in acquiring, collecting, securing and making available objects and places related to his life and work, as well as taking actions aimed at preserving the integrity of Fryderyk Chopin's works.

According to Act on the protection of the Fryderyk Chopin heritage, this activity includes also private legal forms of protection of personal interests (rights), such as the artist's surname and image. This protection, in contrast to the protection provided for in Article 81 and 83 of the Copyright Law,[55] is indefinite. In the literature,[56] it has been pointed out, that the lack of a statutory indication of other personal rights does not imply exclusion from legal protection. All Chopin's personal interests are subject to protection pursuant to Polish Civil Code. The issue of *post mortem* protection of the person's right was widely considered in the German legal doctrine, in which numerous reasons of philosophical and legal nature were referred to justifying its existence.[57] Granting of posthumous protection to personal rights related to the person of Fryderyk Chopin indicates, that the Polish legislator recognized their significant value, also on the legal grounds. The minister competent for culture and protection of national heritage is entitled to claim protection of these assets, and the amounts awarded for damages or compensation for their violation are transferred to the National Fryderyk Chopin Institute. It seems, that protection of *post mortem*, shaped on the basis of the Polish Act on the protection of the Fryderyk Chopin heritage, is part of the German concept of this kind of protection, according to which, protection of person's general right after the subject's death is a general obligation of the state[58].

The pursuit of state honoring of the value of music and the person of Fryderyk Chopin was particularly evident in 2010, at the occasion of the 200th anniversary of his birth. Preparations for public celebrations of the artist's birthday anniversary were started

[55] Act of 4th April 1994 on copyright and related rights, provides, in principle, protection within 20 years from the death of a person whose personal rights are protected. Journal of Laws of 2018, item no 1191.

[56] Mazurkiewicz, 2010. 723–724.

[57] Sieńczyło-Chlabicz, Joanna – Banasiuk, Joanna: *Cywilnoprawna ochrona wizerunku osób powszechnie znanych w dobie komercjalizacji dóbr osobistych*, Wolters Kluwer Polska, Warszawa, 2014. 176.

[58] Moor about concepts of protection of personal interests (rights of personalities) in German law look at: Sieńczyło-Chlabicz–Banasiuk 2014. 176–184.

earlier, among others through appointment in January 2008 of a special Plenipotentiary (Representative)[59] of the Minister of Culture and National Heritage for the indicated events and establishment of the *Celebration Committee of the 200th Anniversary of the Birth of Fryderyk Chopin*.[60] Pursuant to § 3 of the Regulation No. 4/2008 of the Minister of Culture and National Heritage, tasks of the members of this Committee were, first, to promote the person and work of Fryderyk Chopin on the international arena, then, to initiate and implement projects related to the 200th anniversary of Fryderyk Chopin's birth. The year of 2010, by virtue of resolution of the Sejm[61] of the Republic of Poland of 9th May 2008,[62] was established as the Year of Fryderyk Chopin. The resolution indicated conviction of special significance of the artistic achievements of the Patron for national as well as world cultural heritage. In addition, the Polish Sejm emphasized the value of Chopin's music, including his ability to draw patterns from Polish folk music, to shape Polish culture and national identity. The bicentenary of the birth of this outstanding figure was also honored by the Senate[63] of the Republic of Poland, and on this occasion issued a resolution on the establishment of 2010 as the Year of Fryderyk Chopin.[64] The Senate of the Republic of Poland, like the Polish Sejm, emphasized importance and significance of Fryderyk Chopin's activities for national and global culture. In the Senate resolution, Chopin's creativity, contributing to the development of world pianism, was given universal value. The Fryderyk Chopin Institute actively participated in commemoration of the 200th anniversary of birth of its patron.[65] At present, indicated cultural establishment is the fundamental institutional expression of state's custody of this heritage of Fryderyk Chopin. Act from 2001 stipulates, that the minister may, in the scope indicated by him, commission the Institute to perform duties related to protection of Chopin's heritage. Indicated statutory solution has some legislative awkwardness. It suggests, that the minister responsible for culture and protection of national heritage is the basic entity appointed to protect this heritage. However, taking into account the absolute wording of Article 5 of the mentioned Act, as well as the rationale of establishment of the Chopin Institute, taking into account also its practical activities, it should be stated, that the Chopin Institute is an administrative entity, whose activity is focused on protection of its patron's heritage. The minister competent for culture and protection of national heritage, as the organizer of this Institute, may affect its functioning only within the scope provided for

59 Regulation No. 4 of the Minister of Culture and National Heritage of 21st January 2008 on the establishment and tasks of the Plenipotentiary of the Minister of Culture and National Heritage for the celebration of the 200th anniversary of Fryderyk Chopin's birth, Official Journal of the Minister of Culture and National Heritage 2008/1, item no 4.

60 Regulation No. 3 of the Minister of Culture and National Heritage from 21st January 2008 regarding the establishment of the Celebration Committee of the 200th Anniversary of the Birth of Fryderyk Chopin, Official Journal of the Minister of Culture and National Heritage 2008/1, item no 3.

61 Sejm is the lower house of Polish Parliament.

62 Polish Monitor 2008/39, item no 343.

63 Senate is the upper house of Polish Parliament.

64 Polish Monitor 2008/66, item no 866.

65 An important element of this celebration was an International Scientific Congress "Chopin 1810–2010 Ideas – Interpretations – Impacts". It is worth to noting that for the centenary of Chopin's birth in 1910, Chopin's Congress was organized in Lviv, where *Ignacy Jan Paderewski* gave a lively and patriotic speech. The next Congresses took place in 1960 and 1999. After II ww. despite of the enormity of the war losses in 1949, that is in the centenary of the artist's death, in Warsaw took place the Internacional Chopin Competition. http://pl.chopin.nifc.pl/institute/congress/info (10.12.2018).

in Act of 25th October 1991 on organizing and conducting cultural activities,[66] provisions of which apply to matters not regulated in Act on Protection of Fryderyk Chopin's heritage.

II.2.2. Institutional forms of protection of Fryderyk Chopin heritage

Created on the basis of the indicated Act from 2001, the *Fryderyk Chopin Institute* (FCI) is a state cultural institution within the meaning of the Act on organizing and conducting cultural activity. It operates on the basis of a statute granted by the minister competent for culture and protection of national heritage; currently Act of 16 February 2017.[67] The FCI has legal personality, and its organs are: Director of the Institute, which manages its activities and represents it outside and Program Board of the Institute. The Program Board is an advisory and opinion-forming body, and it consists of 13 members appointed for a period of 5 years by the minister competent for culture and protection of national heritage at the request of the Institute Director. The members of the Program Board are representatives of cultural circles associated with Fryderyk Chopin's music, including a representative of the Minister. It is worth noting, that the current Institute's statute of 2017 provides for complete discretion of the Institute Director as to requesting the appointment of specific persons for the members of the Program Board. However, the repealed statute of 2013 provided, that the obligatory members of the Program Board were: the Director of the National Library, the Director of the National Museum in Warsaw and the Chairman of the Fryderyk Chopin Society. The Institute manages, independently or through other contracted persons, real estate and other things related to Fryderyk Chopin, owned by the State Treasury or owned by state organizational units. In addition, the Institute cooperates to protect the heritage of Fryderyk Chopin with state and local government units, as well as organizations and natural persons. The Institute's activity focuses mainly on cultivation and protection of the heritage of Fryderyk Chopin, a figure symbolizing the achievement of Polish and European culture in the world.

The given by the Minister of Culture and National Heritage statute of Chopin's Institute indicates, how its tasks are to be carried out. According to this regulation, protection of the patron's legacy is carried out by undertaking several popularizing and artistic activities, among which the most important is organizing international and national Chopin festivals and competitions, in particular the *International Fryderyk Chopin Piano Competition* in Warsaw.

It is worth noting, that organizing the IFCPC until recently remained the domain of private organizations.[68] Nevertheless, in the following years private entities began to cooperate with public entities. In the current legal status, organization and conduct of the IFCPC has become a public task. This fact testifies not only to the prestige of this competition, but above all, to the legislator's recognition of its public-law value for popularizing Chopin's works in

[66] Journal of Laws of 2018, item no.1983.

[67] Official Journal of the Minister of Culture and National Heritage 2017/6.

[68] The organizer of the first three editions of the Fryderyk Chopin' s International Piano Competition. was the College of Music at the Warsaw Music Society. After World War II, the Ministry of Culture and Art was the client and coordinator of the preparatory work. In the years 1960–2005, the main organizer of the competition was Towarzystwo im. Fryderyk Chopin in Warsaw. In 2010, being the Fryderyk Chopin Year, the Competition was organized for the first time by the Fryderyk Chopin Institute. More about history of the Competition on: http://culture.pl/pl/artykul/miedzynarodowy-konkurs-pianistyczny-im-fryderyka-chopina (20.12.2018).

Poland and abroad. The Institute also performs statutory tasks by ensuring the permanent presence of Fryderyk Chopin's music and its cultural context in the cultural life of the country. The form of ensuring the indicated presence is making the most prominent concert creations available to the Polish and international audience through annual organization of the "Chopin and his Europe" festival. The indicated initiative deserves a special distinction, as it contributes to the international context of Chopin's art and contemporary references to his music. In addition, due to open and partly free access to some concerts, the festival really contributes to dissemination and cultivation of the memory of this great artist.

The Institute carries out its statutory tasks also through diversified publishing activities, promotion of scholarly Chopin topics and promotion of cultural activities, in particular music.[69] Also, helping young musicians to develop their international concert activity is the implementation of the Institute's tasks. The implementation of a universal education program is particularly important from the point of view of public interest, of which young people, who often gain their first experiences in the sphere of music are important recipients. The Fryderyk Chopin Institute also provides institutional protection for his heritage by operating, as its organizational units, the Fryderyk Chopin Museum located in the Ostrogski Castle in Warsaw and the Library, which collection is partly a national library resource.[70] While appreciating the importance of the Institute's current activity, it should be noted, that there is a continuous and real need to expand the Institute's activities throughout the country. It would be reasonable to increase the number of initiatives undertaken in the field, outside the capital, which would be in line with the mission of the national institution. Chopin events dedicated to small local communities and diverse social associations functioning within them would certainly be consistent with intention of the legislator striving to awaken the universal aesthetic sensitivity to Chopin's music.Works and objects related to Fryderyk Chopin were considered valuable enough to look after them for the good of public interest for special state care and concern for their proper behavior, as well as for establishing private protection for them on principles regarding the protection of personal interests. In this light, some legal doubts are raised by the question of the correctness of recording the pianist's name. The 2001 Act stipulates, that the name of Fryderyk Chopin is protected on the basis of personal rights. It seems, that this provision obliges to write the surname in the original form 'Chopin'. Meanwhile, the artist's name is written in the polonized form 'Szopen', even in the public sphere, for example on street names. This action seems not only to have no legal basis,[71] but also to violate the Artist's personal rights and personal interests.

The composer's heritage, as well as an objects and places associated with it, fully deserves to be included in law imponderables category.[72] This music is a recognizable

---

[69] Statute of the National Fryderyk Chopin Institute states about publishing activity in the field of record, music, book and multimedia publications, guaranteeing the recording and making available of the work of Fryderyk Chopin and its most outstanding performances. This Institute per form also scientific, popularizing and educational activities.

[70] Karcz-Kaczmarek, Maria – Kaczmarek, Iwona: Narodowy zasób biblioteczny jako dobro chronione w prawie administracyjnym. In: Duniewska, Zofia (ed.): *Dobra chronione w prawie administracyjnym*. Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 2014. 239–251.

[71] Act of 7th October 1999 on the Polish language provides for exceptions to the obligation to use the Polish language, *inter alia* with reference to own names. Journal of Law 2018, item 931.

[72] In the literature are expressed views that a special legal protection shall be granting not only to Chopin's heritage but also to heritages of others great Poles. Zaildler, 2017. 24. More about the concept of „impoderablilia

element of the Polish cultury and identity of the Polish Nation in the world. Performing Chopin's music is related to its dissemination, spreading its value and information about Polish sources of this music. According to public law, the performance of Chopin's music can be the background for obtaining state orders and decorations for merits in popularizing Polish culture.[73] Fact is, that Chopin's legacy should be recognized not only as national but universal and timeless value, permanently inscribed in European and world culture. Therefore, it is necessary to fully approve the institutional custody indicated in administrative law, as well as private law protection measures. Approved shall be also the legal means aimed at dissemination and cultivation of the discussed heritage.

III. Selected foreign examples of protection of musical cultural heritage

Current example of institutional protection, form of public-private cooperation and custody over musical heritage is operating in Laulasmaa, Estonia, the *Arvo Pärt Centre*. Arvo Pärt Centre was opened to visitors on 17th October 2018. Arvo Pärt's work is an important and recognizable element of the culture not only for Estonia but for the culture of Europe. The Arvo Pärt Centre is an open-access meeting place for musicians, musicologists, research fellows, schools and everyone interested in the music of the composer and its genesis. The idea of establishing the Arvo Pärt Centre in Estonia has become from the composer's family and their initiative this project. The entire start-up capital was provided by the family in the form of the venue, the transportation of archival material from Germany to Estonia and the covering of everyday expenses. The Arvo Pärt Center is an institutional forum for cooperation between public entities and private entities. The center receives state subsidies from the Republic of Estonia and from private Estonia's and abroad organizations and private donators.[74]

In turn, an institutional form of concern of preservation and dissemination of folk music goods is, eg. *the Kodály Method*. In 2016 UNESCO included the Kodály Method to the Register of good practices in the field of protection of the intangible cultural heritage of humanity. It is aimed at protecting, disseminating, transferring and documenting traditional folk music in Hungary and abroad. The main assumption is to incorporate music into the education system (learning to sing and choral singing) and to promote traditional musical heritage by public institutions, including the Kodály Institute, Hungarian Institute of Musicology and the International Kodály Association. The indicated method is also used to document folk music with the participation of its depositaries, public teams and cultural

of law" look at: Dobosz, Piotr: Imponderabilia publiczne w obrębie wartości prawa administracyjnego. In: Zimmermann, Jan (ed.): *Wartości w prawie administracyjnym*. Wolters Kluwer Polska, Warszawa, 2015. 44–57.

[73] On November 5th, 2018 Georgijs Osokins (an outstanding pianist-schopinist of the young generation, finalist of the 17th International Chopin Competition) received the Cross of Merit (Silver grade) awarded by the President of the Republic of Poland.The award was presented by the Ambassador of Poland in Latvia. Decision of President of the Republic of Poland of 5th September 2018 on giving orders and decorations. Monitor Polski 2018, item 1129.

[74] Arvo Pärt is a world-famous contemporary composer, who creative output has significantly changed the way we understand the nature of music. In 1976, he created a unique musical language called *tintinnabuli*, that has reached a vast audience of various listeners and that has defined his work right up to today. https://www.arvopart.ee/en/arvo-part/(10.01.2019).

institutions. A special role is played by the Hungarian Institute of Musicology, which has 15,000 hours of folk music recordings and 200,000 melodies from over a thousand settlements in its collection. The Kodály Method has important practical implications for the protection of musical cultural heritage. It is recommended by UNESCO and the authorization of, among others, by including it in academic curricula in over 60 countries. The Kodály Method contributes to the protection and dissemination of folk music, but also encourages artists to inspire by it in their own works.[75]

In turn, in Latvia, in state-strategic documents, it was noticed that music is an important element of the state's development. About importance of the development of musical culture, mobility and exchange of artists and ensuring the protection of musical national heritage provides among other The Cultural Policy Guidelines 2014–2020 "Creative Latvia".[76] It is a medium-term policy planning document, which determines the State cultural policy objectives and priorities for the time period up to 2020 and promotes the achievement of the objectives brought forward in State long-term and medium-term policy planning documents. According to this Guidelines culture of Latvia becomes more integral part of Europe and the world – both by participating in international networks and establishing relationship with countries, also among individual organisations and bodies. In mentioned document is said that culture, concurrently with economic growth, social inclusion and balanced environmental development, is recognised as the fourth pillar of sustainable development. The role of the state is, e.g. implementation and ensure effectiveness of the programme which has enriched the culture of Latvia with new excellent pieces of music and development of music education. Therefore, one of the strategic goals is to establish materially and technically well equipped, modern cultural education competence centres which provide basis for the preparation of excellence in art and music.[77]

IV. General conclusion

Granting distinguishing legal protection to specific type of musical works (or works of a specific artists) indicates, that the state recognizes artistic values as an important element of national, European and world intangible cultural heritage. The axiological justification of indicated legal regulations are universal values,[78] which play an important role for development and preservation of the identity of man and entire communities. The beauty and art, that music brings with it, do not recognize any boundaries and divisions. That is why music is an excellent platform to get to know and even get familiar with other people

[75] *Polski Komitet ds Unesco: Węgry*. http://www.unesco.pl/no_cache/kultura/dziedzictwo-kulturowe/dziedzictwo-niematerialne/listy-dziedzictwa-niematerialnego/europa-i-ameryka-polnocna/wegry/?print=1 (10.10.2018).

[76] Cultural Policy Guidelines 2014–2020 "Creative Latvia" Order No. 401, 29th July 2014 of of Latvia's Cabinet, https://www.km.gov.lv/uploads/ckeditor/files/KM_dokumenti/CULTURAL_POLICY_GUIDELINES_2014-2020_CREATIVE_LATVIA.pdf (20.12.2018).

[77] Cultural Policy Guidelines 2014–2020 "Creative Latvia" , https://www.km.gov.lv/uploads/ckeditor/files/KM_dokumenti/CULTURAL_POLICY_GUIDELINES_2014-2020_CREATIVE_LATVIA.pdf (20.12.2018).

[78] Zimmermann, Jan: *Aksjomaty prawa administracyjnego.* Wolters Kluwer, Warszawa 2013. 74 75; Duniewska, Zofia: Prawo administracyjne – wprowadzenie. In: *System prawa administracyjnego*, V. 1, Hauser, Roman Niewiadomski, Zbigniew Wróbel, Andrzej (eds.): *Prawo administracyjne materialne*. CH Beck, Warszawa 2010. 106–107.

and their culture. *Georgijs Osokins*, finalist of the 17th International Chopin Competition, called the attention to this cognitive aspect. In opinion of this pianist, to understand the music of the composer, you need to get to know his/her country, people, even folklore.[79] An example of this is the project "*Heritage of Fryderyk Chopin – integration of cultures of the Visegrad countries*", which assumes the promotion of Fryderyk Chopin's works as part of cooperation between artists and music institutions from the Czech Republic, Poland, Hungary and Slovakia. This initiative should lead to building a common cultural space in reference to Chopin's musical legacy, which was and is an important part of the cultural heritage of Europe. The project is financed from the Visegrad Fund.[80] Music is a universal, common and egalitarian value. This kind of artistic activity is an important element of national, European and world intangible cultural heritage. At the same time, the fate of individual nations and states is often reflected in music, and certain musical works are invariably associated with historical events. At present, contemporary states note the important civilization role of musical creativity. Due to this, on national, EU and international law level, there are diverse provision aimed for protecting, disseminating, transferring and development of the musical goods. Law provides special protection, in particular to the national anthems and traditional folk music, because this works is recognizable element of national identity. In Poland also works and objects related to the brilliant composer with Polish roots Fryderyk Chopin are under public custody. Pursuant to Act of 3th February 2001, works and related with Artist subjects are all-national goods, which are subject of a particular legal protection. According to the afore-mentioned Act, the state Fryderyk Chopin's Institute shall supervise its patron's heritage both in the public and private (civil) sphere. The broadly defined state concern for the legacy of outstanding artists justifies its legal and cultural value, as well as the reasons of public interest. It is a national good, that is the source of the Polish Nation's identity, its duration and development. Public care for the preservation and development of the indicated imponderables is also part of implementation of the Polish State's obligations as set out in the preamble of the Polish Constitution regarding the transfer to future generations of all that is valuable from more than a thousand years of experience and maintaining community with compatriots scattered throughout the world.

References

Act of 04th April 1994 on copyright and related rights (Journal of Laws of 2018, item no 1191).

Act of 23st February 1964 The Civil Code (Journal of Law of 2018, item no 1025).

Act of 25th October 1991 on the organization and conduct of cultural activities (Journal of Laws of 2017, item no 867).

---

79 Interview with Georgijs Osokins. *Polish LaVie Warsaw Magazine*, 19.11.2018, http://www.laviemag.pl/muzyka-jest-moja-kochanka/ (10.10.2018).

80 *Dziedzictwo Fryderyka Chopina*. http://www.nfm.wroclaw.pl/projekty/dziedzictwochopina/dziedzictwo-fryderyka-chopina/ (10.10.2018).

Act of 2nd April 1997 the Constitution of the Republic of Poland (Journal of Laws of 1997/78, item no 483).

Act of 2nd December 2009 on Medical Chambers (Jurnal of Laws of 2018, item no 168).

Act of 30th May 1971 Code of Misdemeanours (Journal of Laws of 2018, items no 618, 911, 2077).

Act of 31th January 1980 on the coat- of -arms, colors and anthem of the Republic of Poland and state seals (Journal of Laws of 2018, item no 441).

Act of 3rd February 2001 on the protection of the Fryderyk Chopin heritage (Journal of Laws of 2001/16, item no 168).

Act of 7th October 1999 on the Polish language (Journal of Law 2018, item 931).

Act of 9th June 2011 on supporting families and the foster care system (Jurnal of Laws of 2016, item no 575).

Bilica, Krzysztof: „*Ktokolwiek by wiedział...*", Ruch Muzyczny, 2008/17–18. 50–55.

Boć, Jan – Lisowski, Piotr: Normatywizacja wartości w prawie administracyjnym. In: *Wartości w prawie administracyjnym*, (ed.) Zimmermann, Jan, Wolters Kluwer Polska, Warszawa 2015. 19–43.

Budrewicz, Olgierd: *Polska dla początkujących*, Wydawnictwo Naukowe PWN, Warszawa 1976.

Consolidated Version of The Treaty on European Union drawn up in Maastricht on 7th February 1992 (Official Journal of the European Union C 326/13 of 26.10.2012).

Consolidated Version of the Treaty on the Functioning of the European Union drawn up in Rome on 25th March 1957, Official Journal C 326 of 26.10.2012 P. 0001–0390.

Cultural Policy Guidelines 2014–2020 "Creative Latvia" Order No. 401, 29th July 2014 of of Latvia's Cabinet. https://www.km.gov.lv/uploads/ckeditor/files/KM_dokumenti/CULTURAL_POLICY_GUIDELINES_2014-2020_CREATIVE_LATVIA.pdf (20.12.2018).

Cultural Policy Guidelines 2014–2020 "Creative Latvia" , https://www.km.gov.lv/uploads/ckeditor/files/KM_dokumenti/CULTURAL_POLICY_GUIDELINES_2014-2020_CREATIVE_LATVIA.pdf (20.12.2018).

Cultural Policy Guidelines 2014–2020 "Creative Latvia" Latvia's Cabinet Order No. 401, 29th July 2014, https://www.km.gov.lv (20.12.2018).

Decision of President of the Republic of Poland of 5th September 2018 on giving orders and decorations (Monitor Polski 2018, item 1129).

Decision of the European Parliament and Council of 16th April 2014 No 445/2014 / EU on the Union action for European Capitals of Culture for 2020–2033 (Official Journal of the European Union L 132 of 03.05.2014, 1).

Dobosz, Piotr: Imponderabilia publiczne w obrębie wartości prawa administracyjnego. In: *Wartości w prawie administracyjnym*, (ed.) Zimmermann, Jan, Wolters Kluwer Polska, Warszawa 2015. 44–68.

Duniewska, Zofia: Prawo administracyjne – wprowadzenie. In: *System prawa administracyjnego*, V. 1, Prawo administracyjne materialne, (eds.) Hauser, Roman – Niewiadomski, Zbigniew – Wróbel, Andrzej, CH Beck, Warszawa 2010.61–192.

Duszniak, Stanisław: Terminologia z zakresu czynności nadzorczych i kontrolnych, „*Gazeta Administracji*" 1948/1–2. 51–64.

Dziedzictwo Fryderyka Chopina. http://www.nfm.wroclaw.pl/projekty/dziedzictwochopina/dziedzictwo-fryderyka-chopina/ (10.10.2018).

Einstein, Alfred: *Music in the Romantic Era*, W. W. Norton & Company, Inc., New York 1947.

European Cultural Convention drawn up in Paris on 19th December 1954 (Journal of Laws of 1990/8, item no 44).

Historia Warszawskiego Towarzystwa Muzycznego. http://www.wtm.org.pl/historiaw.htm (20.11.2018).

Hoesick, Ferdynad: *Chopin. Życie i twórczość, vol 3*. Księgarnia F. Hoesick, G. Gebethner, Warszawa–Kraków, 1911.

Hymn Europejski. https://www.coe.int/pl/web/about-us/the-european-anthem (20.11.2018).

Interview with Georgijs Osokins. *Polish LaVie Warsaw Magazine*, 19.11.2018, http://www.laviemag.pl/muzyka-jest-moja-kochanka/ (10.10.2018).

Jarocińscy, Michalina i Stefan: *Muzyka w epoce romantyzmu*, Polskie Wydawnictwo Muzyczne, Kraków 1983.

Karcz-Kaczmarek, Maria – Kaczmarek, Iwona: Narodowy zasób biblioteczny jako dobro chronione w prawie administracyjnym. In: *Dobra chronione w prawie administracyjnym*, (ed.) Duniewska, Zofia, Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2014. 239–250.

Karcz-Kaczmarek, Maria: Dziedzictwo Fryderyka Chopina jako wartość w prawie administracyjnym.In.: *Aksjologia prawa administracyjnego*. V. 2 (ed.) Zimmermann, Jan, Wolters Kluwer, Warszawa 2017. 763–779.

Kasznica, Stanisław: *Polskie Prawo Administracyjne. Pojęcia i instytucje zasadnicze*, Księgarnia Akademicka, Poznań 1947.

Łazienki bez Chopina? Niemcy nie mieli problemu z wysadzeniem pomnika. https://www.polskieradio.pl/39/156/Artykul/854658,Lazienki-bez-Chopina-Niemcy-nie-mieli-problemu-z-wysadzeniem-pomnika (15.11.2018).

Mazurkiewicz, Jacek: *Non omnis moriar. Ochrona dóbr osobistych zmarłego w prawie polskim*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław 2010.

Najważniejsze daty w historii kościoła Sw. Krzyża w Warszawie. http://www.swkrzyz.pl/index.php/historia/najwazniejsze-daty (10.10.2018).

Projekt Traktatu ustanawiającego Konstytucję dla Europy (nieratyfikowany) http://www.europarl.europa.eu/about-parliament/pl/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe(20.11.2018).

PRUSZYŃSKI, Jan: *Dziedzictwo kultury Polski – jego straty i ochrona prawna*, V. 1, Kantor Wydawniczy Zakamycze, Kraków 2000.

Regulation No. 3 of the Minister of Culture and National Heritage from 21st of January 2008 regarding the establishment of the Celebration Committee of the 200th Anniversary of the Birth of Fryderyk Chopin (Official Journal of the Minister of Culture and National Heritage 2008/1, item no 3).

Regulation No. 4 of the Minister of Culture and National Heritage of 21st of January 2008 on the establishment and tasks of the Plenipotentiary of the Minister of Culture and National Heritage for the celebration of the 200th anniversary of Fryderyk Chopin's birth (Official Journal of the Minister of Culture and National Heritage 2008/1, item no 4).

Regulation of the European Parliament and Council (EU) No 1295/2013 of 11th December 2013 on "The Creative Europe (2014–2020) Program" (Official Journal of the European Union L 347 of 20.12.2013, p. 221 with amendments)

SARNECKI, Paweł: Komentarz do art. 5 Konstytucji RP. In: Garlicki, Leszek – Zubik, Marek (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, Wydawnictwo Sejmowe. Warszawa 2016. 230–236.

SIEMIEŃSKA, Halina: *Historia budowy pomnika Fryderyka Chopina w Warszawie*. Komitet Budowy Pomnika Fr. Chopina, Warszawa, 1929.

SIEŃCZYŁO-CHLABICZ, Joanna – BANASIUK, Joanna: *Cywilnoprawna ochrona wizerunku osób powszechnie znanych w dobie komercjalizacji dóbr osobistych*, Wolters Kluwer Polska, Warszawa 2014.

SZYMCZAK, Maciej (ed.): *Słownik języka polskiego*, Vol. II, Państwowe Wydawnictwo Naukowe, Warszawa 1978.

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions drawn up in Paris on 20th October 2005 (Journal of Laws of 2007/215, item no 1585).

UNESCO Convention on the Protection of Intangible Cultural Heritage drawn up in Paris on 17th October 2003 (Journal of Laws of 2011/172, item no 1018)

WYTRĄŻEK, Wojciech: *Działalność artystyczna w sferze muzyki w ujęciu prawa publicznego*, Katolicki Uniwersytet Lubelski, Lublin 2013.

ZEIDLER, Kamil: Z*abytki. Prawo i praktyka*, Wydawnictwo Uniwersystetu Gdańskiego, Wolters Kluwer, Gdańsk – Warszawa 2017.

ZIMMERMANN, Jan: *Aksjomaty prawa administracyjnego*, Lex a Wolters Kluwer business, Warszawa 2013.

Krystyna Nizioł
Public Economic Law Department
Faculty of Law and Administration
Szczecin University
krystyna.niziol@usz.edu.pl

REGULATORY IMPACT ASSESSMENT IN POLAND AND IN THE EUROPEAN UNION IN THE CONTEXT OF ECONOMIZATION OF LAW – CHOSEN ISSUES

I. Introduction

The legal regulations usually have also economic consequences. It is well- known in types of regulation which background has close connection with the economics, such as financial law, tax law or economic law. The economic consequences of established regulation in law and economics are examined. One of the aspects of law and economics is *Regulatory Impact Assessment* (RIA). Law and economics are concentrated, among others, on consequences of established legal regulations, costs and benefits for its recipients and proportions between costs and benefits whereas RIA mainly examines socioeconomic effects of proposed or existing regulations.[1] RIA also uses analytical methods such as cost/benefits. analysis. Nowadays, many countries introduce RIA in order to ensure high quality of law.[2] Therefore, RIA became a part of the legislative procedure in many states. It is also a part of legislative procedure at the supranational and the national level in the member states of the European Union (EU), including Poland.

RIA can also be the example of the economization of law. In legal regulations a few forms of economization of law can be distinguished. One of them is providing regulations for socioeconomic aims, regarding its fairness as well as economic efficiency. Therefore, RIA's issues could be a good example of economization of law, especially that it has practical meaning as a part of legislative procedure in Poland and in the EU.

The aim of the study is to find out if the Polish regulations devoted to RIA are sufficient enough to improve the quality of law. The study uses the analysing RIA in Poland and in the EU in the context of economization of law. In the paper the forms of economization of law were also analysed. Moreover, some chosen examples of economization of financial law, tax law and economic law together with RIA of economic law in Poland were introduced.

[1] Rogowski, Wojciech – Szpringer, Włodzimierz: Problemy metodologiczne oceny skutków regulacji w Polsce – czy powstają nowe perspektywy ekonomicznej analizy prawa? [The Methodology Problems of RIA in Poland – are Created New Perspectives of Law and Economics? In: Rogowski, Wojciech Szpringer, Włodzimierz (eds): *Ocena skutków regulacji – poradnik OSR*, *doświadczenia*, *perspektywy* [*RIA – Handbook of RIA*, *Experiences*, *Perspectives*], C.H. Beck, Warsaw, 2007. 11.

[2] The list of states who prepared documents connected with RIA is available here: http://rulemaking.worldbank.org/ria-documents (17.09.2018).

II. Definition of RIA and its justification

At the beginning it must be stressed that two different notions for describing the analysis of economic consequences of legal regulations are used. In the OECD documents the RIA is used whereas the European Commission uses the notion impact assessment (IA).[3] In Polish legal acts both, RIA (*pol. ocena skutków regulacji*) and IA (*pol. ocena wpływu*) are used as well.

Regulatory Impact Assessment is a part of Better Regulation programme, namely,

> "[*i*]*t aims to deregulate sectors of economy where possible, reduce burdens on businesses and improve the way regulation is enforced. RIAs focus on only adding new regulations where necessary*, *and doing do in a proportionate way*, *whereas the other elements on Better Regulation are concerned with the existing body of regulation.*"[4]

According to the OECD's terminology RIA is

> "*a process if systematically identifying and assessing the expected effects of regulatory proposals*, *using a consistent analytical method*, *such as benefit/cost analysis. RIA is a comparative process*: *it is based on determining the underlying regulatory objective sought and identifying all the policy interventions that are capable of achieving them. These* "*feasible alternatives*" *must all be assessed*, *using the same method*, *to inform decision-makers about effectiveness and efficiency of different options and enable the most effective options to be systematically chosen*".[5]

The purposes of regulation are maximizing social welfare, removing market externalities, achieving equity and other social aims.[6] If state regulation promotes these aims, it should be both efficient and effective. Efficiency means that the planned goals are achieved. Effectiveness means that they are achieved at least cost.[7] In practice, ensure that regulations are efficient in economic sense could be difficult because of various criteria of economic efficiency. For example, there are methodologies of examining economic efficiency such as efficiency in *Pareto sense* (the mostly used in practice),[8] in *Kaldor-Hicks sense* or idea of

---

[3] Kałużyńska, Małgorzata: Ocena wpływu legislacji unijnej i jej oddziaływanie na rozwiązania krajowe [RIA of the EU Legislation and Its Influence on National Solutions]. In: Rogowski, Wojciech Szpringer, Włodzimierz (eds): *Ocena skutków regulacji – poradnik OSR*, *doświadczenia, perspektywy* [*RIA – Handbook of RIA*, *Experiences, Perspectives*], C.H. Beck, Warsaw, 2007. 58.

[4] *Evaluation of Regulatory Impact Assessments Compendium Report 2004–05*, *Report by the Comptroller and Auditor General*, The National Audit Office, London, 2005. 8.

[5] *Introductory Handbook for Undertaking Regulatory Impact Analysis* (*RIA*), OECD, 2008. https://www.oecd.org/gov/regulatory-policy/44789472.pdf (17.09.2018). 3. [OECD Handbook]

[6] OECD Handbook, 6–7.

[7] Kirkpatrick, Colin – Parker, David – Zhang, Yin-Fang: *Regulatory Impact Assessment in Developing and Transition Economies*: *A Survey of Current Practice*. Centre on Regulation and Competition, Working Papers, 83 (2004). 3.

[8] See more: Walulik, Jan: O relacjach regulacji ekonomicznej i ochrony konkurencji – próba podsumowania debaty [About the Relation between Economic Regulation and Protection of Competition – the Probe of Summary]. In: Bernatt, Maciej – Jurkowska-Gomułka, Agata – Namysłowska, Monika – Piszcz, Anna (eds): *Wyzwania dla ochrony konkurencji i regulacji rynku. Księga Jubileuszowa dedykowana Profesorowi Tadeuszowi Skocznemu* [*The Chalanges for protection of competition and market regulation*. *The Memorial Book Dedicated to Professor Tadeusz Skoczny*], C.H. Beck, Warsaw 2017. 480.

maximizing social welfare.[9] RIA uses not only different criteria of economic efficiency, but also is based on the rationality of legislator. Usually, the legislator is rational. For example, according to Article 22 of the Polish Constitution[10]:" *Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons*." This public interest *is „by its very nature, a category founded upon rationality. A legislator who fails to adduce concrete circumstances evidencing the existence of a public interests must refrain from action*."[11]

All above mentioned issues make the RIA quite difficult to conduct in practice. The lawmakers should decide if the states intervention is necessary, and if so, compare the achievements of "feasible alternatives" of intervention using the same analytical method. It must be stressed that RIA can be a part of economization of law, because its aims are connected with socioeconomic aspects of regulation.

III. RIA as an element of the economization of law: the main ideas and chosen examples

RIA can be described as one of the aspects of the economization of law. In lexical meaning 'economic' means 'doing something more economic, economical'.[12] Despite the lexical meaning of the notion of economic refers to the rational, cost-effective methodology of activity in economic sense, it is not enough to explain the idea of economization of law. The economization of law is the broader notion than RIA because it refers not only to RIA but also to all forms of using economics, economic instruments, economic categories in law. Therefore, several form of economization of law can be identified.

First, it is constructing of legal regulations, in which economic categories from microeconomics and macroeconomics without creating its legal definitions are used. For example, the economic categories which are established in financial law are *gross domestic product* (GDP), public debt, unemployment, budget deficit. On the other hand, in tax law there are many economic categories concerning calculating of tax base (e.g. amortization, cost of receiving income) are included. The economic categories in economic law usually are connected with market competition or monopolisation. Therefore, in above mentioned kinds of law the economic background is strongly noticeable.

Second, economization of law is giving a legal significance to some notions including economic category (*e.g.* using economic category in legal definition such as relevant market in antitrust law).

Third, economization of law can also manifest in an enactment and application of law, which will be provided for socioeconomic aims and, at the same time, will be also fair and effective as much as possible.

---

[9] Stelmach, Jerzy, – Brożek, Bartosz – Załuski, Wojciech: *Dziesięć wykładów o ekonomii prawa* [*Ten Lectures about Economics of Law*] Wolters Kluwer Polska, Warsaw 2007. 17 19.

[10] The Constitution of the Republic of Poland of 2nd April 1997, *Journal of Laws* No. 78, item 483 as amended.

[11] Chmielewski, Jan – Hoff, Waldemar: Regulatory Impact Assessment (RIA) and Rationality of Law – Legal Aspects. *Management and Business Administration – Central Europe*, 23 (2015) 2. 95.

[12] Szymczak, Mieczysław (ed): *Słownik języka polskiego* [*The Dictionary of the Polish Language*], Vol. I. PWN, Warsaw 1978. 522.

Moreover, economization of law means using of different economic instruments such as economic techniques and models in order to verify the effects of legal regulations.

The above-mentioned forms of economization of law show how multifaceted issue it is. It is not only problem of using in regulation economic category, but also analysing its economic consequences. Moreover, these consequences should ensure that the aims of regulation will be achieved and that it will be assessed with the use of economic techniques.

The way of presentation of different forms of economization of law on some examples of financial, tax, economic law can be shown.

Financial law background is traditionally connected with economics, especially macroeconomics. The public finance depends on economic situation, so in the financial law many economic categories such as public debt, budget deficit is used. Moreover, in the financial law the economic situation is directly taken into consideration because it influences the financial situation of the state. It is especially apparent in the budget law, because the current macroeconomic situation has significant effect on the budget spending and incomes. Therefore, also the draft of budget bill and its justification includes many macroeconomics indicators. For example, according to the Article 142 item 2 point 2 of Polish Public Finance Act of 27 August, 2009[13] the justification of draft of budget bill contains, among others, the macroeconomic scenario for the financial year and three subsequent years. It contains especially macroeconomic assumptions concerning the prognosis such as GDP, rate of inflation, domestic demand. Moreover, this macroeconomic scenario: 1) has to be compared with the most current European Commissions forecasts and prognosis prepared by independent institutions and has to contain also the analysis of significant differences, 2) has to contain information about actions taken in the case of expected significant divergence influence in a negative way for macroeconomic prognosis in the period of subsequent four financial years preceding the elaboration of macroeconomic scenario, 3) sensitivity analysis in the scope of deficit and debt of general government sector in the meaning of Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Union[14], public debt and the amount of expenditures referred to Article 112 aa item 1 Public Finance Act, under various growth and interest rates assumptions with the discussion of important risk factors. So, the base for preparing the draft of the budget bill in Poland are mainly macroeconomic prognosis.

As was mentioned above, the typical economic category, which are used in financial law are budget deficit and public debt, which are one of the most important indicators for financial stability of the state. Moreover, these economic categories are crucial for the public finances' safety, at the national and supranational level as well. The evidence how important they are, was the financial crisis of the year 2008, which results was, among others, the increasing of amount of public debt and public deficit in many EU countries.[15] Therefore, since then the fiscal rules were introduced and strengthened in the EU member states. Since this financial crisis at the supranational level of EU reforms concerning limitation of the amount of public debt were started. One of the elements of these reforms was strengthening

[13] Journal of Laws of 2017, item 2077 as amended.

[14] Official Journal of the European Union of 10.6.2009, item L 145/1 as amended.

[15] See more: *Government finance statistics – Summary tables*, *Data 1995–2016*, Publications Office of the European Union, Luxembourg, No. 2017/1, *passim*.

the legal regulation which helps to control the amount of public debt. The good example of them are fiscal rules, which are defined as permanent limitation of fiscal policy, usually defined in form of synthetic total index (*i.e.* admissible) of fiscal result (budget).[16]

In the literature fiscal rules are divided in many ways. According to one of the divisions there are quantitative (*e.g.* limits for special economic categories) and qualitative rules (descriptive or procedural restrictions).[17] Another division of fiscal rules concerns its features such as territorial scope (fiscal rules national and supranational), the stages of sector of public finance (the whole sector or its part e.g. local level), the time (short-time or multiannual rules), the subject (spending, income rules, balanced budget rule, public debt rule).[18] The fiscal rules can also rely to incur liabilities (e.g. prohibition of taking public loans by public authorities in central bank).[19]

The economization of financial law is especially apparent in fiscal rules of quantitative nature because its construction contains usually relation of defined economic variables. For example, according to article 216 item 5 of Polish Constitution:

> "*It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute.*"[20]

In this article the limit of public debt at the level of 60% of GDP was established. So, this regulation, which is an example of fiscal rule concerning public debt includes two economic categories such as public debt and GDP. The fiscal rules related to public debt (and also public deficit) at the supranational level were also established. There are two fiscal rules like this: for public deficit (3% of GDP) and for public debt (60% of GDP).

Tax law is another example of law, in which many economic categories are used. The nature of tax is both economic and legal. Moreover, paying tax implies specific socio-economic consequences, which can be used by the state to achieve some social and economic aims (within tax policy). Therefore, in literature the functions of taxes (*e.g.* incentive, allocation) are specified.[21] In tax law especially two types of economization of law which were mentioned above are used, *i.e.* using economic categories in legal acts and tax functions in order to receive socioeconomic aims. The example of the first type of economization

---

16 Kopits, George – Symansky, Steven A.: *Fiscal Policy Rules*. IMF, Occasional Paper 162, Washington 1998. 2.

17 For example, *Alesina* and *Perotti* specify, among others, numerical fiscal rules concerning balanced budget, procedural fiscal rules regarding respective stages of budget procedure. Alesina, Alberto – Perotti, Roberto: Budget Deficits and Budget Institutions. In: Poterba, James von – Hagen, Jurgen (eds): *Fiscal Institutions and Fiscal Performance*. The University of Chicago Press Books, London 1999. 15 17. See also: Folscher, Alta: A Balancing Act: Fiscal Responsibility, Accountability and the Power of the Purse. *OECD Journal on Budgeting*, 6 (2006) 2. *passim*.

18 Spychała, Joanna: *Wydatkowe reguły fiskalne jako instrument dyscyplinujący finanse publiczne* [*The Spending Fiscal Rule as an Instrument of the Discipline of Public Finances*], Zeszyty Naukowe Uniwersytetu Szczecińskiego No. 858, Współczesne Problemy Ekonomiczne, No. 11. 2015. 228 230.

19 Kopits–Symansky.1998.2, see also: Marchewka-Bartkowiak, Kamila: Reguły fiskalne w warunkach kryzysu finansów publicznych [Fiscal Rules in the Conditions of Crisis of Public Finance]. *Ekonomia i Prawo*, 10 (2012) 3, 47–49.

20 The Constitution of the Republic of Poland of 2nd April, 1997, Journal of Law of 1997, no 78 item as amended.

21 See more: Nizioł, Krystyna: *Prawne aspekty polityki finansowej* [*Legal Aspects of Tax Policy*], Difin, Warsaw 2007, *passim*.

of law are economic categories used in the Polish Income Tax from Natural Person Act of 26th July 1991 such as income,[22] cost of receiving income, amortization.

In the economic law, the examples of economization of law can be also found. This kind of law is typically connected with microeconomics. Therefore, the economic categories like market or competition are used in public economic law quite frequently. The good example of connection law and economics is the relevant market, which is the first stage of concentration assessment. The relevant market is defined in the article 4 point 9 of the Act of 16 February 2007 on Competition and Consumer Protection[23] as

> "*a market of goods which by reason of their intended use*, *price and characteristics*, *including quality*, *are regarded by the buyers as substitutes*, *and are offered in the area in which*, *by reason of the nature and characteristics of such goods*, *the existence of market barriers*, *consumer preferences*, *significant differences in prices and transport costs*, *the conditions of competition are sufficiently homogeneous.*"

The relevant market is a normative form of some segment of market in economic sense. It investigates the market in geographic and product aspect in order to examine if the concentration of companies does not disturb competition on it.

In public economic law the economic techniques are also exploited. For example, the *Herfindahl-Hirschman Index* (HHI)[24] is an economic method of measurement of concentration on the market, in this case in banking sector. The advantage of the HHI is that it includes all entities in given sector, not only these which the market's share is the biggest.[25] The HHI can take values form $1/n$, where n means the number of entities on the market to 1, which means the situation of a perfect concentration of a value of feature[26]. For example, if the HHI is 0.49 it indicates the market with the leading company with 70% of market share. For the highest levels of concentration, the HHI is not applied. It is used mostly to oligopoly; in this case the HHI is between 0,10 to 0,25.[27]

---

[22] Journal of Laws of 2018, item 200 as amended.

[23] Journal of Laws of 2017, item 229 as amended.

[24] The Herfindahl-Hirschman Index is defined as the sum of the squares of the market shares of the companies in the total value of an examined feature. Jackowicz, Krzysztof – Kowalewski, Oskar: *Koncentracja sektora bankowego w Polsce w latach 1994–2000* [*The Concentration of Banking Sector in Poland in Years 1994–2000*], Materiały i Studia, NBP, 143 (2002), 14.

[25] Kwiatkowska, Ewa M.: Mierzalne kryteria oceny konkurencyjności rynków telekomunikacyjnych [The Measurable Criteria of Evaluation of Competition on Telecommunication Markets], *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 8 (2013) 2, 84.

[26] Jackowicz–Kowalewski, 2002. 14. If the value of Herfindahl-Hirschman Index is close to zero, it indicates that the market is fragmented and there are many entities on it. On the other hand, if the value of Herfindahl-Hirschman Index is close to one, it shows the monopolization of the market., Kwiatkowska, 2013. 84.

[27] Rogowski, Wojciech – Lipski, Mariusz: *Koncentracja sektora bankowego w Polsce* [*The Concentration of Banking Sector in Poland*], http://kolegia.sgh.waw.pl/pl/KZiF/struktura/IF/struktura/ZFP/Documents/W_Rogowski_M_Lipski.pdf (28.11.2018).

IV. The main characteristics of RIA in Poland in the light of the solutions used in the European Union

As was mentioned above in Polish regulation RIA and IA in legislative procedure are used. RIA is defined in the Polish Statute of working of Council of Ministers from 26th October, 2013[28] (the Statute) as *results of assessment of predicted socioeconomic consequences*. This assessment is a separate part of a draft of legal act (or assumptions of a bill). In the Statute the exemplary elements of RIA were included. There are, among others, entities influenced by the draft of legal act, information about public consultations held before preparing the draft and its scope, presentation the analysis of an influence of the draft for entities, impact on some areas, such as the public finance sector, state budget and budgets of local entities, labour market, competition of economy and entrepreneurship, functioning of entrepreneurs. According to the Statute, RIA should also identify solved problem, define the purpose and the essence of intervention, and compare with solutions adopted in other countries.

In the European Union, RIA is also used; the European Commission uses the term impact assessment (IA). This is a key instrument taking into account by European Commission initiatives and EU legislation in order to prepare it on the basis of transparent, comprehensive and balanced evidence.[29] The objectives of Commission's IA are, among others, helping the EU institutions to design better policies and laws, facilitates better-informed decision making throughout the legislative process; ensures early coordination within the Commission, taking into account input from a wide range of external stakeholders, in line with the Commission's policy of transparency and openness towards other institutions and the civil society, improving the quality of policy proposals by providing transparency on the benefits and costs of different policy alternatives and helping to keep EU intervention as simple and effective as possible, helping to ensure that the principles of subsidiarity and proportionality are respected, and to explain why the action being proposed is necessary and appropriate.[30]

The analytical steps taken during IA at the EU level are as follows:

1.) identifying the problem (among others describe the nature and extent of the problem, identify the key players/affected populations, establish the drivers and underlying causes, develop a clear baseline scenario, including, where necessary, sensitivity analysis and risk assessment;
2.) defining the objectives (i.e. set objectives that correspond to the problem and its root causes, establish objectives at a number of levels, going from general to specific/operational, ensure that the objectives are coherent with existing EU policies and strategies, such as the Lisbon and Sustainable Development Strategies, respect for Fundamental Rights as well as the Commission's main priorities and proposals);
3.) developing main policy options (*i.e.* identify policy options, where appropriate distinguishing between options for content and options for delivery mechanisms, regulatory/non-regulatory approaches, check the proportionality principle, begin

[28] *Regulamin pracy Rady Ministrów* z dnia 29.10.2013 r. [*Statute no 190 Councils' Ministers of 29 October, 2013*], Official Gazette of the Republic of Poland of 2016, no. 1006 as amended.

[29] *Impact Assessment Guidelines*, European Commission, 2009. http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf (28.11.2018).[Impact Assessment Guidelines] 4.

[30] Impact Assessment Guidelines, 6.

to narrow the range through screening for technical and other constraints, and measuring against criteria of effectiveness, efficiency and coherence, draw-up a shortlist of potentially valid options for further analysis;

4.) analysing the impacts of the options (*i.e.* identify, direct and indirect, economic, social and environmental impacts and how they occur, causality, identify who is affected including those outside the EU, and in what way, assess the impacts against the baseline in qualitative, quantitative and monetary terms. If quantification is not possible explain why, identify and assess administrative burden/simplification benefits, or provide a justification if this is not done, consider the risks and uncertainties in the policy choices, including obstacles to transposition/compliance;
5.) comparing the options (*i.e.* weigh-up the positive and negative impacts for each option on the basis of criteria clearly linked to the objectives, where feasible, display aggregated and disaggregated results, present comparisons between options by categories of impacts or affected stakeholder, identify, where possible and appropriate, a preferred option;
6.) outlining policy monitoring and evaluation (*i.e.* identify core progress indicators for the key objectives of the possible intervention, provide a broad outline of possible monitoring and evaluation arrangements).[31]

Taking into consideration the above-mentioned characteristics of RIA in Poland and in the EU some conclusions can be formulated. RIA is usually a part of legislative procedure. In Poland it is an obligatory part of the draft of legal act. The aim of RIA is to support lawmakers in evaluation of socioeconomic consequences of legal acts. Moreover, these consequences should be provided by using economic methods of its evaluation. The main aims of RIA, in Poland and in the EU, it to choose the best option between propositions of regulation regarding any issue, and then evaluate its consequences in order to improve it in the future, if it is necessary.

V. RIA in the Polish Entrepreneurs Law Act and its meaning for development of RIA in Poland

An example of using RIA in Poland in a systemic way are regulations of a new Entrepreneurs Law of 2018[32] (Entrepreneurs Law). In this act for the first time the whole chapter VI (articles 66–71) titled '*Rules preparing drafts of legal act concerning economic law and assessments of its functioning*' was dedicated to RIA. The justification of this regulation was, among others, providing friendly legal conditions for starting, running and closing business. In order to achieve this goal, it was necessary to implement the legal rules concerning these issues to the Polish legal system. RIA also belongs to these rules.[33] The clarifying RIA especially in the case of economic law is intentional, because of the

[31] Impact Assessment Guidelines, 5.

[32] Act of 6 March of 2018 – Entrepreneurs Law, Journal of Laws of 2018, item 646.

[33] *Uzasadnienie do ustawy Prawo przedsiębiorców* [*The Justification to Law Entrepreneurs Act*, *The Print of the Sejm of the Republic of Poland*, *No*. 2051, 2018. http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=2051 (20.09.2018). 58. [Justification to Law Entrepreneurs Act].

necessity of taking into consideration the specific nature of entrepreneurs' activities, which influence various market's entities (both, in microeconomic and macroeconomics scale). That is why, law-making of economic law requires special attention to every detail.[34] Establishing this regulation was necessary especially in the case of the Polish economic law, because the previous legal regulations were straggled in different legal acts. Moreover, they did not fulfil the goals of law-making.[35] In the Entrepreneurs Law two stages of RIA were established. There are RIA *ex ante*; before the beginning of legislative process and RIA *ex post*; concerning existing regulations. Both stages of RIA concerning legal acts from the field of economic law which are connected with rules of starting, running and closing business. The RIA *ex ante* is a part of the justification of the draft of legal act. It must be stressed that in Entrepreneurs Law new solutions concerning RIA were also established. One of them is that the legislator has to obey during RIA *ex ante* the rules of proportionality and adequacy. The compliance with these rules should, among others, contribute to limitation of administrative duties concerning entrepreneurs, limitation of information duties (or its achievement in less oppressive form e.g. electronic). In a specific way in the Entrepreneurs Law the micro, small and medium-sized enterprises (SMS) were treated. The development of the group of these entrepreneurs is especially important for stimulating of the economic growth. Moreover, the devolvement of the SMSs testifies of the increase of competition and entrepreneurship in the economy.[36] Because of these reasons in the Entrepreneurs Law the SMSs test regards the drafts of legal acts of this group of enterprises were established. The aim of this test is to limit administrative duties for them proportionally.[37] In the Entrepreneurs Law the RIA *ex post* concerning established law can be assessed. If in this case significant distortions in law interpretation or significant risk of caused negative economic or social consequences by the given legal act were revealed, the RIA ex post of this act can be taken. This procedure is stated by the Ombudsman of SMS, who is a new institution created in order to protect the rights of SMS in Poland.[38] The next regulation which can be evaluated in positive way, is the duty of overview the legal acts concerning entrepreneur's activity imposed on government's ministers in each year. In practice, it is a duty of doing RIAs ex post overview concerning this issue. All above mentioned changes of the Polish economic law would strengthen RIA in this field. On the example of this regulation the following elements can be clearly seen: the tendency to precise each RIAs element, the entities obliged to take some actions within RIA or the rules which should be taken into consideration during this procedure.

[34] Justification to Law Entrepreneurs Act, 58–59.

[35] Justification to Law Entrepreneurs Act, 59.

[36] See more: Szczepaniak, Iwona: Rola małych i średnich przedsiębiorstw w gospodarce (na przykładzie przemysłu spożywczego) [The Role of SMSs in the Economy on the Example of the Food Industry], *Equilibrium*, (2009) 1, 71–72.

[37] Justification to Law Entrepreneurs Act, 62.

[38] See more: *Ustawa z dnia 26 stycznia 2018 r. o Rzeczniku Małych i Średnich Przedsiębiorców* [The Ombundsman of SMS Act of 6 March, 2018], Journal of Laws of 2018, item 650.

VI. Summary

There are few ways of economization of law. They are especially evident in the kinds of law which background has close connection to economics (*e.g.* financial law, tax law, economic law). The examples of economization of law which were analysed in the paper, showed how important is the role of the economic categories, techniques or socioeconomic aims of regulation in law and legislative process. It must be stressed that RIA is the method to ensure that during law-making process the economic aspects of regulation are taken into consideration (especially its costs and benefits).

At the European Union level RIA is a quite useful instrument of improving quality of law. In Poland RIA became a real part of legislative procedure quite recently (just since a few years). Unfortunately, the Polish law still can be characterised by shortcomings such as law-making because of short-term or political reasons.[39] It must be stressed that using RIA is only in a formal way in not enough to avoid these problems of legislation. The condition of improving quality of law in Poland by using RIA has to be carried out in a transparent and reliable way. It is the procedure which in Poland still needs improvement. One of good examples of regulations which could serve this purpose are rules concerning RIAs of the Polish economic law established in entrepreneur law. One of the advantages of the new regulations is that they are established in legal act such as law (*i.e.* Entrepreneur Law). For the first time in Poland RIA was established in legal act which is so high in the hierarchy of legal sources. Moreover, the RIA consenting economic law in Poland concentrated, at last, on the issues such as limitation of administrative or information duties of entrepreneurs. A new institution of protecting the rights of SMS, the Ombudsman of SMS was also created. These regulations are a good way of improving RIA in Poland.

References

Act of 6 March of 2018 – Entrepreneurs Law, Journal of Laws of 2018, item 646.

Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws of 2017, item 229 as amended.

Alesina, Alberto – Perotti, Roberto; Budget Deficits and Budget Institutions. In: Poterba, James von Hagen, Jurgen (eds): *Fiscal Institutions and Fiscal Performance*. The University of Chicago Press Books, London 1999.

Chmielewski, Jan – Hoff, Waldemar: Regulatory Impact Assessment (RIA) and Rationality of Law – Legal Aspects. *Management and Business Administration – Central Europe*. 23 (2015) 2. 92 108.

The Constitution of the Republic of Poland of 2nd April 1997, *Journal of Laws* No. 78, item 483 as amended.

[39] Rybiński, Krzysztof – Alwasiak, Stanisław – Kowalewski, Oskar – Lewandowska-Kalina, Monika – Możdżeń, Michał: *Rola grup interesów w procesie stanowienia prawa w Polsce* [*The Role of Interest Groups in the Legislative Process in Poland*], Uczelnia Vistula, Warsaw, 2012. 3–6.

Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Union, Official Journal of the European Union of 10.6.2009, item L 145/1 as amended.

Evaluation of Regulatory Impact Assessments Compendium Report 2004–05, *Report by the Comptroller and Auditor General*, The National Audit Office, London 2005.

Folscher, Alta: A Balancing Act: Fiscal Responsibility, Accountability and the Power of the Purse. *OECD Journal on Budgeting*, 6 (2006) 2. 1–20.

Government finance statistics – Summary tables, *Data 1995–2016*, Publications Office of the European Union, Luxembourg, No. 2017/1. 1–141.

Impact Assessment Guidelines, European Commission, 2009. http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf (28.11.2018).

Income Tax from Natural Person Act of 26th July 1991, Journal of Laws of 2018, item 200 as amended.

Introductory Handbook for Undertaking Regulatory Impact Analysis (*RIA*), OECD, 2008, https://www.oecd.org/gov/regulatory-policy/44789472.pdf (17.09.2018).

Jackowicz, Krzysztof – Kowalewski, Oskar: *Koncentracja sektora bankowego w Polsce w latach 1994–2000* [*The Concentration of Banking Sector in Poland in Years 1994–2000*], Materiały i Studia, NBP, 143 (2002). 1 132.

Kałużyńska, Małgorzata: Ocena wpływu legislacji unijnej i jej oddziaływanie na rozwiązania krajowe [RIA of the EU Legislation and its Influence on National Solutions]. In: Rogowski, Wojciech Szpringer, Włodzimierz (eds): *Ocena skutków regulacji – poradnik OSR, doświadczenia, perspektywy* [*RIA – Handbook of RIA*, *Experiences*, *Perspectives*], C.H. Beck, Warsaw, 2007.

Kirkpatrick, Colin – Parker, David – Zhang, Yin-Fang: *Regulatory Impact Assessment in Developing and Transition Economies*. *A Survey of Current Practice*. Centre on Regulation and Competition, Working Papers, 83 (2004). 1–14.

Kopits, George – Symansky, Steven A.: *Fiscal Policy Rules*. IMF, Occasional Paper 162, Washington 1998., 1–45.

Kwiatkowska, Ewa M.: Mierzalne kryteria oceny konkurencyjności rynków telekomunikacyjnych [The Measurable Criteria of Evaluation of Competition on Telecommunication Markets], *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 8 (2013) 2. 74–87.

Marchewka-Bartkowiak, Kamila: Reguły fiskalne w warunkach kryzysu finansów publicznych [Fiscal Rules in the Conditions of Crisis of Public Finance]. *Ekonomia i Prawo*, 10 (2012) 3. 47–59.

Nizioł, Krystyna: *Prawne aspekty polityki finansowej* [*Legal Aspects of Tax Policy*], Difin, Warsaw 2007.

Public Finance Act of 27 August 2009, Journal of Laws of 2017, item 2077 as amended.

Regulamin pracy Rady Ministrów z dnia 29.10.2013 r. [*Statute no 190 Councils' Ministers of 29 October*, *2013*], Official Gazette of the Republic of Poland of 2016, no. 1006 as amended.

Rogowski, Wojciech – Lipski, Mariusz: *Koncentracja sektora bankowego w Polsce* [*The Concentration of Banking Sector in Poland*], http://kolegia.sgh.waw.pl/pl/KZiF/struktura/IF/struktura/ZFP/Documents/W_Rogowski_M_Lipski.pdf (28.11.2018).

Rogowski, Wojciech – Szpringer, Włodzimierz: Problemy metodologiczne oceny skutków regulacji w Polsce – czy powstają nowe perspektywy ekonomicznej analizy prawa? [The Methodology Problems of RIA in Poland – are Created New Perspectives of Law and Economics? In: Rogowski, Wojciech – Szpringer, Włodzimierz (eds): *Ocena skutków regulacji – poradnik OSR*, *doświadczenia*, *perspektywy* [*RIA – Handbook of RIA*, *Experiences*, *Perspectives*], C.H. Beck, Warsaw, 2007.

Rybiński, Krzysztof – Alwasiak, Stanisław – Kowalewski, Oskar – Lewandowska-Kalina, Monika – Możdżeń, Michał: *Rola grup interesów w procesie stanowienia prawa w Polsce* [*The Role of Interest Groups in the Legislative Process in Poland*], Uczelnia Vistula, Warsaw, 2012.

Spychała, Joanna: *Wydatkowe reguły fiskalne jako instrument dyscyplinujący finanse publiczne* [*The Spending Fiscal Rule as an Instrument of the Discipline of Public Finances*], Zeszyty Naukowe Uniwersytetu Szczecińskiego No. 858, Współczesne Problemy Ekonomiczne, No. 11. 2015. 227–236.

Stelmach, Jerzy – Brożek, Bartosz – Załuski, Wojciech: *Dziesięć wykładów o ekonomii prawa* [*Ten Lectures about Economics of Law*], Wolters Kluwer Polska, Warsaw 2007.

Szczepaniak, Iwona: *Rola małych i średnich przedsiębiorstw w gospodarce* (*na przykładzie przemysłu spożywczego*) [*The Role of SMSs in the Economy on the Example of the Food Industry*], Equilibrium (2009) 1. 71–81.

Szymczak, Mieczysław (ed): *Słownik języka polskiego* [*The Dictionary of the Polish Language*], Vol. I. PWN, Warsaw 1978.

Uzasadnienie do ustawy Prawo przedsiębiorców [*The justification to Entrepreneur Law Act*, *The Print of the Sejm of the Republic of Poland* , *no* 2051, http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=2051 (20.09.2018).

Walulik, Jan: O relacjach regulacji ekonomicznej i ochrony konkurencji – próba podsumowania debaty [About the Relation between Economic Regulation and Protection of Competition – the Probe of Summary]. In : Bernatt, Maciej – Jurkowska-Gomułka, Agata – Namysłowska, Monika – Piszcz, Anna (eds): *Wyzwania dla ochrony konkurencji i regulacji rynku. Księga Jubileuszowa dedykowana Profesorowi Tadeuszowi Skocznemu* [*The Chalanges for Protection of Competition and Market Regulation. The Memorial Book Dedicated to Professor Tadeusz Skoczny*], C.H. Beck, Warsaw 2017.

The Ombundsman of SMS Act of 6 March 2018, Journal of Laws of 2018, item 650.

Judit Siket
Senior lecturer
Public Administrative Law Department
Faculty of Law and Political Sciences
University of Szeged
siket.judit@juris.u-szeged.hu

LOCAL GOVERNMENTS IN THE SYSTEM OF SEPARATION OF POWERS – REGULATORY POWERS IN THE FIELD OF LOCAL PUBLIC AFFAIRS

I. Introduction

This paper aims to present the status of local self-governments in generally and investigates the position of Hungarian local self-governments. The functional interpretation of vertical separation of power will be centre. The study consists of analysis on the legislative power of local self-governments relating to the scope of local public affairs, the implementation of local administration tasks, furthermore local public service delivery, and management methods of local public administration. The legislative power manifestly has tight correspondence with the performed responsibilities; therefore the legislative activity of local self-governments should not be assessed without the analysis of local public tasks and services.

For investigating the status of local and territorial self-governments in the system of separation of powers the legal assay can provide a kind of basis, because the separation of powers, as a value and idea of institutional control or limitation is based on normativity.[1] First, the positive legal approach of local-territorial self-governments' tasks and responsibilities, thereby, definition of their role in the system of separation of powers leads to the designation of the role of local self-government and the presentation of major changes which have recently occurred.

Studying the practice of the separation of powers doctrine supplementary to the deliberation of the territorial, local self-governments' responsibilities it is necessary to discover the guarantees ensuring the autonomy and independence in the exercising of their competences. State philosophical perception is discussed only limited scope necessary to highlight local self-governments' status in the separation of powers.

Furthermore, the possible demonstration of the effectiveness of vertical separation of powers might be considered another approach, which is based on the fundamental right conception. The right to local self-government supposes the local level interpretation of the principle of sovereignty; the collective right perception is discussed in a study together with the constitutional level changes of the rules.

---

[1] Sári, János: *A hatalommegosztás*. Osiris Kiadó, Budapest, 1995. 10.

II. Certain aspects of territorial separation of powers[2]

The demand and effective implementation of the principle of separation of powers is an essential requirement in the operation of constitutional legal state. Improvement related to content of the principle of separation of powers leaves room for diverse interpretations for scholars in different stages of state development process. Beliefs related to the principle of power reflect differing approaches nowadays, as well.

The emergence of separation of powers doctrine corresponded to the ideas of the Enlightenment.[3] Originally it was intended against the absolute monarchy, aimed the control and restriction of the empire, and it is broadly based on the concept of *rule of law*.[4] In the classical concepts of the principle of separation of powers, established by *Locke* and *Montesquieu*, the territorial aspect has not been respected. The privileges of the local power connected to the feudal system, in the age of Enlightenment the centralised state organization and operation was idealized.[5]

The principle of separation of power could be interpreted on one hand horizontal way, and on the other hand, as a kind of vertical division of power. Horizontal type of separation of power means the classical form: the legislative power, executive and judicial powers by *Montesquieu*. In connection the Constitution of England he described, that "[*I*]*n every government there are three sorts of power*: *the legislative*; *the executive in respect to things dependent on the law of nations*; *and the executive in regard to matters that depend on the civil law*. …*By the third, he punishes criminals*, *or determines the disputes that arise between individuals*. *The latter we shall call the judiciary power*, *and the other simply the executive power of the state*."[6]

The original theory of *Montesquieu* on the doctrine of separation of power based on the following principles – as systematized *Sári* – (1) the power is subordinated to law, (2) state organizations and state functions are defined and distinguished as legislation, executive power, judiciary, (3) differentiation of organizations and staffs of powers.[7] By the view of *Riklin*, Montesquieu combined three powers (1) legislative power, (2) executive power, and (3) judicial power, three social forces (1) the people, (2) hereditary nobility and (3) hereditary monarch, furthermore seven branches (1) electorate, (2) lower house of parliament, (3) jury, (4) upper house of parliament, (5) upper court, (6) king, and (7) ministers.[8] The foregoing underlines that in the concept of *Montesquieu* the vertical type of separation of power did not appear at all.

For the first time local self-governments were considered autonomous powers as a municipal, local power in works of *Constant*, he regarded municipals as the limitation of central public administration.

---

[2] The publication of sections II–IV. of the paper, the conceptual approach of separation of power and the fundamental right aspect, is in progress in International Law Review under the title 'Local Governments in the system of Separation of Powers. The Executive Function in the Field of Local Public Affairs'.

[3] Varga Zs., András: *Eszményből bálvány*? *A joguralom dogmatikája*. Századvég Kiadó, Budapest, 2015. 45.

[4] Sári, 1995. 45.

[5] Varga Zs., 2015. 45.

[6] Montesquie: *A törvények szelleméről*. Osiris – Attraktor Kiadó, Budapest, 2000. 248.

[7] Sári, 1995. 37–38.

[8] Riklin, Alois: *Montesquieu's So Called 'Separation of Powers' in the Context of the History of Ideas*. Discussion Paper Series No. 61., Collegium Budapest, 1999. 2.

II.1. Dogmatic approach of territorial separation of power

The ancient philosopher especially *Plato* and *Aristotle* besides them the natural law thinkers in 17th and 18th century, like John *Locke*[9] and others investigated the nature of tyranny and tried to avoid the abuse of power. Nevertheless, the territorial dimension was identified as local, municipal power by *Constant*, in the 19th century. According to his view, "[*T*]*he supreme authority is all citizens*",[10] nevertheless it is not unrestricted, and what is more, "*it must be limited by appropriate restrictions*, *in order to avoid the despotism*".[11] *Constant* distinguished the royalty, the executive power, the persistent representative power, the power of representation of the public opinion, and judicial power in political systems.[12] Besides, *Constant* differentiated the three branches of power, analysing the interrelation between constitutional and absolute monarchies, recognised as independent branches of power the presidential power and the municipal, local power, this latter may be considered as the constraint of the central public administration. The municipal, local branch was separated on the presumption of its own local interests and residents. *Constant* originated the source of municipal, local power from the emotional and the volitional unity of the locally residents.[13] According to his view, the recognition of the local, municipal branch, the local power determined the constraints of the central power's potential activity, "*until now the local authority was considered as a dependent branch of the executive power*: *on the contrary*, *never has to obstruct it*, *but does not have to depend on it also*".[14]

Alexis de *Tocqueville* also dealt with different types of vertical separation of power, both the federative and the local government administration, might create obstacles against the tyranny.[15]

In Hungary, the separation of power from historical view emerged, the classical example is the *Holy Crown Doctrine*, although it did not focus the classical separation of power, nevertheless the prerogatives and the protection of the state. During the debate emerged between the centralist and municipalists in the 19th century on the state organization, the municipalists were inspired by the doctrine of Constant.[16]

Turning to the interpretation of the doctrine nowadays, the doctrine of separation of powers is generally effective in the state organization, if the organs might exercise control on activities of each other. The control mechanism should be general, and has a kind of counterbalance role, as well.[17] On the basis of the effectiveness of separation of powers doctrine, in modern states different levels might be distinguished by the attitude of *Petrétei*: (1) horizontal, (2) temporal, (3) vertical, (4) constitutional, (5) decisive and (6) social level.[18]

---

9 Locke, John: *Értekezés a polgári kormányzatról*. Gondolat Kiadó, Budapest, 1986.

10 Constant, Benjamin: *A régiek és a modernek szabadsága*. Atlantisz Kiadó, Budapest, 1997. 77.

11 Constant, 1997. 85.

12 Constant, 1997. 87.

13 Constant, 1997. 87.

14 Constant, Benjamin: *Az alkotmányos politika tana*. Pest, 1862. 134.

15 Tocqueville, Alexis de: *A demokrácia Amerikában*. Gondolat Kiadó, Budapest, 1983. 234–246.

16 Sári, 1995. 77–80.

17 Veress, Emőd: A hatalommegosztás aktualitása. *Magyar Kisebbség*, 9 (2005) 3–4., 236. (10.10.2018.), Csink Lóránt: *Mozaikok a hatalommegosztáshoz*. Pázmány Press, Budapest, 2014. 155.

18 Petrétei József: *Az alkotmányos demokrácia alapintézményei.* Dialóg Campus Kiadó, Budapest – Pécs. 159–174.

Vertical separation of powers in the widest sense is the relationship between those organs, when an organization or body constrains or counterbalances the function of another organ or body (e.g. state organs supervise the local governments' decisions). In the strict sense the vertical separation of powers might operate if the organs, established on territorial basis have the same legitimacy. However, in this latter case the people's sovereignty is the key consideration question, whether local sovereignty of the people is effective or not.

Analysing types of vertical separation of powers might be a dual interpretation, on the one hand the federal state organization, and furthermore, on the other hand the system of local, territorial level self-government public administration bodies.[19] In case of vertical separation of powers organizations at different levels are exercising public power, providing counterbalance against the central power, entirely.[20] The vertical form of separation of powers might be interpreted as otherwise like (1) the right to local self-government, including the division of labour at central, territorial and local levels (territorial decentralization), (2) the functional decentralization, (3) the federal and (4) international, supranational separation of powers.[21]

Since the principle of separation of powers and the principle of people's sovereignty are closely linked, the source of sovereignty could be contested in case of local self-governments.

To explore the position of local self-governments in the system of powers the normative, legal analysis of local self-governments' competencies could serve as a basis of the search. This type of survey might lead to the determination of the role of local self-governments in the state governing system. It might demonstrate the special status of local self-governments, in principle might be accepted, that local self-governments are not autonomous independent branches, but rather counter balancers, since these territorial and local organizations play a major role as executive and regulatory bodies in the field of local public affairs.

The principle of separation of powers could be interpreted from another view also, from functional and from institutional approaches. The institutional approach is based on the principle of one power is only a single institution. On the contrary, the functional approach is based on the competency of the institutions; this latter interpretation can be useful for the analysis of local self-governments functions.[22]

The functional interpretation of the principle of separation of powers deserves special attention in the analysing process. On the basis of the classical threefold power (legislative, executive powers and judicial) the role of local self-governments no longer can be considered referring to the institutional interpretation (the only single power – one organization) in the field of legislation and implementation.[23]

The local self-governance is not just a fundamental right, but a kind of sovereignty also. As it was mentioned, that the source and existence, furthermore the interpretation of local sovereignty is a controversial matter. However, it might be

[19] Csink, 2014. 156., Sári, 1995. 235., Szaniszló, Krisztián: Államszervezeti fogalmak útvesztőjében. *Közjogi Szemle*, 2018/1. 54., Takács, Albert: A hatalommegosztás elvének alkotmányelméleti értelmezése. In: Mezey, Barna (ed.): *Hatalommegosztás és jogállamiság*. Osiris Kiadó, Budapest, 1998. 135.

[20] Sári, 1995. 235., Szaniszló, 2018. 54.

[21] Petrétei 2009. 169–170.

[22] Varga Zs. 2015. 51.

[23] Varga Zs. 2015. 51.

concluded, that local self-governance is the achievement of the self-restraint of the sovereign.[24]

In addition, it is also essential to explore the elements of guarantee which ensure the independence, autonomy of local self-governments in the exercise of powers. The limits of exercising powers shall meet with the requirement of legality; the democratic constitutional state must ensure the enforcement of right protection also in the course of executive-administrative functions.

II.2.Territorial separation of powers from the historical aspect in Hungary

Different forms of territorial separation of power were established during the historical development of the doctrine. Territorial units with autonomy – like nobiliary counties, towns with special rights granted by the king, cities and other territorial-local units like districts, settlements – had huge role in regulation of local social relations, in management of local public affairs, therefore they were to be regarded parties of the system of separation of powers. Especially, the regulative power and executive role of nobiliary counties are worth enshrining; hence they were empowered for local legislation and the implementation of central regulation, exercising the right to *vis inertiae*.

The majority of the listed territorial, local administrative units performed besides the executive and legislative tasks the judicial function in their own territory as well. These territorial units were entitled to exercise the right to send legate to the Parliament, which considered a form of participation in the system of separation of power. Legates had binding mandates; thereby the territorial autonomous units had the right to propose. Nevertheless legates were not delegated directly by the residents of the territorial units, but they were delegated in the age of the feudal estates by the feudal territorial assemblies and the councils of the certain cities. The petition right of the nobiliary counties belonged also to the territorial separation of power directed to the king, the central government and to the Parliament, containing such kind of appoint of view or petition and protestation.[25]

The nobiliary counties were the most important protectors of the Hungarian historical Constitution; their political role was a vital question at the end of the 19th century. The legal status of the territorial and local self-governments, furthermore the establishment of the relationship between the Government and territorial and local self-governments was arranged in 1870 and 1871, furthermore in 1886, the municipal law[26] determined for a long time the legal status and the role in the separation of powers' system of territorial and local self-governments. Local self-governments were important organs of the transmission of state public administration responsibilities beyond the exercising right to local self-government. The municipal law established a centralized public administrative system and the latter regulation strengthened further these tendencies.

[24] Cservák, Csaba: A hatalommegosztás elmélete és gyakorlati megvalósulása. *Jogelméleti Szemle*, (2002) 1. 14.

[25] Kállay, István: Hatalommegosztás és városi rendiség. In: Mezey Barna (ed.): *Hatalommegosztás és jogállamiság*. Osiris Könyvkiadó, Budapest, 1998. 11–27., Stipta István: Parlamenti viták a területi önkormányzatról (1870–1886). In: Mezey Barna (ed.): *Hatalommegosztás és jogállamiság*. Osiris Könyvkiadó, Budapest, 1998. 77–79.

[26] Act XLII of 1870 on the Arrangement of Public Municipal Authorities, Act XVIII. of 1871 on the Arrangement of Municipalities, Act XXI of 1886 on Public Municipal Authorities, Act XXII of 1886 on Municipalities.

The basic features of local self-government system created by the end of 19th century barely changed until the middle of the 20th century. After then the soviet-type regime eliminated the local self-government system and the separation of powers doctrine had no meaning according to the self-government system.

As result of the regime changes, the collapse of the soviet-type system, the local and territorial self-government have also been given a more important role in the administration of local public affairs, in provision of public services furthermore in performing as local actors of certain state responsibilities. According to the view of *Soós* and *Kákai* 'Hungary … has failed to facilitate the so-called devolutionary processes, which would have granted considerable right, specified in the constitution, to subnational levels within the unitary structure'.[27]

III. The state organization guarantees of the separation of powers

In this chapter the provision of the Hungarian Fundamental Law is demonstrated on the doctrine of separation of powers on the one hand, and on the other hand it deals with the interpretation of the doctrine briefly, discusses the content of the principle of separation of powers in the light of the decisions of Hungarian Constitutional Court.

According to the Fundamental Law of Hungary the State shall function based on the principle of separation of powers.[28] The source of public authority shall be the people.[29] Sovereignty of the people goes alongside the separation of powers. The practical effectiveness of the doctrine is ensured by the precise and exclusive definition of competences of state bodies.[30] The former Constitution of Hungary[31] did not contain explicitly the doctrine of separation of powers, but now, the Fundamental Law of Hungary *expressis verbis* includes the provision on the doctrine of separation of powers.

Effectiveness of the doctrine was at the centre in the case law of the Hungarian Constitutional Court several times, generally in the sense of a main part of the principle of rule of law. The Constitutional Court, in an early decision after the transition, interpreted the doctrine of the separation of power as a fundamental requirement of the effectiveness of the principle of rule of law. The Constitutional Court determined, that 'one of the fundamental demand of the effectiveness of rule of law is that organs entitled for exercising public power, operates within the organizational framework and according to the procedural defined by law, within certain limits which must be available for the citizens and ruled predictable way'.[32] The effectiveness of the doctrine in the operation of state organizations was evaluated by the Constitutional Court as it follows: 'Constitutional provisions, ruling on the responsibilities and competences of state organs (branches of powers), legislation

[27] Soós, Gábor – Kákai, László: Hungary: Remarkable Successes and Costly Failures: An Evaluation of Subnational Democracy. In: Loughlin, John – Hendriks, Frank – Lidström, Anders (eds.): *Local and Regional Democracy in Europe*. Oxford University Press, New York, 2011. 532.

[28] Hungarian Fundamental Law (25 April 2011) (hereafter: HFL) Art. C, par. (1).

[29] HFL Art. B, par. (3).

[30] Varga Zs. András: Hatalommegosztás, az állam- és a kormányforma. *Pázmány Law Working Papers*, (2013) 5., 2. http://plwp.eu/docs/wp/2013/2013-5-VZSA.pdf (18.08.2018.)

[31] Act XX of 1949 on the Constitution of Hungarian Republic.

[32] Constitutional Court Decision 56/1991 (11.08.) ABH 1991. 454–456.

concern relationships among the state organs (organizational and procedural guarantees), furthermore constitutional rules of conflict of interests evidenced the effectiveness.'[33]

Analyzing the decisions of the Hungarian Constitutional Court, as a conclusion might be drawn, that interpreting the doctrine of separation of powers, the Court should adopt the classical, horizontal form of it, and the functional interpretation is mandatory, because the constitutional organizations are independent.[34] It should be added, that the Constitutional Court recognised as an independent power of the President of the Republic of Hungary, because the President is an independent, outside person from the aspect of branches of powers.[35]. By the attitude of *Varga Zs*. the interpretation of *Constant* is applied.[36]

The separation of powers doctrine might be applied within the local self-governments structure, according to view of *Varga Zs*., in 'some extent',[37] the inner structure of the Hungarian local self-governments should be briefly outlined to attempt to demonstrate whether the separation of powers doctrine has effectiveness.

Despite of the fact that the Hungarian local self-government system established at two levels, municipal and territorial level, there is no hierarchical relationship, these local governments are legally equal. In the classical sense, the separation of powers in this relationship, between local self-governments, shall not be interpreted.

The main organizations of the local self-governments are the representative body, the mayor and the chief executive. Representative body is entitled to exercise responsibilities of the local self-government, the mandatory tasks of local self-government are performed by the representative body, and only exceptionally the mayor can exercise these competences. The mayor and the chief executive are entitled by legislation to exercise state administrative tasks, in this case there is no hierarchical relationship between the representative bodies and the competent authorities like the mayor or chief executive. In these competences the mayor and the chief executive exercise tasks on their own discretion, may not receive any instructions from the representative body. Where the mayor or the chief executive shall perform the functions assigned to them by the regulation, the doctrine of separation of powers is effective within the organs of local self-government.

As regards to the separation of powers, the administrative, legal supervision system is essential. The Hungarian local self-government supervision system has special characteristic features; however administrative supervision over the decisions became stricter after the adoption of new local self-government act, although remained posterior control mechanism. Legal toolkit of administrative supervision has become more diverse; however it does not cover powerful intervention tools in order to interfere the prevailing of unlawful legislation and provisions. The most powerful monitoring tool is unique in Europe: the replacement of local self-government decision under an appropriate judicial control over its enforcement.

[33] Constitutional Court Decision 2/2002 (01.25.) ABH 2002. 50–51.

[34] Varga Zs., 2013. 6.

[35] Constitutional Court Decision 48/1991 (09.26) ABH 1991. 217–246.

[36] Varga Zs., 2015. 52.

[37] Varga Zs., 2013. 4.

IV. Constitutional status of local self-governments

As it was analysed earlier, beyond the classical horizontal form of the doctrine of separation of powers, as a result of the expansion of administrative function, the vertical form of separation of powers have been given high priority, as well. It might be interpreted in unitary states, like in Hungary as a form of territorial decentralization, operation of territorial, local self-governments. In circumstances where vertical form of separation of powers is functioning, organizations at different levels are exercising the public power, as opposite the central power, counterbalancing it.[38] The vertical division of government power is simply a historically proven, but at least accepted public interest.[39]

Noteworthy one of the positions on the subject, pursuant to which the independent and entire state function might not be assigned to the territorial form of separation of powers, and therefore the local self-governments could not be set against none of the classical horizontal forms, and cannot form a counterbalance neither.[40] This point of view is open to doubt in two respects. On one hand the scope of local public affairs is not considered as dominant factor or local power, furthermore the performing of local public affairs should not qualify as indifferent activity from the aspect of the state, especially in decentralized state system. The main content of the local public affair is the local legislation and administration, provision of local public services, economic development, and might be the direction of local political relations.[41] These components have considerable significance for the state. On the other hand the local sovereignty is a problematic issue; even so the source of sovereignty is derived from the people. The unity of the sovereignty does not exclude either entirely the local interpretation, because the effectiveness of decentralization also supposes the sovereignty at local level, at least indirectly, derived from the state.

Vertical separation of power is an essential issue regarding the connection between local self-governments and the State in Hungary, especially from view of counterbalance role of local self-governments. The real question therefore is, whether local authorities could play such a balancing role, in the changed constitutional and legal environment, after 2012. Various points of views are known on the effectiveness of the vertical separation of powers. According to one aspect, the principle of separation of power does apply to some extent within the local self-governments as well.[42] Another approach would stress that local self-governments are not based on people's sovereignty and therefore vertical separation of powers is not effective.[43] In line with this view the effectiveness of the doctrine of separation of powers depends on the source of sovereignty.

Related to the provision of former Local Governments Act,[44] local government implements the principle of the sovereignty of the people at local level. Local governments shall enforce the principle of the sovereignty of the people and, in public affairs, shall express

---

[38] Csink, 2014. 155.

[39] Balázs, Zoltán: A hatalommegosztás elméletének normatív alapjai. *Working Papers in Political Science*, (2012) 2., 27. https://politologia.tk.mta.hu/uploads/files/archived/2550_2012_8_balazs.pdf (12.12.2018.)

[40] Takács Albert: A hatalommegosztás elvének alkotmányelméleti értelmezése II. *Jogtudományi Közlöny*, (1993) 7. 266–270., Takács 1998. 134.

[41] Pálné Kovács Ilona: *Helyi kormányzás Magyarországon*. Dialóg Campus Kiadó, Budapest – Pécs, 2008. 50.

[42] Varga Zs., 2013. 4.

[43] Csink, 2014. 156.

[44] Act LXV of 1990 on Local Self-Governments.

and enforce the public will in a manner both democratic and open.[45] Local self-governments possessed sovereignty in political and legal sense also.[46] The new Local Government Act,[47] adopted in 2011 by the Hungarian Parliament, does not contain reference to the principle of sovereignty, at all.

The leading conception of the Hungarian Fundamental Law is different compared with the former Constitution. The Fundamental Law focuses on the management of local public affairs and on the exercise of local public powers, instead of fundamental collective rights approach and of the legal protection against the Government and the central public administration. Practically, local public affairs mean the mandatory duties and powers of local governments; the Fundamental Law does not regulate these public powers. In accordance with the new local self-government regulation it might be generally considered that the role of local self-government in the field of local public services and the exercising of local public power, considerably decreased.

V. Regulative power of local self-governments

The constitutions of European states contain provisions on local self-governments, especially on law-making power in variant scope. The fundamental basis of states are the principle of rule of law, however the local legislative power regulations are divers way.[48] The Hungarian Fundamental Law's provisions represent a relatively limited scope with regard to the local self-government regulation.

V.1. Authorization, general requirements and legal supervision

Local governments are organisations that have law-making (regulative) competence based on the Fundamental Law. Regulative competence is guaranteed by the European Charter of Local Self-Government[49] also. Due to the provision of European Charter local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.[50]

The effectiveness of principle of rule of law claims on one hand that the legislation ruling the rights and obligations of the citizen shall be published and easily accessible, and on the other hand the principle of non-retroactivity prevails. These requirements shall be enforced in local legislation as well.[51]

According to the Fundamental Law, there are two means of administering local public affairs: local governments issue decrees and make resolutions; therefore the exercising of

45 Act LXV of 1990 on Local Governments Article 2. (1).

46 Petrétei, 2009. 175–176.

47 Act CLXXXIX of 2011 on Local Self-Governments of Hungary.

48 Fábián Adrián: *Az önkormányzati jogalkotás fejlődés és fejlesztési lehetőségei.* Dialóg Campus, Budapest – Pécs, 2008. 15–18.

49 European Charter of Local Self-Government Strasbourg, 15.X.1985, ETS No.122. [European Charter]

50 European Charter Article 3 (1).

51 Bekényi József (ed.): Önkormányzati rendeletek. Profit L & M Kiadó Bt, 2001. 19.

public power might be with these legal tools.[52] Local self-governments make their decisions in general independently, without previous or posterior assent of any other organisation; only in exceptional cases shall be subject the decision of local self-government to prior consent or posterior approval.[53]

By the provision of Fundamental Law, decree of local government is a legal act, in which a generally binding rule of conduct may be determined. Local governments acting within their competences shall adopt local government decrees to regulate local social relations on one hand which are not regulated by on Act, and on the other hand, by the authority of the Act.[54] Decrees of local governments are at the lowest level in the legislative hierarchy, therefore cannot conflict with 'other laws'.[55]

Where the local self-government is expressly authorized by the parliamentary act to issue municipal decree, it is not only a right, but an obligation also. The most important aim of these local decrees is to regulate statutory provisions more precisely, to fit to local social relations. Adoption of local decrees in general based on the empowerment of the Legislator, but several times emerged a controversial question on the scope of regulation. The Constitutional Court has on several occasions expressed that the central regulation of social regulation is not a bar of the issue of local decree. If there is a local public affair, the local self-government might issue local decrees which are not contrary to central regulation, only complements it.[56]

The Government exercises legal supervisory competence on the decisions and the operation of local self-governments in Hungary. Local self-governments have the obligation to send their decrees to competent Budapest and county government offices. If the territorial governmental office finds the decree or any provisions unlawful, it may initiate the judicial review of the local self-government decree. The government office has the right to bring a case to the court. The same situation is when the local self-government fails to issue local self-government decree.[57] The judicial legal supervision of local self-government decrees until 2012 was the only competence of the Constitutional Court. The new local self-government regulation divided this competence between the court and the Constitutional Court. The Constitutional Court has the competence only in that case when the lawfulness is originated from the violation of the Fundamental Law. In other cases the Supreme Court of Hungary, the special Local Self-Government Council of the Curia has the competence to eliminate the violation of law.

Furthermore a unique legal tool was established from the enter into force of new local self-government act, the acts replacement according to the Fundamental Law as follows: [i]f the municipal government fails to discharge its obligation to adopt decrees and to pass resolutions inside the time limit the court has prescribed in its ruling on the omission, the

---

[52] HFL Article 32 (1) a)–b).

[53] Such a case is the borrowing transaction or the financial commitment of the local self-governments. According to the provision of HFL Article 34 (5), in order to maintain a balanced budget, an act of Parliament may restrict the borrowing of municipal governments above a specific limit, as well as their other commitments subject to certain conditions or Government approval. See details: Act CXCIV of 2011 on Economic Stability of Hungary.

[54] HFL Article 32 (2).

[55] HFL Article T (2).

[56] Constitutional Court Decision 17/1998. (V.13.) ABH 155–159.

[57] HFL Article 32 (4).

court shall – at the initiative of the relevant Budapest or county government office – order the head of the Budapest or county government office to draw up the municipal decree or municipal resolution with a view to remedying the omission in the name of the municipal government at fault.[58] This local decree should not be modified or repealed by the body of representative, the municipal government at fault, but only the representative body after the next general local election. The decree shall be published in the official journal (*Magyar Közlöny*) of Hungary.

V.2. The scope of local regulation

As a result of the enhancement of public tasks, with regard to development of welfare states, local self-governments' public responsibilities widened, as well. Very significant improvements have been made to the local self-governments system in Europe over the last decades, exercising their public power functions were affected by the abovementioned horizontal and vertical arrangements of powers.[59] It has to be highlighted that the functionality of local self-governments' responsibilities was basically changed provided by the new local governmental regulation. The expansion of the State in the provision of local public services had a negative effect on local public affairs and reduced the possibilities for regulation local social relations. All along, performing of public tasks characterized by strict regulation, the provision of service requirements, strengthening the control and from the side of local self-governments there is a decreasing margin for local discretion.

According to the Hungarian Fundamental Law, there are two means of administering local public affairs: local governments can issue decrees and make resolutions.[60] They make their decisions independently, without previous or posterior assent of any other organisation.

It should be highlighted that the functionality of local self-governments' responsibilities was basically changed provided by the new local governmental regulation. The expansion of the state in the provision of local public services had a negative effect on local public affairs and reduced the possibilities for regulation local social relations. Due to the statutory legislation, functionality of local self-governments is defined by the financial resources that are available for implementation of public tasks.

Powerful centralization process could be traced in the state operation in Hungary, this trend has been hit particularly hard the local self-government sector as well. Outstanding changes might be observed in the case of municipal and county self-governments' responsibilities, reducing the regulative power on local social relations of local self-governments. Public education, except for pre-school education is excluded from local public affairs.[61] Changes were occurred in the field of cultural services also: the maintenance of museums was delegated from the county governments to settlements. The same procedure was in the case of public libraries.[62] The archives were nationalized.[63] The social and health

[58] HFL Article 32 (5).

[59] Soós, 1998. 65.

[60] Hungarian Fundamental Law art. 32. par. (1), Act CLXXXIX of 2011 on the Local Self-Government of Hungary art. 48. par. (1)

[61] Act CXC of 2011 on National Education.

[62] Act CXL of 1997 on Museums, Services of Public Libraries and Public Education.

[63] Act LXVI of 1995 on Public Files, Archives and Protection of Private Archives.

care institutions were socialized,[64] except for primary care. Therefore in these fields of local public affairs local self-governments are no longer able to regulate charges of provided services.

The municipal services are obligatory tasks of the local governments, but the statutory legislation may regulate the requirement of majority state or local government property in corporations, which provide certain public services.[65] This is the situation *e.g.* in the field of healthy drinking water service, water drainage or waste disposal. The subject of local regulation has also been reduced in these areas of servicing. There is another important change: local government does not have empowerment to fix the charges of special services (*e.g.* waste disposal).[66]

VI. Concluding remarks

Examining the different forms and interpretation of the doctrine of separation of powers, the vertical separation of power is also effective in Hungary, as a form of decentralization. According to the Hungarian Fundamental Law, the essence of local self-governments is to manage public affairs and to exercise public authority,[67] since this is the reason why local governments shall exist, this type of organs shall act in connection with local public affairs, within the framework of law. Local self-governments should exercise legislative and executive functions, thus they constitutes a substantial part of government power.

After 2010 as a result of a powerful centralization process, great changes could be traced, and these trends have influenced the most important elements of local public affairs: the regulative and functional autonomy has also narrowed substantially during the period considered.

Having regard to fact, that local self-governments' role significantly decreased in the field of providing public services and in exercising of local public powers, therefore, the regulative function has been significantly deteriorated. Local self-governments exercise regulative power for the most part in implementation of parliamentary act, not in the field of classic local public affairs.

References

Act XLII of 1870 on the Arrangement of Public Municipal Authorities

Act XVIII of 1871 on the Arrangement of Municipalities

Act XXI of 1886 on Public Municipal Authorities

Act XXII of 1886 on Municipalities

Act XX of 1949 on the Constitution of Hungarian Republic

[64] Act CLIV of 1997 on Health Care and Act III of 1993 on Social Care and Social Administration.

[65] Act XLI of 2012 on Passenger Transport Services, Act LVII of 1995 on Water Management.

[66] Act CLXXXV of 2012 on Waste.

[67] HFL Article 34. (1).

Act LXV of 1990 on Local Self-Governments

Act III of 1993 on Social Care and Social Administration

Act LVII of 1995 on Water Management

Act LXVI of 1995 on Public Files, Archives and Protection of Private Archives

Act CXL of 1997 on Museums, Services of Public Libraries and Public Education

Act CLIV of 1997 on Health Care

Act CLXXXIX of 2011 on Local Self-Governments of Hungary

Act CXC of 2011 on National Education

Act XLI of 2012 on Passenger Transport Services

Act XCIII of 2012 on the Establishment of District Offices and Modification of Related Acts

Act CLXXXV of 2012 on Waste

Balázs, Zoltán: A hatalommegosztás elméletének normatív alapjai. *Working Papers in Political Science*, (2012) 2. https://politologia.tk.mta.hu/uploads/files/archived/2550_2012_8_balazs.pdf (12.12.2018.)

Bekényi József (ed.): Önkormányzati rendeletek. Profit L & M Kiadó Bt, Budapest, 2001.

Constant, Benjamin: *A régiek és a modernek szabadsága*. Atlantisz Kiadó, Budapest, 1997.

Constant, Benjamin: *Az alkotmányos politika tana*. Pest, 1862.

Constitutional Court Decision 48/1991 (09.26) ABH 1991. 217–246.

Constitutional Court Decision 56/1991 (11.08.) ABH 1991. 454–456.

Constitutional Court Decision 17/1998. (V.13.) ABH 155–159.

Constitutional Court Decision 2/2002 (01.25.) ABH 2002. 50–51.

Cservák, Csaba: A hatalommegosztás elmélete és gyakorlati megvalósulása. *Jogelméleti Szemle*, (2002) 1. http://jesz.ajk.elte.hu/cservak9.html (15.12.2018.)

Csink, Lóránd: *Mozaikok a hatalommegosztáshoz*. Pázmány Press, 2014, Budapest.

Doctrine as Applied to Cities, *Indiana Law Journal*, 18 (1943) 2. 146–149.

Fábián, Adrián: *Az önkormányzati jogalkotás fejlődés és fejlesztési lehetőségei*. Dialóg Campus, Budapest – Pécs, 2008.

Hoffman, István: Az önként átvállalt (alternatív) feladatok szerepe a magyar önkormányzati rendszerben. *Közjogi Szemle*, (2011) 2. 37–44.

Hungarian Fundamental Law (25 April 2011)

Locke, John: *Értekezés a polgári kormányzatról*. Gondolat Kiadó, Budapest, 1986.

Montesquie: *A törvények szelleméről*. Osiris Kiadó– Attraktor Kft., Budapest, 2000.

Morris, Bradley E.: Separation of Powers in Municipal Government: Division of Executive and Legislative Authority. *Brigham Young University Law Review*, (1978) 4. 961–979.

Pálné Kovács, Ilona: *Helyi kormányzás Magyarországon*. Dialóg Campus Kiadó, Budapest – Pécs, 2008.

Petrétei József: *Az alkotmányos demokrácia alapintézményei*. Dialóg Campus Kiadó, Budapest – Pécs, 2009.

Riklin, Alois: *Montesquieu*'*s So Called* '*Separation of Powers*' *in the Context of the History of Ideas*. Discussion Paper Series No. 61., Collegium Budapest, 1999.

Sári, János: *A hatalommegosztás*. Osiris Kiadó, Budapest, 1995.

Soós, Edit: Az önkormányzatok döntéshozatali mechanizmusa az EU-ban. In: Csefkó, Ferenc (ed.): *EU-integráció Önkormányzatok*. Magyar Önkormányzati Szövetségek Társulása, 1998. 47–69.

Soós, Gábor – Kákai, László: Hungary: Remarkable Successes and Costly Failures: An Evaluation of Subnational Democracy. In: Loughlin J., Hendriks F., Lindström A. (eds.) *Local and Regional Democracy in Europe*. Oxford University Press, New York, 2011, 528–551.

Szaniszló, Krisztián: Államszervezeti fogalmak útvesztőjében. *Közjogi Szemle*, (2018) 1. 54–65.

Takács, Albert: A hatalommegosztás elvének alkotmányelméleti értelmezése II. *Jogtudományi Közlöny*, (1993) 7. 261–272.

Takács, Albert: A hatalommegosztás elvének alkotmányelméleti értelmezése. In: Mezey Barna (ed.): *Hatalommegosztás és jogállam*. Osiris Könyvkiadó, Budapest, 1998. 94–149.

Tocqueville, Alexis de: *A demokrácia Amerikában*. Gondolat Kiadó, Budapest, 1983.

Varga Zs., András: *Eszményből bálvány*? *A joguralom dogmatikája*. Századvég Kiadó, Budapest 2015.

Varga Zs., András: Hatalommegosztás, az állam- és a kormányforma. *Pázmány Law Working Papers* 2013/5. Available at: http://plwp.eu/docs/wp/2013/2013-5-VZSA.pdf (15.12.2018.)

Veress Emőd: A hatalommegosztás aktualitása. *Magyar Kisebbség*, 9 (2005) 3–4. 236–297.

Deniz Tekin Apaydin
Assistant Professor
Public International Law Department
Marmara University, Faculty of Law
deniz.apaydin@marmara.edu.tr

THE CANAL ISTANBUL PROJECT: GOVERNANCE BY NATIONAL LAW OR INTERNATIONAL LAW?

I. Introduction

The seas of the world are still the most important medium of trade and transportation. Over 90% of all the world trade is carried out through the seas, which is also considered, by far, "*the most cost-effective way to move en masse goods and raw materials around the world*."[1] A number of canals were built by men to facilitate international trade through the seas. The principle goal for such grand projects was to reduce the sea routes, thus the journey time and costs.[2] The Panama Canal reduces the navigation from New York to San Francisco by about 8,000 nm (5,262 nm instead of going through Cape Horn, which would be 13,135 nm), and also makes it possible to complete the journey in half the time.[3] Similarly, the Suez Canal reduces the navigation from Rotterdam to Singapore by 3467 nm.[4]

In 2011 the then Prime Minister of Turkey, *Recep Tayyip Erdoğan* introduced a mega project (see figure 1), which he referred as the '*Crazy Project*', that involved the construction of a man-made canal in Istanbul, albeit, as an alternative route to Bosphorus – a natural strait. Since its announcement, the project became the focus of various debates. This study aims to examine the Canal Istanbul project in two main aspects: first its interaction with the Montreux Convention[5] that regulates the passage regime through the Turkish Straits; and secondly whether its governance would be subject to national law or international law.

---

1 The UN-Business Action Hub website: IMO Profile. https://business.un.org/en/entities/13 (22.11.2018.)

2 Such savings on costs may include, inter alia, fuel costs, crew costs, insurance costs and docking costs.

3 A voyage that previously took over sixty days was halved to about thirty. What this meant to all maritime merchants was that they could take on more cargo; virtually making two trips in one. American Studies at the University of Virginia website: Panama Canal. http://xroads.virginia.edu/~ma03/holmgren/ppie/pc.html (22.11.2018.)

4 The Suez Canal Authority website: Why Suez Canal? https://www.suezcanal.gov.eg/English/About/Pages/WhySuezCanal.aspx (22.11.2018.)

5 The Convention Regarding the Régime of Straits (adopted 20 July 1936, entered into force provisionally on 15 August 1936 and definitively on 9 November 1936) 173 LNTS 213 [the Montreux Convention].

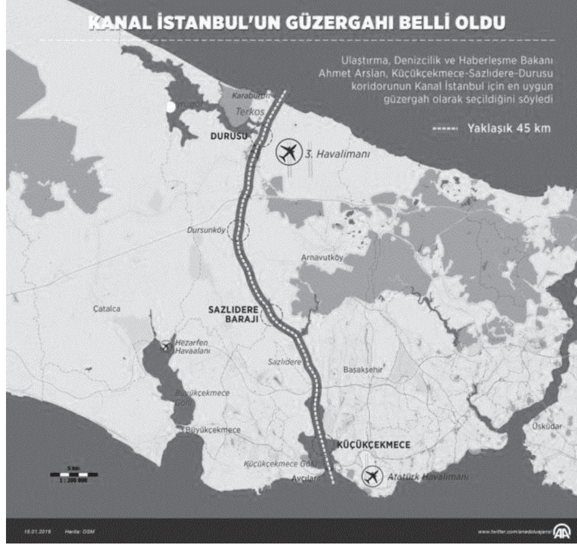

Figure 1 The Route of Canal Istanbul is Officially Announced. Source: Turkish Press Agency: Kanal İstanbul'un Güzergâhı Resmen Açıklandı). January 15, 2018. https://www.bik.gov.tr/kanal-istanbulun-guzergahi-aciklaniyor/ (30.01.2019.)

II. The Regulation of canals

The law of the sea is a well-codified area of international law. The Law of the Sea Convention of 1982[6] (the LOSC) is the last and most ambitious attempt to codify international law of the sea. It was intended to be "*comprehensive in scope and universal in participation*".[7] Nevertheless, the canals are not among those subjects codified under the LOSC. The closest resemblance appears to be with the international straits regulated in Part III on straits used for international navigation. Despite the resemblance, "*it has always been understood that the legal regimes of the canals were separate and distinct*" from that of the international straits.[8] On the other hand, there are no implications that suggest that the rather liberal passage regimes applicable to the international straits cannot similarly be applied for the canals. Yet, in practice, "*inter-oceanic canals and rivers are regulated by specific regimes in which*, *navigational rights are specified and circumscribed*."[9]

The provisions of the LOSC do not offer a formal definition for either a 'strait' or 'straits used for international navigation'. The Oxford Dictionary defines strait as "*A narrow passage of water connecting two seas or two other large areas of water*".[10] An often referred

---

[6] The United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833, 1834, 1835 UNTS 3 [the LOSC].

[7] Boyle, Alan: Further Development of the Law of the Sea Convention: Mechanisms for Change. *International and Comparative Law Quarterly*, 54 (2005) 3. 563.

[8] Rothwell, Donald R. – Stephens, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010. 231.

[9] Caminos, Hugo – Cogliati-Bantz, Vincent P.: *The Legal Regime of Straits*. Cambridge University Press, Cambridge, 2014. 111.

[10] Oxford Dictionaries: strait. https://en.oxforddictionaries.com/definition/strait (28.01.2019.)

attribute of the straits is that they are '*naturally-formed*'. Yet this feature was not included into the LOSC, despite some suggestions.[11] The rationale of such omission is unlikely to reflect the disagreement on the fact, on the contrary, it probably is due to the fact that the "*natural characteristic of the passage was obvious*".[12]

The canals, unlike straits, are '*man-made*' waterways that connect two geographically separate marine areas. The national canals, where the whole installation is within the territory of one State, are most of the time regulated and administered by the canal State. Such canals are therefore considered as internal waters, which are subject to the territorial sovereignty of the canal State. However, in some cases the administration was for a while left to international commissions or sometimes to private undertakings[13] with restricted canal State intervention. The latter may be the case where the construction is undertaken by private enterprises. This is a so called 'build-operate-transfer' scheme, where the canal is subsequently acquired by the canal State.

A canal, even where it is under the sole administration of the canal State, due to its practical importance, may attain to a level of internationalisation to ensure free navigation.[14] That is to say, the free passage of all types of ships and of all flags from the canals is usually secured through international treaties, especially where inter-oceanic canals are concerned. The administrative structuring and the passage regime of some of the major inter-oceanic canals may provide a useful insight for future discussions on the Canal Istanbul Project.

The Suez Canal is nationally administered by the *Suez Canal Authority*, which is an independent public authority with a legal personality, reporting directly to the Prime Minister.[15] The passage regime is, however, governed in accordance with the Constantinople Convention of the Suez Canal of 1888, which was nationalised through domestic procedures.[16] This regime establishes a rather keen freedom of passage right for all types of ships, both at times of peace and war, in a non-discriminative manner; however, in exchange of a protective provision that ensures that the Canal shall never be subject to blockade.

The Panama Canal is administered by the *Panama Canal Authority*, which is an autonomous public body with a legal personality, represented by an 'Administrator', who is under the supervision of an 11-member Board of Directors.[17] The United States controlled the Panama Canal until it was handed over to Panama in 1999, at the end of the transition period agreed upon by the Panama Canal Treaty of 1977 concluded between the United

---

[11] Caminos–Cogliati-Bantz, 2014. 109–110.

[12] Caminos–Cogliati-Bantz, 2014. 111.

[13] The Universal Suez Canal Company constructed and administered the Suez Canal for nearly eighty seven years – from 1869 – until the Canal was nationalised in 26 July 1956. The Suez Canal Authority website: Canal History. https://www.suezcanal.gov.eg/English/About/SuezCanal/Pages/CanalHistory.aspx (22.11.2018.)

[14] Churchill, Robin Rolf – Lowe, Alan Vaughan: *The Law of the Sea*. Manchester University Press, Manchester, 3rd Ed., 2014. 65.

[15] The Suez Canal Authority website: Suez Canal Authority (SCA) Overview. https://www.suezcanal.gov.eg/English/About/SuezCanalAuthority/Pages/SCAOverview.aspx (30.01.2019.)

[16] The Suez Canal Authority website: The Constantinople Convention of the Suez Canal, 1888. https://www.suezcanal.gov.eg/English/About/CanalTreatiesAndDecrees/Pages/ConstantinopleConvention.aspx (30.01.2019.) In 1957 Egypt reaffirmed its will to be bound with the terms of the 1888 Convention on Constantinople concerning the Suez Canal.

[17] The Panama Canal Authority website: The Panama Canal Authority (ACP) Overview. https://www.pancanal.com/eng/acp/acp-overview.html (30.01.2019.)

States and Panama.[18] A concurrent treaty was also drawn up to confirm the neutrality status of the Panama Canal in 1977 (the Neutrality Treaty), which gives the United States a permanent right to intervene should the neutrality status of the Canal is threatened.[19] In accordance with the provisions of this treaty, the Canal is confirmed to be an "*international transit waterway*", the security of which shall be maintained in all circumstances, and it shall be available for passage at all times, in a non-discriminatory manner.[20]

The observation of the legal statuses of the above-mentioned canals, raises the question whether Canal Istanbul, projected as a national canal with no inter-oceanic characteristic, should be regulated through national or international law? Or, if and when we conclude that it should be regulated nationally, how far the international law is expected to influence the national regulation? The attempt to provide an answer to those questions necessitates the observation of some facts surrounding the case.

III. The nautical characteristics of the Bosphorus and the need for safety

At the outset, it would be appropriate to draw attention to the fact that the Canal Istanbul Project is extraordinary, in the sense that it is designed as an alternative waterway to Bosphorus, virtually next to it. This goes against the consuetudinary motive for building a canal, as it is not likely to reduce the costs or the journey of the ships to pass. The major aim is ensuring safety. To elaborate the safety concern, it would be essential to reveal some particularities about the Bosphorus.

Figure 2 The Turkish Straits'. Source: Jones, Dorian: Key Waterways Become Focus of Turkish, Russian Tensions. VOA News. December 11, 2015. https://www.voanews.com/a/key-waterways-become-focus-of-turkey-russia-tensions/3098692.html (30.01.2019.)

[18] Panama Canal Treaty (adopted 07 September 1977, entered into force in 01 October 1979) 1280 UNTS 3. 5. Article 2(2).

[19] Treaty concerning the permanent neutrality and operation of the Panama Canal (adopted 07 September 1977, entered into force in 01 October 1979) 1161 UNTS 177. [the Neutrality Treaty].

[20] It was made clear that the Panama Canal, shall not be the target of reprisals in any armed conflict, and be open for peaceful transit both at times of peace and war. The Neutrality Treaty, 1161 UNTS 177. 183. Articles 1–2.

The Bosphorus, together with the Marmara Sea and the Dardanelles forms what we refer as 'the Turkish Straits' (see Figure 2). These two straits and the Marmara Sea in the middle, connect the Black Sea to the Mediterranean Sea (the Aegean Sea part) as the sole sea route. The Bosphorus (Istanbul Strait) is 17 nm in length, the Marmara Sea is 110 nm in length, and the Dardanelles (Çanakkale Strait) is 37 nm in length, 164 nm in total. Particularly the Bosphorus, is a "*singularly tricky strip of water*"[21], which is very sinuous, often narrow, and flowed by strong and complex currents.[22] For instance, the narrowest point in the Bosphorus is shy of 700 m and there are turns that are as sharp as 80°, accompanied by multiple strong currents to the disadvantage of the ships.

The density of the marine traffic adds to the risk. In 1936, when the Monteux Convention was signed, the ships passing through the Bosphorus was only 17 per day; whereas now it is around 130.[23] Moreover, there is a local sea traffic in Istanbul, which serves around 250,000 people on a daily basis.[24] Many fishing boats and private sea vessels also navigate in the Bosphorus.

Not only the numbers of ships have increased in these 82 years, but also the sizes and tonnages have grown. Recent statistics revealed that in the last decade the number of ships passing through the straits have decreased, (from 56,000 in 2007, to nearly 43,000 in 2017) whereas the total tonnage have increased (from 485 million tons in 2007, to nearly 600 million tons in 2017),[25] meaning that larger ships are now used in navigation.

A considerable number of those ships carry toxic, dangerous or explosive cargo. Here we need to make note of the oil and gas reserves in and around Russia and the Caspian Sea, and mention that despite all the transnational pipelines, still most of such substances are transported through ships that navigate from the Bosphorus. The Turkish Straits are thus, one of the key shipping chokepoints of the world seaborne oil trade.[26] One hundred and forty four million tons of the 485 million was of tankers in 2007 and in 2017 147 million tons of the total 600 million was tankers.[27] Nearly ¼th of the total cargo is oil and gas of various types.

Unfortunately, these presented facts and figures come with a toll. The city of Istanbul is under a perpetual threat. Istanbul, which hosts nearly 16 million people, was declared by UNESCO as a World heritage city due to its 3000 years of remarkable history and rich culture.[28] Nevertheless, there has been many ship accidents in the Bosphorus and Istanbul is constantly under the threat of a disastrous accident especially by the tankers. Although currents and darkness are defined as the two prevalent factors causing marine accidents

---

[21] Ece, Nur Jale – Sözen, Adnan – Akten, Necmettin – Erol, Serpil: The Strait of Istanbul: A Tricky Conduit for Safe Navigation. *European Journal of Navigation*, 5 (2007) 1. 47.

[22] Association Francaise Des Capitaines De Navires website: The Turkish Straits Vessel Traffic Service. http://www.afcan.org/dossiers_techniques/tsvts_gb.html (22.11.2018.)

[23] Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[24] Çanci, Metin et al: İstanbul'da Deniz Ulaşımının Geleceğinin Değerlendirilmesi (The Evaluation of the Future of Marine Transportation in Istanbul), 2015. Project by Okan University, Faculty of Business and Administrative Sciences. http://www.istka.org.tr/media/20863/%C4%B0stanbul-da-deniz-ula%C5%9F%C4%B1m%C4%B1n%C4%B1n-gelece%C4%9Finin-de%C4%9Ferlendirilmesi.pdf (06.12.2018.) 11.

[25] Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[26] Ece–Sözen–Akten–Erol, 2007. 50.

[27] Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[28] UNESCO Website: https://whc.unesco.org/en/list/356/video (26.11.2018.)

in the Bosphorus,[29] with the admixture of the factors such as, geographical situation, narrowness, strong currents, sharp bends, uncertain weather conditions, combined with 2500 regional maritime traffic activity, 150 non-stopover vessels and 23 vessels carrying hazardous cargo passed every day, Bosphorus is one of the most unusual natural narrow waterways in the world.

The aggravated circumstances pose serious risk not only to the people living in Istanbul and the historical and cultural heritage of the city[30], but also to the marine environment. For instance, in an incident in November 1979, a Romanian Tanker *M/V Independenta* collided with a Greek cargo ship *M/V Evrialy* at the southern entrance of the Bosphorus. Upon collision, the *M/V Independenta* exploded[31] and 95,000 tons of oil leaked into the sea and some of it burned for almost a month.[32] This has been recorded as one of the biggest oil pollution accidents all over the world. [33] This accident killed 43 people and destroyed 96% of sea life in the region.[34] The risk posed by the tankers is not exclusive to Istanbul and the Marmara Sea, but it also extends to the Black Sea. The ecological state of the Black Sea is very fragile and gradually suffocating,[35] which is worsened by the oil tankers navigating through the Bosphorus. Such accidents may also lead to air pollution along with related health issues.

Another aspect is the possible effects of ship accidents on the trade and economy of Turkey and other States. Upon such incidents, the marine traffic in the straits is suspended for some time[36], which is a massive economic loss both for Turkey and other related States. Such suspension or deceleration at the marine traffic in the Bosphorus adversely affects the economies of particularly the Black Sea countries, as there is no alternative route available.[37]

---

[29] Ece–Sözen–Akten–Erol, 2007. 48.

[30] Recently, in April 2018, a Malta flagged ship crushed into a *Yalı* (the historical houses/mansions built by the Bosphorus) and destroyed part of the historical building. That incident flared the discussions on the safety issues in the Bosphorus once again. Daily Sabah: https://www.dailysabah.com/istanbul/2018/04/07/ship-crashes-into-waterfront-mansion-in-istanbuls-bosporus-after-rudder-gets-stuck (28.01.2019.)

[31] In this explosion the windows of houses up to six kilometres inland were smashed and that part of the city was under an intense smoke for days. ITOPF website: http://www.itopf.org/in-action/case-studies/case-study/independenta-boshporus-turkey-1979/ (28.01.2019). Energy Global News website: http://www.energyglobalnews.com/independenta-explodes-bospohorus/?print=print (28.01.2019.)

[32] Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[33] Google Earth Files: Black Tides: The Worst Oil Spills in History. http://earth.tryse.net/oilspill.html (26.11.2018.)

[34] Doğan, Ertuğrul – Burak, Selmin: Ship-Originated Pollution in the Istanbul Strait (Bosphorus) and Marmara Sea. *Journal of Coastal Research*, 23 (2007) 2. 389.

[35] "*Each year, thousands of tons of pesticides, fertilizers, industrial effluents, gasoline and other wastes flow from East European, Ukrainian, Russian and Georgian rivers into the Black Sea, lapping up finally on Turkish shores or pouring through the Bosporus.*[…] *Battered by East European river wastes and international oil spills, exhausted by several thousand years of quiet ecological struggle and assaulted by renegade jellyfish deposited accidentally by foreign ships, the Black Sea is slowly losing the layers of oxygen near its surface that for centuries supported bountiful schools of dolphins, sturgeon and anchovies.*" at: Coll, Steve: Turkey's Dire Strait. *Washington Post*, June 14, 1993, A 14.

[36] For instance, in 1994 *M/V Nassia* (an oil tanker) collided with M/V Shipbroker (a bulk carrier) at the northern entrance of the Bosphorus, killing 27 people. The tanker burned for several days which caused the Bosphorus traffic to be stopped for six days. Bosphorus Strait News website: http://www.bosphorusstrait.com/the-bosporus-strait/incidents/ (28.01.2019.)

[37] Turkish Straits are the sole outlet for Ukrainian port of Odessa, Russian Ports of Novorossiysk and Rostov-na-Donu, and Romanian ports. Pavlyuk, Serge V.: Regulation of the Turkish Straits: UNCLOS as an Alternative

IV. The Passage regime of the Bosphorus: the Montreux Convention

Part III of the LOSC lays down two principle regimes[38] for passage from the international straits: innocent passage regime and transit passage regime. Both are regimes of passage[39], meaning that such passage needs to be in conformity with the definition of Article18 of the LOSC.[40] The innocent passage regime in the international straits is as presented in Part II Section 3 of the LOSC, which regulates innocent passage in the territorial sea, with the sole exception that such passage cannot be suspended in the straits.[41] Innocent passage is not available for aircrafts, while submarines are required to navigate on the water surface showing their flag.[42] Transit passage on the other hand presents a more liberal regime, offering free passage for aircrafts and under water navigation for submarines.[43] Transit passage regime is applicable to straits connecting one part of the high seas or the exclusive economic zone to another.[44] Innocent passage regime, on the other hand, applies to international straits excluded from the transit passage regime under Article 38(1) and to the straits connecting a part of the high seas or the exclusive economic zone to the territorial sea of a State.[45]

Conventionally, the international character of a strait is predominantly determined according to its geographical features; a secondary determinant being its international use for navigation. The LOSC regulates the straits used for international navigation, leaving the national straits out of its scope. When the passage regime of a strait becomes the subject of an international treaty, it automatically attains an international character notwithstanding the geographical factors.[46] Yet, such straits shall continue to be governed by those long-standing special treaties.

The passage regime of the Turkish Straits is regulated by the Montreux Convention of 1936. This is an example *par excellence* of the situation described above.[47] The Turkish Straits,[48]

to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region. *Fordham International Law Journal*, 22 (1999) 962.

38 Archipelagic sea lanes passage as submitted in Part IV of the LOSC may be referred as a third passage regime, though a rather exceptional one.

39 Nandan, S. N. – Anderson, D.: Straits. In: Camınos, Hugo (eds.): *Law of the Sea*. Routledge, New York, 2016. 77.

40 "*Meaning of passage*

1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress." The LOSC 1833, 1834, 1835 UNTS 3. Article 18.

41 The LOSC 1833, 1834, 1835 UNTS 3. Article 45(2).

42 The LOSC 1833, 1834, 1835 UNTS 3. Article 20.

43 The LOSC 1833, 1834, 1835 UNTS 3. Article 38.

44 The LOSC 1833, 1834, 1835 UNTS 3. Article 37.

45 The LOSC 1833, 1834, 1835 UNTS 3. Article 45(1).

46 The LOSC 1833, 1834, 1835 UNTS 3. Article 35(c).

47 Churchill–Lowe. 2014. 106.

48 The Bosphorus connects the Black Sea (enclosed/semi-enclosed sea) to the Marmara Sea (territorial sea), and the Dardanelles connect the Marmara Sea to the Aegean Sea (high seas). Both straits are used for international navigation, as the only route to and from the Black Sea.

as is stipulated in the preamble to the Montreux Convention, consist of the Bosphorus (strait), Marmara Sea and the Dardanelles (strait).[49] Parties to the Convention were: Turkey, France, The United Kingdom, The USSR (Soviet Russia), Japan, Romania, Bulgaria, Greece and Yugoslavia. Italy has acceded to the Convention in 1938, and Japan has withdrawn from the Convention in 1951. As construed in Article 1, the general principle of the Convention for the merchant vessels is the "principle of *freedom of passage and navigation* by sea in the Straits". The meaning and scope of 'freedom of passage' is elaborated in the Article 2 of the Convention.[50]

There also are many constraints in this regime, particularly as regards the passage of warships. The Montreux regime involves different categories of passage regulations such as peace time, war time, imminent danger of war time both for merchant ships and warships. It also provides different regulations for Black Sea States and Non-Black Sea States. The peace time regulations include provisions regarding both passage from the Straits, and the status of being in the Black Sea. The protective and restrictive provisions of the Convention aim to protect not only Turkish interests as the State bordering the straits, but also all other coastal States of the Black Sea (the 'Black Sea Powers' as referred by the Convention). Therefore, the total naval force of non-Black Sea States is restricted in terms of their presence in the Black Sea.

Turkey is authorised to close the Straits to all foreign warships in wartime[51] or when it was threatened by aggression[52]; additionally, it was authorised to refuse transit from merchant ships belonging to countries at war with Turkey[53].

Due to its particular relevance, only the peace time restrictions as regards the vessels of war will be addressed. Those are twofold: restrictions as per passage from the Straits, and restrictions as regards the Black Sea.

The restrictions as per passage: The transit of all vessels of war should be notified to Turkish authorities at least eight days before their passage.[54] In time of peace, light surface vessels, minor war vessels and auxiliary vessels, whether belonging to Black Sea or non-Black Sea Powers, and whatever their flag, shall enjoy freedom to transit through

---

[49] "*Desiring to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus comprised under the general term* "*Straits*" *in such manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea*, […]" Preamble to the Convention Regarding the Régime of Straits [The Montreux Convention]. 173 LNTS 213. 215.

[50] "*In time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities, except as provided in Article 3 below. No taxes or charges other than those authorized by Annex I to the present Convention shall be levied by the Turkish authorities on these vessels when passing in transit without calling at a port in the Straits*. I*n order to facilitate the collection of these taxes or charges merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 their name, nationality, tonnage, destination and last port of call* (*provenance*). *Pilotage and towage remain optional*." The Montreux Convention. 173 LNTS 213. 219. Article 2.

[51] The Montreux Convention. 173 LNTS 213. 225. Article 20.

[52] The Montreux Convention. 173 LNTS 213. 227. Article 21.

[53] The Montreux Convention. 173 LNTS 213. 219. Article 5.

[54] It is also submitted that this period is to be extended to fifteen days for non-Black Sea Powers. The notification is required to specify the destination, name, type and number of the vessels, as also the date of entry for the outward passage and, if necessary, for the return journey. The Montreux Convention. 173 LNTS 213. Article 13.

the Straits without any taxes or charges.[55] The maximum aggregate tonnage of all foreign naval forces which may be in course of transit through the Straits shall not exceed 15,000 tons, or nine vessels.[56]

The restrictions as regards the Black Sea: The aggregate tonnage which non-Black Sea Powers may have in that sea in time of peace shall normally not exceed 30.000 tons,[57] and the tonnage which any one non-Black Sea Power may have in the Black Sea shall be limited to two-thirds of the aggregate tonnage.[58] Vessels of war belonging to non-Black Sea Powers cannot remain in the Black Sea more than twenty-one days, whatever the object of their presence there may be.[59]

In consequence, no aircraft carriers, capital warships or submarines of non-Black Sea Powers are allowed through the Turkish Straits. This is an important security instrument for Black Sea States perhaps more than it is for Turkey.

VI. National Administration of the Turkish Straits

In Turkey, the administration of the straits is carried out by the Directorate General of the Coastal Safety (set up in 1997), which is placed under the Ministry of Transport and Infrastructure. The mission of the Directorate General of the Coastal Safety (DGCS) is to assist and improve the safety of navigation in Turkish waters, and its core competences are: search and rescue, salvage and towage, Turkish Straits Vessel Traffic Services (TSVTS), aids to navigation (lighthouses, buoys, etc.), marine communication, and marine oil spill response during salvage operations or in case of emergency.[60]

In 1993 Turkey invited the International Maritime Organisation (IMO) to consider the navigational risks and hazards in the Turkish Straits. In 1994 Turkey adopted Maritime Traffic Regulations for the Turkish Straits and Marmara Region, upon recommendations by the IMO.[61] This legislation however, exceeded the IMO's recommendations and brought stricter rules for safety.[62] It is worth mentioning that IMO's Rules and Recommendations were rather "*minimal*" compared to the Panama[63] and

---

[55] The Montreux Convention. 173 LNTS 213. 221. Article 10.

[56] The Montreux Convention. 173 LNTS 213. 223. Article 14.

[57] Exceptionally that can be increased up to 45,000 tons under the conditions laid down in Montreux Convention Article 18. The Montreux Convention. 173 LNTS 213. 223–225.

[58] The Montreux Convention. 173 LNTS 213. 221–225. Article 18(1).

[59] The Montreux Convention. 173 LNTS 213. 225. Article 18/2.

[60] Directorate General of the Coastal Safety website: https://www.kiyiemniyeti.gov.tr/aboutus (03.12.2018.)

[61] The traffic separation schemes (TSS) were introduced in 1994 in the Straits in accordance with the provisions of the 'International Regulations for Prevention of Collision at Sea' (COLREG). The TSS were approved by the International Maritime Organization (IMO) General Assembly in November 1995. Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[62] *Schweikart* examined IMO's role as a forum for international problem solving and observed its shortcomings to address the navigational safety concern in the Turkish Straits. Schweikart, Debora: Dire Straits. The International Maritime Organisation in the Bosporus and Dardanelles. *University of Miami Yearbook of International Law*, 5 (1996–1997) 3. 29–50.

[63] In the Panama Canal, as a general rule, pilotage is compulsory, where it was only '*strongly recommended*' by the IMO in the Turkish Straits. The Panama Canal Authority website: Maritime Regulations: Regulation for

Suez[64] Canals, "*two other narrow, key oil tanker routes*".[65] Still, the 1994 Regulations led to serious reaction especially from States that rely on the straits for their shipping activities, on the grounds that it did not comply with the IMO rules and recommendations, international law, and the Montreux Convention.[66] Turkey, on the other hand, strictly contested such allegations.[67] In 1998 Turkey replaced that Regulation with a new one, which appeared more acceptable by the concerned States. The Maritime Traffic Regulations of 1998[68] was designed to apply to all vessels entering or navigating in the Turkish Straits, and aims to ensure safety of navigation, safety of life, property and marine environment by improving the safety of vessel traffic in the Straits. The Regulations introduced some safety and control measures such as the setting up of Traffic Separation Schemes, Traffic Control Centre and Stations, technical conditions and reporting requirements for ships.

As a further measure, equipped with 13 observation towers, the VTS (The Vessel Traffic System) has been operational since 2003, in the Turkish Straits. Each Observation Tower has X band radar, Monocolor – Color-Infrared Camera and Network Equipment. A few Towers has extra, meteorological Stations and communications equipment.[69] The establishment of the VTS is a major investment with considerable running costs. Yet it enables the monitoring electronic display chart all of vessels movement on area of interest; provides navigational assistance to captains to routing the vessels; renders Information Services to give the knowledge regarding meteorological and hydrographical situations and etc. of the Turkish Straits; supplies promulgation of navigational information and general warnings; and helps to provide effective vessel passage planning: saving time, while ensuring safety. It may be considered as money well spent.

Although these national measures drastically reduced the number of casualties in the Bosphorus,[70] it is still far from safe.

Navigation in Canal Waters. Agreement No. 13. June 3, 1999. https://www.pancanal.com/eng/legal/reglamentos/acuerdo13-eng.pdf (30.01.2019.) Article 90.

[64] In the Suez Canal, pilotage is compulsory for all vessels, and it regularly operates as a one-way waterway, where IMO recommended that two-way traffic in Turkish Straits '*may temporarily be suspended*' to ensure safe transit of vessels which cannot comply with the traffic separation schemes. The Suez Canal Authority website: Rules of Navigation. https://www.suezcanal.gov.eg/English/Navigation/Pages/RulesOfNavigation.aspx (30.01.2019)

[65] Schweikart, 1996–1997. 45.

[66] IMO Maritime Safety Committee: Report of the Maritime Safety Committee. 64th Session, U.N. Doc. MSC 64/22.1994. 11–14.

[67] It was submitted by Turkey that: "*The Turkish Straits Regulations and the TSS aim at enhancing safety of navigation in the Turkish Straits and are in conformity with the relevant rules of international law and practice*." Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[68] The English text of the Maritime Traffic Regulations of 1998 is available at: http://denizmevzuat.udhb.gov.tr/dosyam/T%C3%9CRK%20BO%C4%9EAZLARI%20VE%20DEN%C4%B0Z%20TRAF%C4%B0K%20D%C3%9CZENLEME%20Y%C3%96NERMEL%C4%B0%C4%9E%C4%B0.doc (03.12.2018.)

[69] Directorate General of the Coastal Safety website: About Us. https://www.kiyiemniyeti.gov.tr/aboutus (03.12.2018.)

[70] "*The Maritime Safety Committee of the IMO concluded at its 71st session, which was held in London on 19–28 May 1999, that the safety measures and the associated IMO Rules and Recommendations* '*have proven to be effective and successful*'. *The drastic decline in the number of accidents and collisions substantiate this conclusion*." Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

VI. The 'Crazy Project' as a crazy solution?

The Canal Istanbul Project, which was announced as the 'Crazy Project' is proposed as a safer route for the ships to navigate and presumed to be able to reduce the ship accidents in the Bosphorus. Moreover, it is rationalised equally on an economy-related aspect. It is claimed to provide extra revenue to Turkey. It is projected to create a new tourist attraction and also boost the real-estate market. Being a massive project, it is also expected to positively affect the political power of the government.

Safety argument, presented as the main motive for the Canal, appears to suffer from some discrepancies. To begin with, the availability of an alternative route is unable to address the safety concerns, for two basic reasons. First, it will not divert all the traffic off the Strait, as Montreux Convention Articles 1 and 2 constitute a legal barrier to such an imposition to use the Canal instead of the Bosphorus.[71] So it will be up to the vessel to choose which route to navigate from. The ship can prefer to navigate through the Canal, for avoiding the financial burden of congestion in the Bosphorus.[72] Yet the pricing of the Canal passage will be of critical significance in influencing this decision. *Akgün* and *Tiryaki* argue that going back to the original version of the Montreux Convention and apply *Gold Franc* would increase the actual fees paid today by the ships, and then there would be a chance for Turkey to direct ships that carry hazardous materials to use the planned Canal at an equivalent rate.[73] I do not agree with the second part of this argument: even if the Canal would somehow end up to be the cheaper option, it still does not legally provide Turkey with a right to derogate from the '*eternal*' principle of freedom of navigation in the Straits.[74] Such an imposition to the contrary of a crystal-clear legal regulation cannot be justified by merely offering equivalent conditions. The only possible way to make it happen would be through reregulation or deregulation; that is to say, either by amendment[75] or termination[76] of the Montreux Convention or enactment of a new treaty to replace it. On the other hand, I agree that such an initiative to go back to Gold Franc will consequently increase the applicable charges[77], which could create a competitive advantage for the Canal. Yet again this cannot be forced upon the ships but can only increase the incentive to use the Canal. Under the current legal conditions, it is nearly impossible for Turkey to profit from the Canal passages, since should the price is set too high, it is likely that the Canal

---

[71] Freedom of navigation principle as construed in the Convention preclude the possibility to obstruct the passage from the Bosphorus.

[72] It is estimated that the average daily waiting cost of a medium-sized ship is 30,000USD when the trade is in its lowest. Tütüncü, Ayşe Nur: Montrö Sözleşmesi ve Kanal İstanbul (The Montreux Convention and Canal Istanbul). *Public and Private International Law Bulletin*, 37 (2017) 1, 118.

[73] Akgün, Mensur – Tiryaki, Sylvia: The Political Feasibility of the Istanbul Canal Project. Global Political Trends Center (GPoT), *Policy Brief*, 2011/27. https://core.ac.uk/reader/20539280 (06.12.2018.) 5.

[74] The Montreux Convention Article 28(2) states that unlike the Convention itself, the principle of transit and navigation affirmed in Article 1 shall '*continue without limit of time*'. The Montreux Convention. 173 LNTS 213. 225. Article 28(2).

[75] The Montreux Convention. 173 LNTS 213. 225. Article 29.

[76] The Montreux Convention. 173 LNTS 213. 225. Article 28.

[77] *Akgün* and *Tiryaki* reveal that a commercial ship with a net tonnage of 10,000 is for its passage from the Straits is obliged to pay 4,881 USD to Turkey, whereas if we were to apply Gold Franc (according to the gold rate of 4th of August, 2011) it would increase to 59,976 USD. Akgün–Tiryaki, 2011. 4, 5.

will become the unfavourable option; whereas should the price is set too low, it will impair the economic feasibility of the Project.

Secondly, the Canal Project is accompanied by huge urbanisation plans around the Canal. It is planned that a considerable amount of people will be accommodated by the new shores of the Canal, with a vision to relief the densely populated areas, especially in the old town part of Istanbul.[78] However, this plan could cause increased strain over the city such as air pollution and health issues, and practically may end up with relocating some of the existing risks in the Bosphorus at the Canal shore.[79]

Leaving aside the feasibility and possible environmental impact of opening a man-made canal in Istanbul, the question on the legal sphere rests: How it should be regulated?

As a national waterway, Canal Istanbul is expected to be subject to national law and administered through national authorities.[80] Then, would it be governed by the Directorate General of the Coastal Security or another administrative body? As the plan involves the employment of a 'build-operate-transfer scheme' to finance the project, how much '*say*' would the contractor have over the passage regulation? These are more of the internal matters, but the subject also has a transnational aspect. Despite categorising it as 'national', is it possible to extend the Montreux restrictions to the Canal?

Before proceeding with substantive examination of such questions, it could be useful to shed a light on the Turkish constitutional system with reference to its relationship with international law. The relationship between international law and national law according to the Turkish legal system has always been a complicated subject. Since the Constitution of the Republic of Turkey 1982[81] has no clear references as to the relationship between international law and national law, indicating supremacy of either one over another, such normative vagueness leads to the presentation of dissimilar opinions in the legal literature that vary immensely as to the categorisation of such relationship as per the classical theoretical views of monism and dualism.[82]

---

[78] The creation of new residential areas bears the risk of triggering internal migration and increase the already dense population. The project is estimated to cause a rise in the population of Istanbul up to 25 millions, and that of the Thrace Region (including Istanbul) – which is approximately 8% of the whole Turkish land territory – up to 40–45 millions. Gökçe, Cemal: İstanbul Kanal Projesi Neden Yapılmamalıdır? (Why the Istanbul Canal Project should not be done?). Chamber of Civil Engineers, *Press Release*, TMH-490-2016/2. http://www.imo.org.tr/resimler/ekutuphane/pdf/17210_26_36.pdf (06.12.2018.) 61.

[79] Akkaya, M. Ali: "Kanal İstanbul" Projesi Karadeniz Kıyısındaki Devletlerle Olan İlişkilerimize Etkisi ve Montrö Sözleşmesi ("Canal Istanbul" Project and the Effect Thereof Upon Our Relations with the Coastal States of the Black Sea, and the Montreux Convention), *Ordu Üniversitesi Sosyal Bilimler Araştırmaları Dergisi*, 5 (2015) 12, 254–255.

[80] Upon a question, the Minister of Transport and Infrastructure, *Cahit Turhan*, has recently affirmed the legal status of the Canal as a national waterway. He also mentioned that the Canal will be open for international navigation, yet it is intended for the passage of commercial ships. Moreover, he confirmed that the pricing studies according to the permitted ship types and tonnages, along with the technical and administrative preparation work in relation to navigational safety is in progress. Gürcanli, Zeynep: Kanal İstanbul'un hukuki statüsü açıklandı. İç suyolu (The legal status of Canal Istanbul is revealed: National waterway). *Sözcü*, 05 December, 2018. https://www.sozcu.com.tr/2018/gundem/kanal-istanbulun-hukuki-statusu-aciklandi-ic-su-yolu-2777579/ (06.12.2018.)

[81] The English text of the 1982 Constitution of the Republic of Turkey is available at the official website of the Grand National Assembly of Turkey: https://global.tbmm.gov.tr/docs/constitution_en.pdf (29.01.2019)

[82] Tekin Apaydin, Deniz: Monizm-Düalizm İkileminde Türk Hukuk Sistemi: Uluslararası Hukuka Bakış Üzerine Doktrinel Uzlaşmazlığın Nedenleri ve AB Hukuku Işığında bir Değerlendirme (Turkish Legal System in the

According to Article 104 of the 1982 Constitution, the ratification and promulgation of international treaties is a duty of the President of the State.[83] Yet, such ratification shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification in accordance with Article 90.[84] The first sentence of the Article 90(5) provides that "*International agreements duly put into effect have the force of law*", which stipulates that the treaties are positioned as equivalent to laws in the hierarchy of norms. This indicates that the Turkish legal system perceives international treaties and national law as a single unit and determines their respective position within that single body of law. Moreover, the third sentence of the same paragraph refers to the case of a conflict between international treaties concerning fundamental rights and freedoms and national laws, and gives priority to the application of the former. Such a case relating to a conflict between international law and national law is only possible within monist systems, because dualist systems observe international law and national law as two different sets of laws that cannot co-exist. Hence in dualist systems those two laws cannot conflict with each other, unless international law is incorporated into national law with a legislative act, which then converts the conflict into a domestic one. Therefore, the present author strongly believes that the Turkish legal system represents the peculiarities of a monist structure.[85]

The Montreux Convention was implemented immediately and has been applied as an integral part of Turkish law since 1936.[86] If the Canal Project is carried out and regulated nationally there is a possibility that it may conflict with the provisions of the Montreux Convention. In such a scenario the legal instrument used for regulating the Canal would be

Monism – Dualism Conundrum: The Reasons of the Doctrinal Disagreement on the Viewpoint of International Law and a Review in the Light of EU Law). *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 9. (2018) 1. 529–560.

83 The English text of the 1982 Constitution: https://global.tbmm.gov.tr/docs/constitution_en.pdf (29.01.2019.) 44.

84 "D. Ratification of international treaties Article 90 – *The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification. Agreements regulating economic, commercial or technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the State, and provided they do not interfere with the status of individuals or with the property rights of Turks abroad. In such cases, these agreements shall be brought to the knowledge of the Grand National Assembly of Turkey within two months of their promulgation. Implementation agreements based on an international treaty, and economic, commercial, technical, or administrative agreements, which are concluded depending on the authorization as stated in the law, shall not require approval of the Grand National Assembly of Turkey. However, economic, commercial agreements or agreements relating to the rights of individuals concluded under the provision of this paragraph shall not be put into effect unless promulgated. Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph. International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.* (*Sentence added on May 7, 2004; Act No. 5170*) *In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*" The English text of the 1982 Constitution. 39.

85 Tekin Apaydin, 2018. 529–560.

86 Turkey became a party to the Montreux Convention in accordance with the Constitution of the Republic of Turkey 1924, which, in its Article 26, sought the approval of the Grand National Assembly to ratify an international treaty, with no further references for a transposition procedure. This design may also be perceived as reflecting a monist approach as regards international law. The English text of the Constitution of the Republic of Turkey 1924 is available through: Earle, Edward Mead: The New Constitution of Turkey. *Political Science Quarterly*, 40 (1925) 1. 91.

of crucial significance, as it will be the main determinant in resolving the conflict. Should the Canal be regulated through a regulation or by-law, as the Convention is equivalent to statutory law, the Convention will be ranked higher in the hierarchy of norms, thus prevail according to *lex superior derogat legi inferiori* principle provided that the terms of the Convention are self-executing. However, if the Canal is to be regulated through a statutory law, they would be equal, so the general principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori* would apply.

Getting back to the substantive questions; following the common predisposition in the regulation of canals, if Turkey applies a freedom of passage for all types of ships and for instance permits the passage of a non-Black Sea capital warship through the Canal, would it violate the Montreux Convention? There is no single and straightforward yes or no answer to this question.

From a generic perspective it would be a 'no', because the Montreux Convention regulates passage from the 'Turkish Straits' and Canal Istanbul is not part of the Turkish Straits. The Canal is beyond the geographical scope of the Convention. However, it would also be a 'yes', because the Convention not only regulates the passage of warships from the Straits, but also their presence in the Black Sea. So as regards the *passage*, the Montreux restrictions would not be applicable to the Canal; on the other hand, upon passage, the restrictions as regards *presence* in the Black Sea would start to apply. The literal meaning in the interpretation of Article 18 of the Convention, purports to verify the provision applicable, notwithstanding the route of passage. Therefore, assuming that the Canal was regulated based on freedom of passage for all types of ships, the ships, which passed from the Canal freely, would become subject to Montreux restrictions, once they reach to the Black Sea. This means that passage from the Canal would indirectly and ultimately be subject to the Montreux Convention.

In the same scenario, accepting the contrary interpretation that suggests that the Montreux Convention is entirely inapplicable to the Canal, would mean the circumvention of the Convention. Russia in particular, feels threatened by this possibility, as it endangers the protected status of the Black Sea against the United States. For that reason, Russia takes it very seriously and the Russian officials say that countermeasures could be applied where necessary.[87] In this case, unless the restrictions of the Convention is somehow translated into the national regulation, it could be like reopening the Pandora's Box, and probably start a diplomatic fuss in the best case scenario. It could even lead to the termination of the Convention, the aftermath of which is a big question mark.

VII. Conclusion

The Turkish Straits "*territorially speaking*" are "*narrow geographical areas*", but through "*their position*, *they are geostrategic keys*, *which is the reason why the powers in the area have had an interest in changing their status*."[88] The privilege of Turkey to keep the two gates

[87] Russian News website: Canal Istanbul: The Turks Encircle the Neighbouring Russia. https://svpressa.ru/society/article/44524/ (03.12.2018.)

[88] Popescu, Daniela: The Straits – between geopolitical best card and bone of contention in the Turkish–Russian relations. Kanal Istanbul Projesi. *Romanian Journal of History and International Studies*, 2 (2015) 2, 235.

of the Black Sea opening to the Mediterranean Sea comes up with the burden of a highly delicate balance to maintain. In the post-cold-war era, Turkey, being a NATO member, is expected to take sides with the United States and Europe against Russia in such international disputes. However, it is not that straightforward. Turkey is in a position to watch for the peaceful relations in the Black Sea region, while teaming up with its allies, which proves to be challenging at times of crisis.[89] Such incidents put Turkey in a "*difficult diplomatic position not only between two neighbouring countries with which it has been cultivating close relations and cooperation, especially on energy*, *but also between the United States and Russia*".[90] From this viewpoint, the Canal Istanbul Project can be perceived as "*a will for an independent foreign policy*",[91] albeit, not free from complications.

Despite the developments in international law of the sea that upheld the efforts to ensure certain navigational rights in the strategic international straits, those developments never sought to also address international canals.[92] Thus, their internationalisation has been maintained not by developing general rules in international law, but through specific international treaties. The lack of common rules applicable to canals provides no clear guidance for the Canal Istanbul. The situation is further deteriorated by the fact that the Canal Istanbul Project suffers the absence of an inter-oceanic category.

The Canal Istanbul Project is still at a planning phase and there is a chance that it may at least be postponed for now due to the current unfavourable economic conditions. Yet there is no such official announcement as of now.[93]

The feasibility of this project to counterchallenge the navigational risks posed by the ship traffic in the Bosphorus is questionable, yet again beyond the scope of this study; so is the possible environmental impact of constructing the Canal. The more immediate and relevant question is addressing the tension between the Montreux Convention, which represents international law obligations and *pacta sunt servanda*; and the national regulation of the Canal Istanbul, which stands for national sovereignty and national interests.

The obvious solution to avoid conflict would be to regulate the Canal by national law, save that such regulation is in conformity with the provisions of the Montreux Convention. From one point of view, this could mean the triumph of international law over State sovereignty. Another option could be to allocate the Canal to the passage of merchant ships

[89] In the South Ossetia crisis between Georgia and Russia (in August 2008), Turkey felt the strain between the US and Russia. Initially permitting the passage of three US warships (of nearly 30,000 tons in total) ostensibly, to provide '*humanitarian aid*' to Georgia, Turkey later refused permission to the entrance of two massive warships of 140,000 tons into the Black Sea, saying that such passage would be against the provisions of Montreux Convention. Turning down the wish of its ally "to make a show of support for Georgia" unsurprisingly displeased the US. Morrison, David: Turkey Restricts US Access to the Black Sea. October 18, 2008. http://www.david-morrison.org.uk/us/turkey-restricts-us-access.htm (30.01.2019.)

[90] Aliriza, Bulent: Turkey and the Crises in the Caucasus. September 9, 2008. *Commentary*. Center for Strategic and International Studies. https://www.csis.org/analysis/turkey-and-crisis-caucasus (30.01.2019.)

[91] Popescu, 2015. 239.

[92] Rothwell, Donald R. – Stephens, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010. 231.

[93] According to the latest official statements the project will '*hopefully*' start in 2019 and will be finished by 2023, on the 100th anniversary of the Turkish Republic. Şahin, Tuba: Turkey plans to start building Canal Istanbul in 2019. *Anadolu Agency*, 15 November, 2018. https://www.aa.com.tr/en/energy/international-relations/turkey-plans-to-start-building-canal-istanbul-in-2019/22308 (06.12.2018.)

only, which would leave the contestable part out of the equation.[94] Yet, none of those options is capable of providing a cure for the Bosporus, suffering from a chronic safety condition.

In a retrospective perspective, perhaps the project could be used as a leverage to renegotiate the terms of the Convention and modify the 'freedom of passage' principle to a more restricted passage regime to protect Istanbul in particular and Turkey and the region in general, rather than actually constructing the Canal that can seriously harm the city and the environment. The Montreux Convention was concluded as a result of initiations by Turkey, relying on the change of circumstances since the conclusion of the Lausanne Peace Treaty in 1923,[95] which was then governing the Turkish Straits. Despite all the political risks, perhaps, once again, it is time to invoke the *clausula rebus sic stantibus* to modify the terms to adapt the current circumstances to protect Istanbul. The Montreux Convention was "*adopted in another era*", and unless it is capable of being modified to reflect contemporary navigational concerns, its ongoing application may be questioned by user States.[96]

The US Energy Information Administration (the EIA) refers to the Turkish Straits as "*Only half a mile wide at the narrowest point, the Turkish Straits are among the world's most difficult waterways to navigate because of their sinuous geography.*", yet one of the busiest maritime chokepoints.[97] Under the circumstances, the Bosphorus has increasingly been like an impending disaster waiting to occur. The Montreux Convention prescribes freedom of navigation for merchant ships, including the oil tankers and ships carrying hazardous cargo. However, this principle should be interpreted with due regard to the safety of millions of people and the protection of environment. As proclaimed by the Turkish Ministry of Foreign Affairs, "*otherwise, this would be nothing but an abuse of the right of freedom of passage without taking into account the legitimate and justified concerns of Turkey for its people, its environment and its historical and cultural assets.*"[98]

Undoubtedly, there exists a pressing need for a change in the Bosphorus. The Monteux Convention proves to be insufficient to ensure the safety of the Bosporus and is a fortiori focused on protecting the Black Sea Powers from the marine access of non-Black Sea forces. This approach needs to be adjusted to address the safety and marine environmental protection concerns. It is necessary and inevitable that certain actions are to be taken to ensure that such concerns are dealt with. But, I personally hope that one of them is not the construction of a canal in Istanbul. In either case if the Canal is built, a Turkish national regulation will possibly determine the future of an international treaty, legally; together with the future of a region, politically.[99]

---

[94] This option appears to be the preferred one by Turkish authorities as of today.

[95] Lausanne Peace Treaty, II. Convention Relating to the Régime of the Straits, Ministry of Foreign Affairs website: http://www.mfa.gov.tr/ii_-convention-relating-to-the-regime-of-the-straits.en.mfa (29.01.2019)

[96] Ünlü, Nihan: *The Legal Regime of the Turkish Straits*. Martinus Nijhoff, The Hague, 2002. 10914, considering options for reform, quoted via Rothwell–Stephens, 2010. 245

[97] The EIA website: World Oil Transit Chokepoints, July 25, 2017. https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=WOTC (29.01.2019.)

[98] Ministry of Foreign Affairs website: http://www.mfa.gov.tr/the-turkish-straits.en.mfa (26.11.2018.)

[99] *Karlıklı* examines the geostrategic importance of the Black Sea region and the balance secured by the Montreux Convention. He suggests that sustainable peace and the future of the region mostly depends on the political choices of Turkey in relation to the Montreux Convention and the Black Sea. Karlikli, Yücel: Rethinking the Montreux Convention Regarding the Regime of the Straits in its 80th Anniversary. *Public and Private International Law Bulletin*, 37 (2017) 1, 48.

References

akgün, Mensur – Tiryaki, Sylvia: The Political Feasibility of the Istanbul Canal Project. Global Political Trends Center (GPoT), *Policy Brief*. 2011/27. https://core.ac.uk/reader/20539280 (06.12.2018).

Akkaya, M. Ali: "Kanal İstanbul" Projesi Karadeniz Kıyısındaki Devletlerle Olan İlişkilerimize Etkisi ve Montrö Sözleşmesi ("Canal Istanbul" Project and the Effect Thereof Upon Our Relations with the Coastal States of the Black Sea, and the Montreux Convention), *Ordu Üniversitesi Sosyal Bilimler Araştırmaları Dergisi*, 5 (2015) 12, 242–262.

Aliriza, Bulent: Turkey and the Crises in the Caucasus. September 9, 2008. *Commentary*. Center for Strategic and International Studies. https://www.csis.org/analysis/turkey-and-crisis-caucasus (30.01.2019.)

American Studies at the University of Virginia website: Panama Canal. http://xroads.virginia.edu/~ma03/holmgren/ppie/pc.html (22.11.2018.)

Association Francaise Des Capitaines De Navires website: The Turkish Straits Vessel Traffic Service. http://www.afcan.org/dossiers_techniques/tsvts_gb.html (22.11.2018.)

Bosphorus Strait News: http://www.bosphorusstrait.com/the-bosporus-strait/incidents/ (28.01.2019.)

Boyle, Alan: Further Development of the Law of the Sea Convention. Mechanisms for Change. *International and Comparative Law Quarterly*, 54 (2005) 3, 563–584.

Caminos, Hugo – Cogliati-Bantz, Vincent P.: *The Legal Regime of Straits*. Cambridge University Press, Cambridge, 2014.

Churchill, Robin Rolf – Lowe, Alan Vaughan: *The Law of the Sea*. Manchester University Press, Manchester, 3rd Ed., 2014.

Coll, Steve: Turkey's Dire Strait. *Washington Post*. June 14, 1993, A 14.

Convention Regarding the Régime of Straits (adopted 20 July 1936, entered into force provisionally on 15 August 1936 and definitively on 9 November 1936) 173 LNTS 213 [the Montreux Convention].

Çanci, Metin *et al*.: İstanbul'da Deniz Ulaşımının Geleceğinin Değerlendirilmesi (The Evaluation of the Future of Marine Transportation in Istanbul), 2015. Project by Okan University, Faculty of Business and Administrative Sciences. http://www.istka.org.tr/media/20863/%C4%B0stanbul-da-deniz-ula%C5%9F%C4%B1m%C4%B1n%C4%B1n-gelece%C4%9Finin-de%C4%9Ferlendirilmesi.pdf (06.12.2018.)

Daily Sabah: https://www.dailysabah.com/istanbul/2018/04/07/ship-crashes-into-waterfront-mansion-in-istanbuls-bosporus-after-rudder-gets-stuck (28.01.2019.)

Directorate General of the Coastal Safety website: About Us. https://www.kiyiemniyeti.gov.tr/aboutus (03.12.2018.)

Doğan, Ertuğrul – Burak, Selmin: Ship-Originated Pollution in the Istanbul Strait (Bosphorus) and Marmara Sea. *Journal of Coastal Research*, 23 (2007) 2, 388–394.

Earle, Edward Mead: The New Constitution of Turkey. *Political Science Quarterly*, 40 (1925) 1, 73–100.

Ece, Nur Jale – Sözen, Adnan – Akten, Necmettin – Erol, Serpil: The Strait of Istanbul: A Tricky Conduit for Safe Navigation. *European Journal of Navigation*, 5 (2007) 1, 46–55.

Energy Global News website: http://www.energyglobalnews.com/independenta-explodes-bospohorus/?print=print (28.01.2019.)

Google Earth Files: Black Tides: The Worst Oil Spills in History. http://earth.tryse.net/oilspill.html (26.11.2018.)

Gökçe, Cemal: İstanbul Kanal Projesi Neden Yapılmamalıdır? (Why the Istanbul Canal Project should not be done?). Chamber of Civil Engineers, *Press Release*, TMH-490-2016/2. http://www.imo.org.tr/resimler/ekutuphane/pdf/17210_26_36.pdf (06.12.2018.)

Gürcanli, Zeynep: Kanal İstanbul'un hukuki statüsü açıklandı: İç suyolu (The legal status of Canal Istanbul is revealed: National waterway). *Sözcü*, December 05, 2018. https://www.sozcu.com.tr/2018/gundem/kanal-istanbulun-hukuki-statusu-aciklandi-ic-su-yolu-2777579/ (06.12.2018.)

IMO Maritime Safety Committee: *Report of the Maritime Safety Committee*. 64th Session, U.N. Doc. MSC 64/22. (1994.)

ITOPF website: http://www.itopf.org/in-action/case-studies/case-study/independenta-boshporus-turkey-1979/ (28.01.2019.)

Jones, Dorian: Key Waterways Become Focus of Turkish, Russian Tensions. *VOA News*. December 11, 2015. https://www.voanews.com/a/key-waterways-become-focus-of-turkey-russia-tensions/3098692.html (30.01.2019.)

Karlikli, Yücel: Rethinking the Montreux Convention Regarding the Regime of the Straits in its 80th Anniversary. *Public and Private International Law Bulletin*, Vol. 37. No. 1. 2017. 29–49.

Lausanne Peace Treaty, II. Convention Relating to the Régime of the Straits, Ministry of Foreign Affairs website: http://www.mfa.gov.tr/ii_-convention-relating-to-the-regime-of-the-straits.en.mfa (29.01.2019)

Ministry of Foreign Affairs website: Turkish Straits. http://www.mfa.gov.tr/the-turkish-straits.en.mfa (06.12.2018.)

Morrison, David: Turkey Restricts US Access to the Black Sea. October 18, 2008. http://www.david-morrison.org.uk/us/turkey-restricts-us-access.htm (30.01.2019.)

Nandan, S. N. – Anderson, D.: Straits. In: Camınos, Hugo (eds.): *Law of the Sea*. Routledge, New York, 2016. 66–114.

Oxford Dictionaries: strait. https://en.oxforddictionaries.com/definition/strait (28.01.2019.)

Panama Canal Treaty (adopted 07 September 1977, entered into force in 01 October 1979) 1280 UNTS 3.

Pavlyuk, Serge V.: Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region. *Fordham International Law Journal*, 22 (1999) 961–1001.

Popescu, Daniela: The Straits – between geopolitical best card and bone of contention in the Turkish–Russian relations. Kanal Istanbul Projesi. *Romanian Journal of History and International Studies*, 2 (2015) 2, 233–243.

Rothwell, Donald R. – Stephens, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010.

Russian News website: Canal Istanbul: The Turks Encircle the Neighbouring Russia. https://svpressa.ru/society/article/44524/ (03.12.2018.)

Schweikart, Debora: Dire Straits. The International Maritime Organisation in the Bosporus and Dardanelles. *University of Miami Yearbook of International Law*, 5 (1996–1997) 3, 2950.

Şahin, Tuba: Turkey plans to start building Canal Istanbul in 2019. *Anadolu Agency*. November 15, 2018. https://www.aa.com.tr/en/energy/international-relations/turkey-plans-to-start-building-canal-istanbul-in-2019/22308 (06.12.2018.)

Tekin Apaydin, Deniz: Monizm-Düalizm İkileminde Türk Hukuk Sistemi: Uluslararası Hukuka Bakış Üzerine Doktrinel Uzlaşmazlığın Nedenleri ve AB Hukuku Işığında bir Değerlendirme (Turkish Legal System in the Monism – Dualism Conundrum: The Reasons of the Doctrinal Disagreement on the Viewpoint of International Law and a Review in the Light of EU Law). *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 9 (2018) 1. 529–560.

The Convention Regarding the Régime of Straits (adopted 20 July 1936, entered into force provisionally on 15 August 1936 and definitively on 9 November 1936) 173 LNTS 213 [the Montreux Convention].

The EIA website: World Oil Transit Chokepoints, July 25, 2017. https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=WOTC (29.01.2019.)

The English text of the Maritime Traffic Regulations of 1998: http://denizmevzuat.udhb.gov.tr/dosyam/T%C3%9CRK%20BO%C4%9EAZLARI%20VE%20DEN%C4%B0Z%20TRAF%C4%B0K%20D%C3%9CZENLEME%20Y%C3%96NERMEL%C4%B0%C4%9E%C4%B0.doc (03.12.2018.)

The Grand National Assembly of Turkey website (The Constitution of the Turkish Republic of 1982): https://global.tbmm.gov.tr/docs/constitution_en.pdf (29.01.2019.)

The Panama Canal Authority website: Maritime Regulations: Regulation for Navigation in Canal Waters. Agreement No. 13. June 3, 1999. https://www.pancanal.com/eng/legal/reglamentos/acuerdo13-eng.pdf (30.01.2019.)

The Panama Canal Authority website: The Panama Canal Authority (ACP) Overview. https://www.pancanal.com/eng/acp/acp-overview.html (30.01.2019.)

The Suez Canal Authority website: Canal History. https://www.suezcanal.gov.eg/English/About/SuezCanal/Pages/CanalHistory.aspx (22.11.2018.)

The Suez Canal Authority website: Rules of Navigation. https://www.suezcanal.gov.eg/English/Navigation/Pages/RulesOfNavigation.aspx (30.01.2019.)

The Suez Canal Authority website: Suez Canal Authority (SCA) Overview. https://www.suezcanal.gov.eg/English/About/SuezCanalAuthority/Pages/SCAOverview.aspx (30.01.2019.)

The Suez Canal Authority website: The Constantinople Convention of the Suez Canal, 1888. https://www.suezcanal.gov.eg/English/About/CanalTreatiesAndDecrees/Pages/ConstantinopleConvention.aspx (30.01.2019.)

The Suez Canal Authority website: Why Suez Canal? https://www.suezcanal.gov.eg/English/About/Pages/WhySuezCanal.aspx (22.11.2018).

The UN-Business Action Hub website: IMO Profile. https://business.un.org/en/entities/13 (22.11.2018.)

The United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833, 1834, 1835 UNTS 3 [the LOSC].

Treaty concerning the permanent neutrality and operation of the Panama Canal (adopted 07 September 1977, entered into force in 01 October 1979) 1161 UNTS 177.

Turkish Press Agency: Kanal İstanbul'un Güzergâhı Resmen Açıklandı (The Route of Canal Istanbul is Officially Announced). January 15, 2018. https://www.bik.gov.tr/kanal-istanbulun-guzergahi-aciklaniyor/ (30.01.2019.)

Tütüncü, Ayşe Nur: Montrö Sözleşmesi ve Kanal İstanbul (The Montreux Convention and Canal Istanbul). *Public and Private International Law Bulletin*, 37 (2017) 1, 113–123.

UNESCO website: https://whc.unesco.org/en/list/356/video (26.11.2018.)

Ünlü, Nihan: *The Legal Regime of the Turkish Straits*. Martinus Nijhoff, The Hague, 2002.

Imola Schiffner
Senior lecturer
Department of International and European Law,
University of Szeged, Faculty of Law
schiffner.imola@juris.u-szeged.hu

NEW ASPECTS IN THE FAMILY REUNIFICATION PROCEDURE IN THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

I. Family reunification right in the EU law

One of the more contested aspects of European Union (EU) citizenship is the right of static EU citizens to be accompanied by third country national ("TCN") family members in their own Member State. In this paper, I will attempt to introduce these special aspects of the family reunification law with the help of the case-law of the Court of Justice of the European Union.

The right to family reunification is an essential part of EU law. As the Directive on Family Reunification itself puts it: "Family reunification is a necessary way of making family life possible. It helps to facilate the integration of third country nationals in the Member State."[1]

Family reunification could grant the acquirement of a residency right of a third country national into a Member State of the European Union, based on the fact that he or she maintains a family relationship with a European citizen.[2]

The different options for family reunification depending upon whether a person manages to find a link with the scope of application of EU law.

The European Union has developed a legislation system concerning residence family rights of third country national EU family members.

Directive 2003/86/EC on the right to family reunification sets minimum standard conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member State. However the Family Reunification Directive does not apply to family members of EU citizens. They can invoke the more favourable rules of Directive 2004/38.

---

[1] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003. 0012–0018.

[2] Kroeze, Hester: The Difference between European Citizens and European Citizens. A Constitutional Equilibrium of Citizenship Concepts. An analysis of reverse discrimination in the field of family reunification law and its connection with the constitutional equilibrium of multiple citizenship concepts in the European Union.2014. http://www.inclusionexclusion.eu/site/wp-content/uploads/2014/11/DUBR14_P_KroezeHester.pdf (01.11.2018.) 5.

Directive 2004/38/EC on the right of free movement of EU citizens and their family members covers EU citizens residing in another Member State wishing to live with a third country national family member.

Directive 2004/38 (the citizens' rights Directive) extends the right of entry and residence accorded to the EU citizen to family members who are not nationals of a Member State, accompanying or joining the EU citizen in the host Member State. [3] Nevertheless as a general rule, the Directive only confers a right of residence to TCNs, and so family reunification right, if their EU citizen family member made use of their freedom of movement.[4]

Therefore, those nationals who residing in their EU Member State of origin wishing to live with a third country national family member – the so-called *static citizens* – fall outside the scope of the Directive with regard to this right. The legislation applying to this category is still national, these family reunification cases ruled by their national citizenship status. So the *static citizens* are being disadvantaged in comparison with *mobile citizens*. [5]

Static citizens can only rely on their EU citizenship rights, including a right of residence for their third country family members, when they fall within the scope of application of EU law. If their situation has no link with EU law, they are subject to the often more restrictive national rules of the Member States.[6]

This situation generates difference in treatment between the family of EU citizens who have not exercised their right to free movement and have stayed in the country of their nationality and those who have exercised their right to free movement. National law in some circumstances regulates the family reunification of its own nationals more restrictively than EU law.[7]

The debate has been particularly focused on the role played by the Court of Justice of the European Union (Court) in deciding cases involving EU citizens and their third country national family members. The Court has been criticized for inconsistent judgments and providing a lack of legal certainty.

However, the Court stressed that 'EU citizenship is intended to be a fundamental status of nationals of the Member States.[8] So, the rights attaching to the status of citizen of the EU may be relied upon, even in the absence of a cross-border element, against any national measure causing the deprivation of those rights.

The Court started to use the concept of EU citizenship in order to grant family protection also to EU citizens that never crossed their state of origin's borders and used these cases in family reunification to determine the conditions of family joining in cases of static citizens.

---

[3] Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L 158/77. Article 3(1).

[4] Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L 158/77. Article 1.

[5] Kroeze, 2014. 8.

[6] Van Elsuwege, Peter – Kochenov, Dimitry: On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law*,13 (2011) 4.

[7] Proposal of a Council Directive on Family Reunification, COM (1999) 638 final, 14.

[8] C-184/99 Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies – Louvain la Neuve [2001] ECR I-6193. 6193., C-135/08 Janko Rottmann v Freistaat Bayern [2010] ECR, para.43.

The relevant case-law of the Court[9] reinforces the right of the EU citizens, especially for family reunification, and extent it to third country national family member too but only in special circumstances. In the same time the Court improved the legal position of third country nationals with the help of the EU law and so automatically harmonised the immigration law of the Member States.

The main question is where the limit of national authority in immigration law are and in the decision about family reunification claims.

II. Case-law on family reunification of static EU citizens and their TCNs family member

II.1. The Zambrano-doctrine

The famous *Zambrano case*[10] was in this line the first one which granted a family reunification right to third country nationals in purely/wholly internal situation, where the family member EU citizen never crossed the borders of State of origin.

In that case, Belgium had denied a right of residence to a Colombian father of two Belgian minors. The Court held that, by not giving the father of a Belgian children a derived residence right, Belgium will oblige the children to leave the territory of the EU as a whole, and therefore deprive the children of *the genuine enjoyment of the substance of the rights* conferred by the EU citizenship status.[11] This would mean that the children, as EU citizens, would no longer be able to make use of their rights in the EU.[12]

According to the Court's decision in a situation like this the EU citizens could invoke Article 20 Treaty on the Functioning of the European Union (TFEU) against their Member State of nationality, even if they had never previously made use of their free movement rights and enforce the EU citizen's rights. As stated in the decision, Article 20 TFEU precludes national measures that have the effect of depriving citizens of EU citizenship rights, including the right to family reunification.[13]

As other crucial consequence the Court in his decision made clear that a third country national had a derived right to reside with his EU citizen children.[14]

With this decision the Court created the so-called *Zambrano-doctrine* and redefined the scope of application of EU law, extending its reach to an otherwise "purely internal situation".[15]

---

9 Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004] ECR I-9925., Case C-148/02, Garcia Avello v Belgian State [2003] ECR I-11613.

10 C-34/09 Ruiz Zambrano v Office national de l'emploi (ONEM) [2011] ECR I-0000.

11 C-34/09 Zambrano case, para. 45.

12 C-34/09 Zambrano case, para. 44. Haag, Maria: Case C-133/15 Chávez-Vílchez and Others – Taking EU Children's Rights Seriously. *The European Law Blog*, 30.05.2017. http://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/(30.10.2018.)

13 C-34/09 Zambrano case, para. 42.

14 C-34/09 Zambrano case, para. 34.

15 Murphy, Ciara: At the Periphery of EU Citizenship: C-356/11 O, S and L. *The European Law Blog*,11.01.2013. http://europeanlawblog.eu/2013/01/11/at-the-periphery-of-eu-citizenship-c-35611-o-s-and-l/ (30.10.2018.)

After *Ruiz Zambrano*, several important questions arose. The Court did not clarify how, in the absence of a cross-border element, Articles 20 TFEU interact. The Court did not specify under which circumstances a national measure may have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the EU or when does a national measure produce a '*deprivation effect*'?[16]

The Court managed to clarify its position in the following cases, especially in *McCarthy* and *Dereci* case.

II.2. The restricted Zambrano-doctrine

In *McCarthy case*[17] Mrs McCarthy was a national both the UK and Ireland, however she had never used the EU free movement right. She married to a TCN man. Mrs McCarthy and her husband applied for a residence permit under EU law as, respectively, an EU citizen and the spouse of a EU citizen. The Secretary of State refused their applications on the ground that Mrs McCarthy was not 'a qualified person' (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of 'a qualified person'.[18]

The Court found the situation purely internal as she never exercised a right of free movement, and for this reason refused the application of EU law. [19]

The Court stated that no element of the situation indicated that the national measure had the effect of depriving Mrs.McCarthy of the genuine enjoyment of the substance of the rights or restricting her right to move and reside freely within the territory of the Member States.[20]

So the Court in *McCarthy case* on one side, confirmed the *Zambrano-doctrine* by applying it but, at the same time, curtailed it by finding that Mrs. McCarthy was not dependent on her Jamaican husband like the Zambrano children were on their parents.[21] It seems that the relationship between the genuine enjoyment substance of citizenship rights and the residence family rights of third country national family members did not apply because of the lack of dependency.

The Court held that the refusal to grant a UK residence permit to the TCN husband of a EU citizen woman did not deprive her of the substance of her EU citizenship rights.[22]

---

[16] Lenaerts, Koen: EU citizenship and the European Court of Justice's 'stone-by-stone' approach. *International Comparative Jurisprudence*, 1 (2015) 1,1–10., 3. https://www.sciencedirect.com/science/article/pii/S2351667415000062 (31.10.2018.)

[17] C-434/09 Shirley McCarthy v Secretary of State for the Home Department [2011] ECR I-03375.

[18] C-434/09 McCarthy case, para. 17.

[19] C-434/09 McCarthy case, para. 46.

[20] C-434/09 McCarthy case, para. 49.

[21] Berneri, Chiara: The movement and residence rights of third country national family members of EU citizens: a historical and jurisprudential approach.(Unpublished Doctoral thesis, City, University of London) http://openaccess.city.ac.uk/18070/, 119.

[22] C-434/09 McCarthy case, para. 49., Murphy, 2013.

Accordingly, Mrs. McCarthy's inability to have proper family life in the UK, curiously, was not viewed by the Court as a substance of her EU citizenship rights.[23]

The second case that had an impact on *Zambrano-doctrine* was the *Dereci case*.[24]

Dereci case concerned a series of refusals to grant residence permits to third country national family members of Austrian nationals who had never exercised EU free movement rights. All of the applications were rejected on the basis that the situation was purely internal. Nevertheless the referring court sought a preliminary ruling from the Court in order to clarify the scope of *Zambrano-doctrine*.

The Court found that the children were not dependent on Mr. Dereci, a Turkish national, for subsistence and could stay with their Austrian mother in Austria.[25] So, the father's expulsion would not force them to follow him to Turkey.[26]

Furthermore the Court suggests that the EU law, and especially the Article 20 TFEU is not applicable, because the situation was purelly internal.[27]

Moreover according to the Court in *Dereci case*, the *Zambrano-doctrine* grants protection only even if the family was being severed and consequently exposed to emotional and financial difficulties, or even if the whole family, including the EU citizen children, would have to leave the EU if they wanted to stay together.[28]

The Court held that „the fact that it might be desirable, for economic or family reasons, to keep the family together was not sufficient (…)" for to give residence permit.[29]

For this reason the *Dereci case* was subject to a lot of criticism with regard to excluding the right to family life from the genuine enjoyment. Advocate general Mengozzi stated that an EU citizen, in order to be able to enjoy a family life in accordance with EU law, has to exercise one of the freedoms of movement.[30]

So as well as advocate general stated, the Court ruled that only the family reunification right could not bring the case under the EU law, the rights which enjoyment is deprived in case of rejection of residence permit do not include the right to rescpect of family life.[31]

However this decision questions the development of the idea of EU citizenship as the fundamental status of the nationals of the Member States.[32]

Unlike the McCarthy case, the Court in Dereci case did not try to specify the content of the genuine enjoyment of the substance of the citizenship rights test. Despite the lack of specification of the rights that amount to the substance of EU citizenship, the Court in *Dereci case* made clear when a national measure should be considered violating substantive EU citizenship rights.[33]

---

[23] Van Elsuwege, Peter – Kochenov, Dimitry: On the Limits of Judicial Intervention. EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law*,13 (2011) 446.

[24] C-256/11 Dereci, Heiml, Kokollari, Maduike and Stevic v Bundesministerium fur Inneres [2011] ECR I-0000

[25] C-256/11 Dereci case, para.6.

[26] C-256/11 Dereci case, para. 40., Haag, 2017.

[27] C-256/11 Dereci case, para.61.

[28] C-256/11 Dereci case, para.68.

[29] C-256/11 Dereci case, para.68.

[30] Opinion of Advocate General Mengozzi, Case C-256/11, Dereci v. Bundesministerium für Inneres,2013 E.C.R. I□ny, para. 50.

[31] C-256/11 Dereci case, para.72.

[32] Shaw, Jo: Has the European Court of Justice challenged Member State Sovereignty in Nationality Law?", EUI working papers, 2011/62, 39.

[33] Berneri, 2014. 124.

The Court underlined that a national measure has to be considered violating the substance of EU citizenship rights the EU citizen has to leave not just the territory of the Member State but of the EU as a whole.[34]

To conclude, after the *Zambrano case* the Court followed a strict approach of *Zambrano-doctrine*, they emphasized that cross-border movement remained a pre-requisite[35]. In the *Zambrano case* the Court stated that citizenship in itself could be a sufficient connecting factor to EU law irrespective of the existence of a movement between the Member States, but in these cases the Court restated again that citizenship law only applies in a cross-border context.[36] So, it restricted the scope of the doctrine by finding if there is no movement in EU level the case remain out of the scope of Article 20 of TFEU.[37]

So, the Court ensures a residence right to third country national family member only in special and exeptional circumstances in family reunification cases.

What are these special circumstances? In the reasoning of the Court there is no clarity and consistency.

II.3. *Zambrano-doctrine* in light of the child's best interest

Joined O, S & L case[38] involved, once again, static EU citizens and their third country national family members.

The cases concerned two TCN women residing in Finland. Both women were first married to Finnish nationals with whom they had Finnish children, but then divorced and remarried with TCNs with whom they had TCN children.

TCN husbands applied for a residence permit on the basis of the marriage, that was, however, rejected on the grounds that he did not have secure means of subsistence. So, were refused the right to reside in Finland.[39]

Here, the main issue was whether EU citizenship provisions preclude a Member State from refusing to grant a TCN a residence permit on the basis of family reunification, where that TCN wishes to reside with his TCN wife and his TCN child, and where the TCN wife resides lawfully in the Member States and is the mother of an EU citizen child from a previous marriage.[40]

So, the Court was asked whether a TCN step-parent could derive a right of residence from the EU citizenship of his step-child.[41]

[34] C-256/11 Dereci case, para. 66.

[35] Murphy, 2013.

[36] Van Elsuwege–Kochenov, 2011. 446.

[37] Haag, 2017.

[38] C-356/11 and C-357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L [2012] E.C.R. I-000 (Joined O, S & L case)

[39] Joined O, S & L case, paras 18–22.

[40] Goldner Lang, Iris: Extending the Scope of EU Law to Internal Situations. "In the Child's Best Interests We Swear, but not a step further. *EU Immigration and Asylum Law and Policy*, 29.06.2018. http://eumigrationlawblog.eu/extending-the-scope-of-eu-law-to-internal-situations-in-the-childs-best-interests-we-swear-but-not-a-step-further (31.10.2018.)

[41] Joined O, S & L case, para.33.

The Court started recalling what was already stated in the previous pronouncements of *Zambrano*, *McCarthy* and *Dereci case*.

The Court stated that the simple fact that an EU citizen never made use of his/her right of free movement does not necessarily mean that the case is a purely internal situation.[42] EU citizens can rely on the citizenship rights even against their state of nationality, if the national measure has the effect of denying the genuine enjoyment of the substance of citizenship rights.[43] It occurs when the national measure forces the EU citizen not just to leave the territory of the Member State of which he/she is a national but also the territory of the Union as a whole[44] because there is a *dependency relationship* between the TCN and a EU citizen.

Court underlined that this *dependency relationship* can force the EU citizen to leave the territory of the EU as a whole. So the national court should also take into account whether the third country national step-fathers are on whom the EU children are "*legally*, *financially or emotionally dependent*."[45]

Moreover the Court finally concluded that Article 20 TFEU does not preclude Member States from refusing to grant a residence permit to a TCN who resides with his legally resident TCN spouse, who is the mother of an EU citizen child from her previous marriage, if there is no violation of *the child's best interests*.[46]

According to the Court the *principle of the child's best interest*[47] is to be entailed in the notion of dependency, if it exists, the national measures could deprive the EU citizen of the enjoyment of citizenship rights.[48]

Nevertheless in the case is there was no (legal, financial or emotional) dependency between Finnish children and their TCN stepfathers,[49]so refusing to grant a residence permit to a TCN does not entail, for the minor EU citizen concerned, the denial of the genuine enjoyment of the substance of his/her EU citizenship rights.[50] Consequently the non-existence of dependency between EU citizen children and their TCN stepfathers places the situation outside the scope of Article 20 TFEU.[51]

In the previous cases, the Court did not offer a precise explanation of the meaning of this dependency. In the Joined O, S & L case the Court described the idea of dependency as legal, financial or emotional.[52] If it exists, it takes the situation under the EU law, into the scope of the Article 20 TFEU. So, after this case, we could conclude that according to the Court the key element is the dependency.

---

42 Joined O, S & L case, para. 43.

43 Joined O, S & L case, paras. 44–45.

44 Joined O, S & L case, paras. 47.

45 Joined O, S & L case, paras. 56.

46 Joined O, S & L case, para. 22.

47 The principle of the child's best interest as an international children's rights has been codified in Article 24(2) of the Charter of Fundamental Rights of the European Union. This right are mentioned in Directive 2003/86/EC on the right to family reunification too.

48 Joined O, S & L case, para. 52.

49 Joined O, S & L case, para. 56.

50 Joined O, S & L case, para. 58.

51 Joined O, S & L case, para. 57.

52 Joined O, S & L case, para. 56.

In the following cases the Court tried to determine the criteriums of dependency, especially in relation of minors.

II.4. *Zambrano-doctrine* reloaded

In *Rendon Marín*[53] and *CS* case[54] the Court analysed again a clearly internal situation in light of the family reunification right of TCN's.

Both cases considered the effect of a criminal record of a TCN parent on his or her derived residence right under Article 20 TFEU.

The cases concerned the question whether Article 20 TFEU precludes a Member State from expelling from its territory a TCN, due to his/her criminal record, where the TCN was the parent and the primary carer of an EU citizen child.

The *CS case* concerned a Moroccan national, who resided in the UK together with her British national son. In 2012, she was convicted of a criminal offence and given a prison sentence of 12 months. Following her conviction her application for asylum was denied.[55]

The facts in *Rendón Marín case* were very similar to the ones in CS and essentially raise the same question. Rendón Marín concerned a Colombian national father, who lived in Spain together with his Spanish national son and his Polish national daughter. His application for a residence permit was rejected due to his criminal record.[56]

The Court was asked under which circumstances the expulsion of a TCN caretaker of a EU citizen could be permitted under EU law. So, whether a TCN parent of a EU citizen has a derived right of residence in the home Member State under Article 20 TFEU or this right can be limited on grounds of public policy or public security.[57]

In both *CS and Rendón Marín cases*, the Court found that the applicants' circumstances fell within the scope of EU law. For this reason, using the *Zambrano-doctrine* on the situations in Rendon Marín and CS is justifiable.

In the cases there was a *relationship of dependency* between the TCN and the EU citizen children, unlike *O*, *S & L case*.[58] Consequently, by refusing the right of residence to Mr. Rendon Marín and to Ms. CS their EU citizen children would most likely have to leave the EU and would therefore be deprived of the genuine enjoyment of the substance of their EU citizenship rights.

So, the Court reassert in his decision that Article 20 TFEU "precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens"[59] The refusal to grant residence to the applicants third-country national, to whose sole care those children have

[53] C-165/14 Rendón Marín v Administración del Estado, [2016] E.C.R. I-000.

[54] C-304/14 Secretary of State for the Home Department v CS, [2016] E.C.R. I-000.

[55] C-304/14 CS case, paras. 12–16.

[56] C-165/14 Rendón Marín case, paras. 14–18.

[57] C-304/14 CS case, para. 20.

[58] Haag, Maria: CS and Rendón Marín. Union Citizens and their Third-Country National Parents – A Resurgence of the Ruiz Zambrano Ruling. *The European Law Blog*, 27.09.2016. http://eulawanalysis.blogspot.com/2016/09/cs-and-rendon-Marín-union-citizens-and.html (31.10.2018.)

[59] C-165/14 Rendón Marín case, para. 26.

been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that citizenship rights, in particular the right of residence.[60]

This means that

> "*a right of residence must be granted to a third-country national who is a family member of* [*a minor EU citizen*] *since the effectiveness of citizenship of the EU would otherwise be undermined, if*, *as a consequence of refusal of such a right that citizen would be obliged in practice to leave the territory of the European Union as whole*"[61]

So, Rendón Marín and CS thus had a derived right of residence under Article 20 TFEU in their children's home Member State.

Nevertheless, the Court held that, as a general rule, such a derived residence right can be derogated for reasons of public policy or public security, but the decision needs to take account of *the right to family life* and *the child*'*s best interest*.[62]

The *concept of public policy* must be interpreted strictly,[63] the refusing decision could found only on "the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security".[64] However a decision cannot be made "automatically on the basis solely of the criminal record of the person concerned."[65]

> "*The assessment must take into account the personal conduct of the individual concerned*, *the length and legality of his residency on the territory of the Member State, the nature and gravity of the offence committed*, *the extent to which the person is currently a danger to society*, *the age of any children at issue and their state of health*, *as well as their economic and family situation.*"[66]

The Court certainly does not exclude the possibility that "in exceptional circumstances"[67] a criminal and dangerous parent who poses a threat to a Member State's public policy or public security could be deported. Even if this means that his or her EU citizen children are forced to leave EU territory and thus deprived of the genuine enjoyment of their EU citizenship rights. Nevertheless, the Court advice a very strict test before such a decision can be taken.[68]

II.5. The criteriums of dependency-the *Chavez-Vilchez case*

In the next case the Court analysed the *Zambrano-protection* in a situation where one of the parents was a third country national and the other parent an EU citizen and tried to clear the notion of dependency.

---

[60] C-165/14 Rendón Marín case, para. 78.

[61] C-304/14 CS case, para. 29., C-165/14 Rendón Marín case, para. 74.

[62] C-304/14 CS case, paras. 48–49.

[63] C-304/14 CS case, para. 37., C-165/14 Rendón Marín case, para. 91.

[64] C-304/14 CS case, para. 40., C-165/14 Rendón Marín case, para. 92.

[65] C-304/14 CS case, para. 41.

[66] C-304/14 CS case, para. 42.

[67] C-304/14 CS case, para. 50.

[68] Haag, 2016.

In *Chavez-Vilchez case*[69] the case concerned TCN mothers of one or more Dutch children whose fathers were also Dutch. All the children lived mainly or exclusively with their mothers and the EU citizen children had never exercised their free movement rights, so, the situations were purely internal.

In all cases the application of child benefits was denied on the basis that the mother did not have lawful resident status. The Dutch court referred a preliminary ruling to the Court in order to ascertain whether the applicants could derive a right of residence under EU law. If that were the case, the Dutch court held, the applicants, as foreign nationals legally residing in the Netherlands, would have the same access to social assistance as Dutch nationals.[70]

It was also novelty that this is the first case that has come before the Court on the issue of Article 20 TFEU and the rights to social benefits. Interesting question whether the Court will ensure other citizenship right to TCN family member due the family reunification right in the future.

In light of *Zambrano-doctrine* the real question in the case was that could the TCN mothers acquire the right of residence based on Article 20 TFEU, if the Dutch national fathers might, in fact, be able to care for the children too.[71]

The right of residence in the EU of an EU citizen child can be violated even if the child is theoretically not forced to leave the EU due to the fact that one parent is entitled to stay, but still because of the relationship to other TCN parent.

Whether or not the child would have to leave the EU with the TCN parent, depends on who *the primary caretaker* of the child is and whether there is in fact a *relationship of dependency* between the child and the TCN.

It is also a relevant consideration that the other parent is an EU citizen who is willing and able to assume the care for the child but is not sufficient to determine whether dependency exists.[72]

In this respect the Court should consider the child's legal, financial and/or emotional dependency on the parent according to the previous cases.[73] This is a relevant factor, but the Court found in *Chavez-Vilchez case*, that should be considered other individual element too, as the right to *respect for family life* and the *best interests of the child*.

Relevant circumstances are "*the age of the child*, *the child*'*s physical and emotional development*, […] *his* [*or her*] *emotional ties* [*to both parents*], *and the risks which separation from the* [*TCN parent*] *might entail for the child*'*s equilibrium*."[74]

These are the criteriums of dependency, which must take into account to decide whether a derived right of residence exists. If between the TCN parent and the EU citizen child such a „*relationship of dependency*" exists the child would be compelled to leave the EU if the TCN parent was refused the right of residence.[75] In other words, if depriving the TCN parent of the right of residence would be against the child's best interests, due to the child's dependency on the TCN parent. Consequently, the TCN parent has a derived right

[69] C-133/15 Chavez-Vilchez and Others [2017] 3 CMLR 35. 296–297.

[70] C-133/15 Chavez-Vilchez case, paras. 20–32.

[71] C-133/15 Chavez-Vilchez case, para. 39.

[72] C-133/15 Chavez-Vilchez case, para. 71.

[73] C-133/15 Chavez-Vilchez case, para. 59.

[74] C-133/15 Chavez-Vilchez case, para. 72.

[75] C-133/15 Chavez-Vilchez case, para. 72.

of residence in the EU, based on the Article 20 TFEU. *Chávez-Vilchez case* confirms that the protection under Article 20 TFEU is safeguarding the best interests of the EU child.[76]

With this decision the Court clarified how to determine whether the case is in the scope of the *Zambrano-protection*.[77]

The Court explicitly cleared that the key element of this is the dependency, and the extent of the dependency.

So, the notion of dependency and the principle of the child's best interests add anything new to the *Zambrano-doctrine*.[78]

II.6. The *K.A. and others case* – The renewed *Zambrano-doctrin*e

The most recent in this line of cases is *K.A. and others case*.[79] The case concerns seven TCNs who have been subject to orders to leave Belgium. Having received the orders to leave and entry bans, all seven TCNs applied for residence permits for the purpose of family reunification with Belgian nationals who had never exercised their free movement rights. According to Belgian administrative practice, if a TCN was issued with a valid and final ban on entry of at least three years, his/her subsequent application for family reunification with an EU citizen would not be examined at all.[80]

Firstly, the Court recalls that Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of citizenship rights.[81]

However this overriding nature of the *Zambrano-protection* exists only if there is a *relationship of dependency* between the EU citizen and his TCN family member. If there exists a *relationship of dependency* between the TCN and the EU citizen of such a nature that it would lead to the EU citizen being compelled to leave the territory of the European Union, the refusal to grant a right of residence to a TCN can undermine the effectiveness of the EU citizen.[82]

Up to this point of the judgment the Court reassert his finding in connection of the criteriums of dependency[83], but moreover takes a revolutionary statement too.

Court in his decision draws a clear line between situations involving minor and adult EU citizens by determination of dependency.[84]

According to the Court, in cases where the EU citizen is an *adult*, who could live independent apart from the members of their family, dependency exists only in exceptional circumstances, where the separation of the EU citizen and the TCN family member is not possible.[85]

---

[76] Haag, 2017.

[77] Goldner Lang, 2018.

[78] Klaassen, Mark: The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter: *European Journal of Migration and Law*, 19 (2017) 2. 191–218.

[79] C-82/16 KA and others v Belgium Judgment of 8 May 2018 (Unreported).

[80] C-82/16 K.A and others case, para. 40.

[81] C-82/16 K.A and others case, para. 49.

[82] Progin-Theuerkauf, Sarah: K.A and others – The Zambrano Story Continues. *The European Law Blog*, 22.05.2018. https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues (30.10.2018.)

[83] C-133/15 Chavez-Vilchez case, para. 72.

[84] C-82/16 K.A. and others case, para. 76.

[85] C-82/16 K.A. and others case, para. 76.

Even though the Court does not give examples, this could be the situations where an adult EU citizen, – for reasons of a physical or psychological nature, – could not live without the adult TCN family member.[86]

When the EU citizen is a *minor*, it is important to determine in each case which parent is the primary carer und whether there is a *relationship of dependency* between the child and the TCN parent.[87] Competent authorities must take into account the right to *respect for family life* and the *best interests of the child*.[88]

The Court repeats its statement of *Chavez-Vilchez case*, that the relationship of dependency "*must be based on consideration*, *in the best interest of the child*, *of all the specific circumstances*, *including the age of the child*, *the child*'*s physical and emotional development*, *the extent of his emotional ties to each of his parents*, *and the risks which separation from the TCN parent might entail for that child*'*s equilibrium*."[89]

Where separation is possible, but not desirable, as it is contrary to the best interests of the child, due to the child's dependency on the TCN parent.[90]

So if the dependency in a determined extent exists it could justify a derived right of residence under Article 20 of TFEU. [91]

The effectiveness of Union citizenship would be compromised if an application for residence for the purposes of family reunification were to be automatically rejected where such a relationship of dependency between a EU citizen and a third-country national family member came into being. Therefore, Member States authorities cannot refuse to examine an application for family reunification solely on the ground that the TCN is subject of an entry ban. It is their duty to examine the application and to assess whether there is a relationship of dependency of such a nature.[92]

We could conclude that *K.A. and others case* is an important advancement in family reunification cases. The Court determined in his jugdment the extend of the application of Article 20 TFEU in internal situations.[93]

The criteriums of dependency, determined by the Court, enables the application of *Zambrano-protection* to another group of internal situations where a minor EU citizen would, in practice, have to leave the EU territory in order to stay together with his/her parent on whom he/she is emotionally dependent. However, the criterion of dependency gets a different reading in the context of adult EU citizens and minors. [94]

3. Conclusion

After the ground-breaking decision in *Zambrano case*, the Court restricted the so-called *Zambrano-protection* in several subsequent decisions on this issue.

---

86 Goldner Lang, 2018.

87 C-82/16 K.A. and others case, para. 71.

88 C-82/16 K.A. and others case, para. 71.

89 C-82/16 K.A. and others case, para. 76.

90 C-82/16 K.A. and others case paras. 72 and 76.

91 C-82/16 K.A and others case, para. 52.

92 C-82/16 K.A and others case, para. 62.

93 Goldner Lang, 2018.

94 Goldner Lang, 2018.

The hope that *Zambrano case* had created a EU citizenship beyond free movement, which protecting fundamental rights (especially family reunification rights), was quickly pronounced dead.

In the current political climate in Europe it is not surprising that to ensure equal treatment for all EU citizens and the harmonisation of family reunification rules is not on the agenda. As long as the Member States do not take their responsibility in this field, the Court is obliged to work with the imperfect *Zambrano-doctrine* with all its consequences of legal uncertainty.

Since 2016, however, a number of decisions have revived this case-law and proven that the protection under Article 20 TFEU right is quite powerful.[95]

EU citizens could invoke Article 20 TFEU against their Member State of nationality, even if they had never previously made use of their free movement rights.[96] Member States were precluded from denying a residence right to TCN carers of national minors.

So, the Court extending the scope of application of EU citizenship rules to certain purely internal situations too, and unavoidably implies a further harmonisation of national immigration law.

However these cases made it very clear too that protection under Article 20 TFEU is only applicable to a very small number of people in "very specific situations".[97]Only if there exists a *relationship of dependency* between the TCN and the EU citizen of such a nature, fall the case into the scope of *Zambrano-doctrine*.

It must be assessed on a case-by-case basis whether there is a *relationship of dependency* with the EU citizen, which may compel the EU citizen to leave the territory of the EU to accompany the TCN and therefore deprive him or her of the famous "genuine enjoyment of the substance of rights conferred by the status as EU citizen". [98]

It is important to determine in each case which parent is the primary carer und whether the criteriums of dependency between the child and the TCN parent exist.[99]Competent authorities must take into account the right to respect for family life in conjunction with the obligation to take into consideration the best interests of the child.[100]

In these jugdments after Zambrano case the Court made an attempt to enhance the EU citizenship status and extend the EU law on third country nationals too, but with restriction in order to protect the national sovereingty of Member States in field of immigration.[101]

So a majority of static EU residents remains subject to the case by case approach after *Zambrano-doctrine* too.[102] The different options for family reunification depending upon whether a person manages to find a link with the scope of application of EU law and, in particular, the legal uncertainty about the exact limits of the Court's 'cross-border' and 'genuine enjoyment' tests, which reinforce the instability of *Zambrano-protection*.

[95] Haag, 2017.

[96] Haag, 2017.

[97] Rendón Marín case, para. 74; CS case, para. 29., Haag, 2016.

[98] Gyeney Laura: The Right of Residence of Third Country Spouses who Became Victims of Domestic Violence in the Scope of Application of the Free Movement Directive – Legal Analysis of the NA Case. *Pécs Journal of International and European Law*,2018/1.5.

[99] C-133/15 K.A. and others case, para. 71.

[100] C-133/15 K.A. and others case, para. 71.

[101] Lenaerts, 2015. 3.

[102] Kroeze, 2014. 13.

But keeping the family together – even though this is still not an acceptable reason by itself – is in the child's best interests, then it would be a valid reason for a derived right of residence of a TCN family member based on Article 20 TFEU. The protection under Article 20 TFEU and the genuine enjoyment rule could ensure family reunification rights to the third country parents of EU citizens in a purely member state situation and so other citizenship rights in the European Union too.

References

Berneri, Chiara: The movement and residence rights of third country national family members of EU citizens: a historical and jurisprudential approach.(Unpublished Doctoral thesis, City, University of London) http://openaccess.city.ac.uk/18070/ (11.02.2019.)

Case 133/15 Chavez-Vilchez and Others [2017] 3 CMLR 35 296–297.

Case 165/14 Rendón Marín v Administración del Estado, [2016] ECR. I-000.

Case 184/99, Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies – Louvain la Neuve [2001] ECR I-6193.

Case 256/11 Murat Dereci and Others v Bundesministerium für Inneres [2011] ECR I-0000

Case 304/14 Secretary of State for the Home Department v CS, [2016] ECR. I-000.

Case 34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2011] ECR I-1177.

Case 356/11 and Case 357/11, O, S v Maahanmuuttovirasto, and Maahanmuuttovirasto v L [2012] ECR. I-000

Case 434/09 Shirley McCarthy v. Secretary of State for the Home Department, [2011] ECR I-3375.

Case 82/16 KA and others v Belgium Judgment of 8 May 2018 (Unreported).

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, 2003] 0J L 251/12

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

Goldner Lang, Iris: Extending the Scope of EU Law to Internal Situations: "In the Child's Best Interests We Swear, but not a step further. *EU Immigration and Asylum Law and Policy*, 29.06.2018. http://eumigrationlawblog.eu/extending-the-scope-of-eu-law-to-internal-situations-in-the-childs-best-interests-we-swear-but-not-a-step-further (31.10.2018.)

Gyeney Laura: The Right of Residence of Third Country Spouses who Became Victims of Domestic Violence in the Scope of Application of the Free Movement Directive –Legal Analysis of the NA Case. *Pécs Journal of International and European Law*, 2018/1. http://epa.oszk.hu/02600/02691/00008/pdf/EPA02691_pjiel_2018_01_082-100.pdf (12.02.2019.)

Haag, Maria: Case C-133/15 Chávez-Vílchez and Others – Taking EU Children's Rights Seriously. *The European Law Blog*, 30.05.2017. http://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/ (31.10.2018.)

Haag, Maria: CS and Rendón Marín. Union Citizens and their Third-Country National Parents – A Resurgence of the Ruiz Zambrano Ruling? The European Law Blog, 27.09.2016. http://eulawanalysis.blogspot.com/2016/09/cs-and-rendon-Marín-union-citizens-and.html (31.10.2018.)

Klaassen, Mark: The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter: *European Journal of Migration and Law,* 19 (2017) 2. 191–218.

Kroeze, Hester: The Difference between European Citizens and European Citizens. A Constitutional Equilibrium of Citizenship Concepts. An analysis of reverse discrimination in the field of family reunification law and its connection with the constitutional equilibrium of multiple citizenship concepts in the European Union. 2014. http://www.inclusionexclusion.eu/site/wp-content/uploads/2014/11/DUBR14_P_KroezeHester.pdf (12.02.2019.)

Lenaerts, Koen: EU citizenship and the European Court of Justice′s 'stone-by-stone' approach. *International Comparative Jurisprudence*, 1 (2015) 1, 1-10. https://www.sciencedirect.com/science/article/pii/S2351667415000062, (31.10.2018.)

Murphy, Ciara: At the Periphery of EU Citizenship: C-356/11 O, S and L. *The European Law Blog*,11.01.2013. http://europeanlawblog.eu/2013/01/11/at-the-periphery-of-eu-citizenship-c-35611-o-s-and-l/ (31.10.2018.)

Progin-Theuerkauf, Sarah: K.A and others – The Zambrano Story Continues. *The European Law Blog*, 22.05.2018. https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues (31.10.2018.)

Shaw, Jo: Has the European Court of Justice challenged Member State Sovereignty in Nationality Law?", *EUI working papers*, 2011/62.

Van Elsuwege, Peter – Kochenov, Dimitry: On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights. *European Journal of Migration and Law*, 13 (2011) 443–466.

Erzsébet Csatlós
Senior lecturer
Department of Public Administrative Law
Faculty of Law and Political Science
University of Szeged
csatlos.e@juris.u-szeged.hu

CONSULAR PROTECTION OF EU CITIZENS IN THIRD STATES: VARIETY IS DELIGHTING?

The Case of the Emergency Travel Document[1]

Abstract

Consular protection of European Union (EU) citizens in Third States is a right inherent to the citizenship status. Since the entry into force of the Maastricht Treaty, Member States are required to guarantee the same level of protection to non-national, unrepresented EU citizens as they would do to their own nationals in certain qualified situations although the measures are not harmonised. It is due to the domestic nature of consular protection regulation, although a simple common format without any details was established to replace travel documents to facilitate thus the effective protection. Meanwhile, during its practice of 20 years, it has been proven that an additional harmonisation is needed with detailed rules on cooperation of authorities and exact provisions on an EU type of travels document. Therefore, a Council directive proposal was submitted on 31 May 2018 to achieve this aim which, in case of adoption, may be a step forward a unified concept of EU citizenship towards third States and strengthen the same level of serving the interests of citizens and it would also be milestone in administrative cooperation to ensure good administration of consular protection.

I. Introduction

Although every citizen of the European Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, is entitled to protection by the diplomatic or consular authorities of any Member State, on the same

[1] This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled *Aspects on the development of intelligent*, *sustainable and inclusive society*: *social*, *technological*, *innovation networks in employment and digital economy*. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

conditions as the nationals of that Member State,[2] the EU has no aim and competence to unify the consular protection. EU law does not confer them a right to uniform protection abroad. The Maastricht Treaty, which introduced the EU citizenship and the inherent rights so as the current Treaty in force, provide for a mere prohibition of discrimination based on nationality,[3] and until 2015, only modest tools were used to facilitate the necessary measures in favour of citizens.[4] So, the Member States still enjoy a great scope for action. According to domestic laws of Member States, there is a variety of benefitting the holders of the right in case of death, serious accident or serious illness, arrest, or detention, falling victim of violent crime, loss or theft of identity documents, and situations requiring repatriation or relief especially in armed conflicts, and in case of natural disasters; namely in qualified situations enlisted first by Council Decision 95/553/EC.[5] Apart from settling those situations which definitely require the Member States to provide consular help and protection, the Member States also agreed upon the usage of a common format as an emergency travel document which can be issued to temporarily replace the missing travel document of a non-national EU citizen, and a basic scenario was also fixed for the repayment of costs of the consular service.[6] All these provisions were settled with full respect of the domestic provisions and the external relations of the Member States.

However, variety has been proven to be unsatisfactory. In 2015, upon Article 23 of the Treaty on the Functioning of the European Union (TFEU), the Council adopted a new directive on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the EU in third countries (Consular Protection Directive). In addition, on 31rd May 2018 a Council directive proposal (Proposal) was submitted to reduce diversity and impose detailed provisions for the scenario for cooperation when the consular authority issue emergency travel document for a non-national EU citizen and a common, renewed form to that end.[7]

---

2 Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012. 391–407. [EU Charter] Article 46.; Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 47–390. [TFEU] Article 23.

3 On generalising the principle of non-discrimination ratione personae and its limits see: Wollenschläger, Ferdinand: *The Europeanization of Citizenship. National and Union Citizenships as Complementary Affiliations in a Multi-Level Polity*. Paper presented at the EUSA Tenth Biennial International Conference Montreal, Canada, May 17 – May 19, 2007. http://aei.pitt.edu/8025/1/wollenschlager-f-03h.pdf (20.12.2018.) 8–12.

4 Being strictly attached to the foreign policy area, basically, the EU's consular policy used to be under the scope of the intergovernmental regime of the former second pillar which was the widest area for national sovereignty and the least power for EU. Csatlós, Erzsébet: Consular Protection Policy of the EU in the View of Good Administration. In: Csatlós, Erzsébet (ed.): *Recent Challenges of Public Administration. Papers Presented at the conference of* '*Contemporary Issues of Public Administration*', 26th April, 2017. Iurisperitus, Szeged, 2017. 85–86.

5 95/553/EC Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations OJ L 314, 28.12.1995. 73–76. [No longer in force] Article 5. Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC OJ L 106, 24.4.2015. 1–13. Article 9.

6 Directive 2015/637, Article 9.; 14–15. Decision 95/553/EC Article 5; 6.

7 Proposal for a Council directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP Brussels, 31.5.2018. COM(2018) 358 final [Proposal]

The paper aims to explore and examine how the content of the new proposal while it reveals how it expands the EU's influence on foreign relation and develops European administration of a legal area under the cover of coordination and cooperation measures.

II. The emergency travel document

II.1. Connection between travelling, documents and consular protection

Before World War I, document-free international travel was the general rule for individuals, and the restriction of the free movement by official documents was the product of the 20th century.[8] The right to leave any country, including one's own, and to return home (right to leave and return) is now recognized under international and European human rights law,[9] although travel document is necessary for travel and the conditions of issue varies from State to State, and restrictions on the right to return is recognized only in special cases,[10] but as Liu says, the "*right to return is accepted so widely that its existence as a rule of law is virtually beyond dispute*"[11] and it is respected as a general principle.[12] However, in order for the right to be effective, the State must provide the individual with a travel document, in particular a passport, which is a certificate of identification and an evidence that the bearer is the national of the issuing State[13] enjoys its protective power[14] and has an incontestable right to enter the territory controlled by its issuing State.[15] It is an authentic document normally issued by the State of nationality of the individual as an inseparable aspect of citizenship policy, therefore it is a core element of State sovereignty.[16] The passport, as a summary name of travel documents which are the issued to reflect the above-mentioned status, is therefore an important element in border-crossing thus administration in case of the passport is lost, stolen or destroyed during one's staying abroad, is an important function

---

8 Bauman, Robert E: *The Passport Book. The Complete Guide to Offshore Residency*, *Dual Citizenship and Second Passports*, The Sovereign Society, Delray, 2009. 18–20.

9 UDHR, Universal Declaration of Human Rights, 10 December 1948, Paris, UN GA Res 217A, Article 13(2); International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171 [ICCPR] Article 12(2); (4); Protocol n°4 of the ECHR, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16.11.1963, Strasbourg, ETS 46, Article 2(2); Liu, Guofu: *The Right to Leave and Return and Chinese Migration Law*. Brill, Leiden, 2007. 2932.

10 ICCPR Article 12.3; Guild, Elspeth: *The right to leave a country*. Issue Paper by the Council of Europe Commissioner for Human Rights, 2013. https://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2015/07/31/Ayrilma.pdf 13

11 Liu, 2007. 84.

12 Lee, Luke T.: *Consular Law and Practice*. Frederick A. Praeger, New York, 1961. 175.

13 Lee, 1961. 175.

14 Hargitai, József: Az útlevél és a külföldre utazáshoz való jog nemzetközi jogi alapjai. *Magyar jog*, 42 (1995) 12, 715.

15 Liu, 2007. 53.; Torpey, John: *The Invention of the Passport, Surveillance, Citizenship and the State*. Cambridge University Press, Cambridge, 2000. 163.

16 Hargitai, 1995. 710.; Zieck, Marjoleine: Refugees and the Right to Freedom of Movement: From Flight to Return. *Michigan Journal of International Law*, 39 (2018) 1. 106.

of consular authorities[17] and now also an entitled situation when Member States are obliged to ensure service under the consular protection policy of the EU. Consular protection is, in fact, the collection of services and acts performed by the external administrative authorities of the States on the territory of another State and being a prerogative of the State and based on bilateral treaties between the State of nationality and the state where the national needs administrative help, is not a legal area that falls under the legislative competence of the EU.[18] The substance of law is not regulated by EU law, and administrative law issues are also marginally regulated by the EU. The EU and its Member States do not offer common consular administrative and legal services abroad, only certain situations are enlisted when the citizens might need help: arrest or detention; being a victim of crime; a serious accident or serious illness; death; relief and repatriation in case of an emergency and the replacement of lost, stolen or damaged travel documents that entitles the citizen to return home.[19] The level and quality of measures depend on the domestic regulation of Member States, so the essence of consular protection and the procedural rules of this administrative service varies from Member State to Member State. However, the Council decision of 96/409/CSFP[20] wanted to provide a genuine help to the proceeding authorities by establishing a quick solution for the most commonly occurring problem of travellers: the issuing of a travel document to help the EU citizen return home. It does not replace the passport. The passport is, nevertheless, the expression of the State's territorial sovereignty thus decisions concerning the modalities of issuance and acceptance of passports depends on the State's discretionary power.[21] The legislation in the form of CFSP was considered a simplified form of international agreement,[22] that is all the signatories accepted that, the application of the *emergency travel document* (ETD) seemed to face no burden for serving citizens.

[17] Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261 [VCCR] Article 5 d).

[18] TFEU, Article 23(1) appears to use the adjectives 'diplomatic' and 'consular' as synonyms, although diplomatic protection and consular protection are two completely different legal concepts. Given the fact that consular function can also be practiced by both diplomatic and consular agents and considering the content of secondary sources it is obvious that Article 23 TFEU refers only to consular protection. Schiffner, Imola: A diplomáciai védelem gyakorlásának eszközei, avagy a fogalom-meghatározás és az elhatárolás problémái. *Acta Universitatis Szegediensis de Attila József Nominatae Sectio Juridica Politica*, 72 (2009) 18. 535–543.; Vigni, Patricia: The Protection of EU Citizens: The Perspective of International Law. In: Larik, Joris – Moraru, Madalena (eds.): *Ever-Closer in Brussels – Ever-Closer in the World*? *EU External Action after the Lisbon Treaty*. EUI Working Papers, Law 2011/10, 100. Battini, Stefano: The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection. In: Chiti, Edoardo –Mattarella, Bernardo Giorgio (eds.): *Global Administrative Law and EU Administrative Law*. Springer-Verlag, Berlin – Heidelberg, 2011. 177–178.; Becánics, Adrienn: Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából. In: Karlovitz, János Tibor (ed.): *Fejlődő jogrendszer és gazdasági környezet a változó társadalomban*. International Research Institute s.r.o., Komárno, 2015. http://www.irisro.org/tarstud2015aprilis/index.html (18.12.2018.) 25–26. Diplomatic protection is still considered an exclusive prerogative of the State of nationality which does not have any duty to exercise such protection vis-à-vis its nationals. Cf. Vigny, 2010. 17. and *Odigitria AAE v Council of the European Union and Commission of the European Communities* [1996] ECJ, 28 November 1996, Case 293/95, ECR II-02025.point 43–45.

[19] Directive 2015/637, Article 9.; Council Decision of 1995, Article 5.

[20] 96/409/CSFP Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document.

[21] Hagedorn, Cornelia: Passport. In: *Max Planck Encyclopaedia of Public International Law*. Oxford Public International Law, January 2008. http://opil.ouplaw.com (24.12.2018.) point 7.

[22] CARE Final Report. Consular and Diplomatic Protection. Legal Framework in the EU Member States. 2010. http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf [CARE report] 571–573; 579.

II.2. Emergency travel document and Member State obligations under the consular protection policy of the EU

The ETD is a single-journey document, allowing the bearer to return home, or, exceptionally, to another destination, if they do not have access to their regular travel documents.[23] Issuing temporary travel document is a typical a consular protection measure via an administrative procedure; actually, it is the only one which was uniformly regulated by the 96/409/CSFP decision soon after 1992 when the Maastricht Treaty declared the right to consular help in third countries as a clear demonstration of the practical benefits of being a citizen of the Union.[24]

According to its provisions, it is a piece of security paper, with a photo and important personal information on the holder including name, date of birth, place of birth, height, nationality and the signature of the holder.[25] It can be issued for a maximum period of time to return home. An ETD should be made valid for barely longer than the minimum period required for completion of the journey for returning home with the necessary overnight stops and for making travel connections.[26] The recipient may only be a national of a Member State whose passport or travel documents are lost, stolen damaged or temporarily not available and has no accessible diplomatic or consular representation with the capacity to issue a travel document. In such cases, after being successfully identified as an EU citizen, or in case of extreme emergency without that, the consular authority of the Member State represented at site may issue the necessary document. Decision 96/409/CSFP also empowers Member State to extend the application of ETD rules to other persons.[27]

However, it shall be emphasized that neither the TFEU, nor Directive 2015/637 establishes obligation for Member States to issue ETD or gives the right to any circle of recipients to get such document from any Member States consular authority in a third State. EU consular policy establishes obligation to assist but Member States' consular law gives

---

[23] Proposal, preamble (2).

[24] 96/409/CSFP Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, Official Journal L 168, 06/07/1996. 4 –11, preamble al 3.

[25] ETDs shall be printed on security paper. It is 18x13 cm when it is open and 9 × 13 cm in folded format. The security paper is free of optical brighteners (approximately 90 g/m²), use a standard 'chain wires` watermark legally protected for the manufacturer of the document, with two invisible fibres (blue and yellow, SSI/05) fluorescent under ultraviolet light and reagents against chemical erasure. Each Member State shall provide the documents with a centralized numbering system, combined with the initials of the issuing Member State. The photograph of the bearer shall be laminated in accordance with national practice, it being understood that Member States shall take the necessary steps to ensure an appropriate level of security for the document. The bearer's personal details on the ETD form shall be consistently entered in either handwritten or typewritten form and shall be covered with a laminate. When an ETD is issued, the seal of the issuing authority shall be affixed partly on the document and partly on the bearer's photograph. ETDs shall have a guilloche protective background with indirect letterpress printing in four colours on the pages where data is to be entered with due consideration to iridescent printing. The decision also provides for the printing technology that shall be used. The inks used shall be copy-resistant and any attempt to make a colour copy shall result in clearly recognizable colour deviations. Moreover, at least one colour shall contain fluorescent agents. The inks shall also contain reagents against chemical erasure. The blank ETD forms shall be ensured a theft-proof storage. 96/409/CSFP Annex III.

[26] 96/409/CSFP, Annex II. 4.

[27] 96/409/CSFP, Annex II. 6.

the substance for the provisions and if a Member State's consular law does not provide for the possibility to issue travel document, then that State's consular authority will be responsible *to ensure assistance* when there is a need for emergency travel document,[28] and the Provision should not affect more favourable national provisions either in so far as they are compatible with its provisions.[29] In fact, "*the right to leave includes the positive obligation to issue travel documents, so that the right to leave can actually be exercised*"[30], but its circumstances rests in domestic competence domain, that is why it is important to emphasize the EU norms' role in enhancing the task as *assistance* in the case of emergency travel document issue and not referring to it as a consular protection measure to be ensured for citizens.

The first and outmost obligation of the requested consular authority at site is, namely, to contact the Ministry of Foreign Affairs of the Member State of which the person claims to be a national or, where appropriate, the competent embassy or consulate of that Member State, and provide it with all the relevant information at its disposal, including regarding the identity of the person concerned, possible costs of consular protection, and regarding any family members to whom consular protection may also need to be provided.[31] Except for extreme urgency, the checking of the identity of the person comes first, and then, the Member State of nationality has the chance to provide consular protection in accordance with its national law or practice and the requested Member State and its consular authority relinquish the case as soon as the Member State of nationality confirms that it is providing consular protection to the unrepresented citizen.[32] The right to issue a passport is still the prerogative of the nation State, to provide for its types and if they are willing to ensure short term, temporary travels document. The Member States' practice is colourful concerning temporary travel documents if there is any,[33] the establishment of a standard model by Decision 96/409/CSFP aimed to provide genuine help to the citizens of the Union in distress, as it might have been a clear demonstration of the practical benefits of being a citizen of the EU.[34]

According to data from 2017, the issuance of emergency travel document is the most frequent form of assistance given to unrepresented EU citizens (more than 60 % of all cases) but in absolute terms, the number of EU ETDs issued is relatively small. The annual numbers have been estimated at around 320 outside the EU and another 250 within the EU, and another 400–500 unrepresented citizens annually are issued national ETDs rather than the EU ETD format. However, the figures for EU ETDs are fragmentary and probably underestimated, as currently not all Member States collect precise statistical data on EU

[28] Directive 2015/637, Article 9 (f).

[29] EU ETD Proposal, (9).

[30] Zieck, 2018. 88.

[31] Directive 2015/637, Article 10.

[32] Directive 2015/637, Article 3.

[33] Eight Member States issue more than one type of emergency travel document. Emergency travel document as a paper is used by 9 Member States, as a booklet by 3 Member States, laissez passez in paper format is used by 3 Member States, in booklet format by one; under the term provisional/temporary passport 7 Member States uses booklet form and as emergency passport 2 Member States use paper format and 6 Member States use booklet format. ETD Presidency reflection paper, 9.

[34] Decision 96/409/CSFP, preamble.

ETDs.[35] So, the picture is still colourful meanwhile there is no evidence of any distressed citizens that was left without travel document, so in that point of view, no right has been violated relating to consular protection policy of the EU. However, bearing in mind equal treatment, the pure application of the provisions may also lead to diversity in practice as States consular law is different and it also have effect on individuals and the evaluation of their substantial rights as the level of service is different even in the same third State.

III. The Council directive proposal for a new type of ETD

III.1. The need of updated rules on ETD

The application of the Council decision 96/409/CSFP has approximately two decades of experience and meantime, the right to consular help in third States was definitely recognized among the fundamental rights of EU citizens and by the Lisbon Treaty, the Council got expanded competence to act in accordance with a special legislative procedure and after consulting the European Parliament and adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.[36] On 18 January 2011, the Council invited the European Commission to make a proposal for the production of a new EU ETD format containing security features in line with the current practices. As a first step, on 14 December 2011, the Commission presented a proposal which led to the adoption of a comprehensible Consular Protection Directive in 2015 to update and clarify coordination and cooperation measures to facilitate consular protection of EU citizens in third States. Rules to implement its new measures had to be done until the 1st May 2018. The concept of harmonisation of consular protection has not changed, it is still a domestic competence, and the situations when Member States are required to help each other's citizens are the same, although this time, the focus of provisions is on the cooperation and coordination of acts of authorities involved in the procedure.[37] Among the situations, it clarified an express reference to the issue *emergency travel documents* as one of the forms of assistance within the scope of consular protection. It is a major difference compared to the former regime as Decision 95/553/EC does not mention the issue of emergency travel document among the situations when assistance is required.

The Commission reported in 2017 that in more than 60% of the cases when EU citizens needed help outside the EU, they needed travel documents. It is also recognized that the emergency travel document established by 96/409/CSFP was not used by all the Member States (*Germany*, *Ireland*, *Greece*, *France*, *Croatia and the United Kingdom*)[38] due to the insufficient and unsatisfactory security nature of the common format. As it is a serious

---

[35] Proposal, 1. footnote 4; EU Citizenship Report 2017, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening Citizens' Rights in a Union of Democratic Change Brussels, EU Citizenship Report 2017, 31.1.2017, COM(2017) 30 final/2. 18.

[36] TFEU, Article 23 al. 2.

[37] Csatlós, Erzsébet: Consular Cooperation in Third States: Some Aspects Concerning Europeanisation of Foreign Service for EU Citizens. *Bratislava Law Review*, 1 (2017) 1. 77–78.

[38] Emergency Travel Document (ETD) – Presidency reflection paper. COCON 14, CFSP/PESC 523, COTRA 13, 11955/15, Brussels, 17 September 2015. [ETD Presidency reflection paper] 3.

obstacle for the effective protection of citizens abroad, recognizing the need for better security measures and further upgrade of the ETD procedure, the reform of 96/409/CSFP was put on the agenda.

A public consultation was launched from 12 September 2017 until 5 December 2017 to see views and concerns of EU citizens, businesses, organisations as well as public authorities on how the EU legislation on the Emergency Travel Document worked and on possible options to modernise them to make sure that EU citizens who find themselves without a passport outside the EU, and with no embassy or consulate of their own to help them, can get effective help to travel home.[39] Following requests from some Members States' Authorities and to encourage greater response rates, the survey deadline was extended to 8th December 2017. In addition to the survey to the authorities, over 50 companies, a mix of airline companies, tour operators and insurance companies, were contacted by the external contractor to gather their views on the EU ETD and potential options for improvement.

A total of 95 responses were received to the *stakeholder consultation*, and there was a good coverage of Member States responded to the targeted consultation, with all EU Member State represented by at least one stakeholder (insurance company incl. associations, airline company incl. associations, tour operator incl. associations, citizens, border control) and insurance company. The responses emphasized the need for security development of the ETD and the option of developing further guidelines as a soft measure is questionable.[40] In contrast, the *open public consultation* got little interest: q very limited number of replies were received. 23 EU citizens, 5 administrations and 3 organisations from 14 Member States responded to the questionnaire. Respondents were very mobile, with over 65% travelling outside the EU at least once a year or more and 84% of the respondents agreed that EU citizens living or travelling in a country within the Union should also be able to receive an EU ETD both inside and outside the EU, if their home country has no embassy or consulate there and their travel document is lost, stolen, destroyed or unavailable.[41]

A Council directive proposal was submitted with new rules on the now called *European Union emergency travel document* (EU ETD) on 31th May 2018. This proposal is based on the same competency rules as the Consular Protection Directive of 2015, so the future directive is a coordination and cooperation measure necessary to facilitate consular protection of EU citizens in third States.[42]

[39] Public consultation on the EU Emergency Travel Document (EU ETD) https://ec.europa.eu/info/consultations/public-consultation-eu-emergency-travel-document-eu-etd_en (20.12.2018.)

[40] The online survey to Member States' competent authorities was answered by all Member States, with the exception of Germany, Cyprus and Greece. However, all three countries responded to our request for telephone interviews and information. Cyprus and Greece confirmed that they had not issued any EU ETDs to date; thus, their input to the survey was considered by them to be of limited added value. Commission Staff Working Document Impact Assessment Accompanying the document 'Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP, Brussels, 31.05.2018. SWD(2018) 273. [Impact Assessment] 55. See the results in charts and numbers on page 56–64.

[41] Impact Assessment, 65–66.

[42] Proposal, 3.

III.2. Security features of the document

The Proposal puts a great emphasis on detailed rules on the security and reliability of the format of the EU ETD. Given the fact that it is a travel document issued to enable its holder to cross borders and enter the EU, it is an important element of border management and increasing the similarity of the common format to a passport may increase its acceptance by third countries.[43] Given the fact that cost-efficiency[44] and proportional measures are preferred, thus in addition to a uniform form a sticker would be used instead of biometrics[45], just like in the case of visas.[46] The sticker shall contain information on the holder,[47] shall be in consistent with ICAO document 9303, Part 2,[48] and shall be printed. No manual changes shall be made to a printed EU ETD sticker except for the case of *technical force majeure*.[49] If the sticker shows error, it shall be invalidated and if it is affixed to the EU ETD form, both shall be destroyed and new ones shall be produced.[50] The facial image of the applicant

[43] Proposal, 3.

[44] Opportunity costs of EUR 93/day in saved time per case. The time savings based on 1000 annual cases per year can be valued at EUR 93,000 across all citizen. Based on the annual issuance of 1000 EU ETDs a year at 8 euro per piece estimated production cost. Additional benefits are not quantifiable but reduce costs: quicker and more reliable processing of citizens travelling on EU ETDs at the EU borders reduces administration and extra costs for both citizens and Member States by handling and compensation payments for authorities and airlines and reduced denial-of-boarding costs (lost sale) for airlines. Impact Assessment, 68–69.

[45] The cost of equipment needed for personalisation per issuing post is estimated between 10 000 and 15 000 euros. Currently, only a minority of EU Member States' consulates have such equipment available and many Member States treat the requests for passports either domestically or at several regional centres in the world. Their service involves a waiting period of several days to several weeks and does not correspond to the needs of an emergency travel document, which should be readily available. Therefore, equipping all consulates with the required equipment on the other hand would be prohibitively expensive in proportion to the number of cases of EU ETDs issued every year and sharing common equipment would not reduce the costs as much as it would slow down the issuance process. In addition, the new EU ETD booklet also have an estimated cost in the range of 60–100 euros per printed copy, based on the example of the EU laissez-passer biometric passport printed in relatively low quantities. Impact Assessment, 38.

[46] Proposal, Article 8.1. Annexes I and II; Commission Implementing Decision C(2018) 674 of 9 March 2018 as regards further technical specifications for the uniform format for visas and repealing Commission Decision C(2010) 31–91.

[47] Annexes to the Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP. 9643/18, COCON 9, VISA 134, FREMP 90, Brussels, 1 June 2018. 3–4.

[48] Proposal, Article 8.2. The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention). Strictly attached to aviation safety, it has a broad global agenda of traveller identification management and aims to provide the States the necessary mechanism to identify individuals by their travel document with the highest possible degree of certainty, security and efficiency. To that end formulates standards and recommendations. See more about this program: Traveller Identification Program: ID Management Solutions for More Secure Travel Documents. https://www.icao.int/Security/FAL/TRIP/Pages/default.aspx (20.12.2018.) The European Union (EU) is an ad-hoc observer in many ICAO bodies (Assembly and other technical bodies). The Proposal refers to its document about Machine Readable Travel Documents (MRTD). The MRTD, and its method of issuance, shall be designed to incorporate safeguards to protect the document against fraudulent attack during its validity period. ICAO Doc 9303 Machine Readable Travel Documents (MRTD). Part 2: Specifications for the Security of the Design, Manufacture and Issuance of MRTDs https://www.icao.int/publications/Documents/9303_p2_cons_en.pdf (20.12.2018.) 1.

[49] Proposal, Article 8.45.

[50] Proposal, Article 8.6.

used for the EU ETD should be taken live at the embassy or consulate by digital camera or equivalent means.[51] Compared to the ETD, the EU ETD should contain blank pages so that transit visas, if required, can be affixed directly to the form.[52] Other formats may only be used in case of crisis situation.[53]

III.3. Vertical cooperation: provisions for procedural actions including deadlines

While Council decision 96/409/CSFP only provides for the format of ETD and the conditions of issuance, the Proposal also contains exact description of consecutive procedural steps including deadlines for each action in case of a demand for ETD. In case of receiving an application for an EU ETD, the consular authority has 24 hours to contact the alleged MS of nationality to check the identity. Requests for protection should be processed if applicants present a valid passport or identity card. However, unrepresented citizens in need of consular protection might no longer be in possession of their identity documents. To identify the person, the consular authority shall share the data on the applicant to be included on the EU ETD sticker including the facial image of the applicant, save in exceptional circumstances, which is taken by the authorities of the assisting Member State on the day of the application.[54] According to the Impact Assessment prepared for the Proposal, the Member States will be obliged to exchange data through formal and secure channels, such as the *CoOL website*.[55] The data is exchanged between Member States for the purpose of confirming the identity of a citizen without other valid travel documents and is justified on those grounds. At all times, during data collection, storage and transmission, the Member States are obliged to follow the EU's acquis and fundamental rights, particularly in relation to data protection.[56]

The Member State's competent authority of the alleged nationality shall confirm or deny the nationality within 36 hours. The assisting consular authority shall provide the applicant with the EU ETD no later than the working day following the response from the Member State of nationality is received. These deadlines are strict, except for duly justified exceptional cases.[57] In crisis situations, the assisting Member State may issue

[51] Proposal, Article 4.2. (b).

[52] Proposal, preamble (13).

[53] Proposal, Article 8.8.

[54] Proposal, Article 4.2.

[55] Impact Assessment, 37. Member States' authorities should closely cooperate and coordinate with one another and with the Union, in particular the Commission and the EEAS, in a spirit of mutual respect and solidarity. To ensure swift and efficient cooperation, Member States should provide and continuously update information on relevant contact points in the Member States through the secure website of the EEAS. The EEAS manages the CoOL (Consular Online) website, which connects Member States' consular departments and crisis centres as well as the EU Delegations for purposes of information sharing (mainly in crisis situations) and contingency planning. Directive 2015/637, preamble (16). EU SITCEN should provide consular offices in third countries access to the CoOL website. The website could be used both as an instrument for informing missions about new agreements and key documents relevant to their consular work; as well as serve as an archive for consular EU-documents, lessons learned from exercises and/or information shared by Member States. All Member States have a role to play in making CoOL an efficient working instrument. Guidelines on Consular Protection of EU Citizens in Third Countries. 10109/2/06 REV 2 PESC 534 COCON 14. Brussels, 5 November 2010. 13.

[56] Impact Assessment, 38.

[57] Proposal, Article 4.34.

an EU ETD without prior consultation of the Member State of nationality. The assisting Member State shall notify the Member State of nationality, as soon as possible, of the fact that an EU ETD has been issued and of the identity of the person to whom the EU ETD was issued. That notification shall include the name of the person and all data which are readable on the EU ETD.[58]

The authority of the Member State issuing the EU ETD shall store one copy of each EU ETD issued and shall send another to the applicant's Member State of nationality and the recipient is also obliged to return the EU ETD; these copies shall be destroyed within 60 days after the expiry of the EU ETD unless they are necessary for the issuance of a new passport or travel document.[59] An EU ETD shall be valid for the period required for completion of the journey for which it is issued. In calculating that period, allowance shall be made for necessary overnight stops and for making travel connections. The period of validity shall include an additional '*period of grace*' of two days, but it shall not exceed 15 calendar days, unless exceptional circumstances occur.[60]

III.4. Connecting vertical issues to horizontal cooperation

For the effective application of the provisions on issuing the EU ETD, the Proposal pays particular attention on the cooperation and coordination among the actors taking part in any process. It refers not only to the actions of Member States authorities but empowers and involves EU organs and institutions into the process. The Proposal establishes an information management network between the competent Member States' authorities and the Commission as the central administrative institution of the EU. Each Member State shall designate one body having responsibility for printing EU ETDs and shall communicate the name of that body to the Commission and the other Member States. The same body may be designated by two or more Member States and if there is any change in the designation, the facts shall be communicated the same way.[61] By no later than 21 months after the entry into force of the Directive, the Member State holding the Presidency of the Council will have the duty to provide generic specimens of the uniform EU ETD form and sticker to the Commission and the *European External Action Service* (EEAS). This latter is an autonomous, sui generis body, separate from the Commission and Council. "*Whereas the EEAS can be marked a* '*Brussels-based machinery*', *its external part*, *the Union delegations*, *operate as a diplomatic service to the Union*."[62] The EEAS shall transmit the generic specimens of the form and sticker to its delegations in third countries and these external diplomatic services of the EU are obliged to notify the relevant authorities in the third countries of the uniform EU ETD format as well as its main security features, including by providing generic specimens of the form and sticker for reference purposes. The Union delegations in third countries shall make generic specimens of the uniform EU ETD form

[58] Proposal, Article 4.5.

[59] Proposal, Article 4.6.

[60] Proposal, Article 4.

[61] Proposal, Article 10.

[62] Wouters, Jan – Duquet, Sanderijn: The EU, EEAS and Union Delegations and International Diplomatic Law: New Horizons. Leuven Centre for Global Governance Studies, *Working Paper* No. 62. Leuven, 2011. https://ghum.kuleuven.be/ggs/publications/working_papers/2011/62WoutersDuquet (20.12.2018.) 7.

and sticker available to the diplomatic and consular missions of the Member States for training or reference purposes.[63] Therefore, by sharing of task and empowering EU organs with new competences, the consular protection administration is organically linked with its administration by Member States, creating a unique administrative structure.

Apart from being the centre of information management, the Commission is entitled to adopt implementing acts containing additional technical specifications for EU ETDs relating to the design, size and colours of the uniform EU ETD form and sticker; and additional security features and requirements including enhanced anti-forgery, counterfeiting and falsification standards; and other rules to be observed for the filling in and issuing of the EU ETD. It may decide that these specifications shall be secret and not be published. In that case they shall be made available only to the bodies designated by the Member States as responsible for the printing of EU ETDs and to persons duly authorised by a Member State or the Commission.[64]

IV. The evaluation of the Proposal's achievements

All in all, the Proposal englobes significant achievements that contribute to a more successful and effective consular protection for citizens in third States with certain harmonisation to avoid *fragmentation*. The Proposal itself englobes more that it suggests at first sight and expresses all that the development of EU policies is about: the successful application of EU policies induces developments and expand the EU acquis on related policies.

IV.1. Less fragmentation towards integrated EU diplomacy via a more coherent administration of a service

EU law obliges Member States and it is *pacta tertiis* for third States.[65] Third States are not required to neither accept nor tolerate that a consular authority is providing a foreign person travel documents or just giving this person any kind of administrative service. Issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State is a classical consular function recognized by international law.[66] The consular protection policy of the EU is based on the concept that a State may exercise consular functions on behalf of another State upon appropriate notification to the third State and only if this third State does not make any objection against the practice.[67] In the previous regime, negotiation with the third State was the duty of the Member State represented there and even the recently adopted Consular Protection Directive calls the Member States to undertake the necessary measures in relation to third countries to ensure that consular protection can be

[63] Proposal, Article 12.

[64] Proposal, Article 9.

[65] *Pacta tertiis nec nocent nec prosunt* is a general principle of international law, that is: a treaty binds the parties and only the parties; it does not create obligations for a Third State without its expressed consent. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331. Article 34.

[66] VCCR Article 5 (d).

[67] VCCR Article 8.

provided on behalf of other Member States in any given case.[68] In case of the EU ETD, the Proposal aims to unite this task and empowers the delegations to communicate with the third States and send the specimen with them to enhance its successful usage when the EU citizen wishes to use it at the border to leave the territory of the third State and return home. Although the acceptance of the EU ETD cannot be enforced, the new security measures and the conformity with international standards of travel documents increase its possibility as the main argumentation against the ETD was its poor security feature and the high risk of abuse. The improvement of security features was the main motif for the support of proportionality of the measure of adopting new rules on ETD.

It shall be noted that the EU as an international organisation does not issue EU passport, not even diplomatic one for its diplomats of delegations sent to third States.[69] The EU uses a *laissez-passer* as an alternative to the diplomatic passport.[70] It is the Commission – and as *Wouters* and *Duquet* points out, not the *High Representative of the Union for Foreign Affairs and Security Policy* (*HR/VP*) [71]– who is responsible for negotiating and concluding with third States agreements for the recognition of the EU laissez-passer.[72] In the case of the EU ETD, according to the Proposal, the Commission is also empowered to settle additional security features for the common format, [73] and in the name of the EU, the EEAS transmits the generic specimens of the form and sticker to Union delegations in third countries while this latter is responsible with notification of the specimens. The issue of EU ETD is based on the personal data checked and verified by the alleged State of nationality, therefore, its usage does not require the company of a police report or protocol as a certificate on the theft or loss of original travel documents.[74] The improved security features thus aim to eliminate the fear of accepting it at the borders and increase its recognition as a valid travel document.

Lisbon has transformed delegations from mere information offices in the 1950s to "*prototype embassies for Europe*".[75] The centralisation of emergency travel document

[68] Directive 2015/637, preamble (6).

[69] Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, 13–390. [TEU] Article 32 al 3.; Article 35.

[70] Wouters – Duquet, 2011.16. Laissez-passer in a form to be prescribed by the Council, acting by a simple majority, which shall be recognised as valid travel documents by the authorities of the Member States, may be issued to members and servants of the institutions of the Union by the Presidents of these institutions. Protocol (No 7) on the privileges and immunities of the European Union. Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 266–272. Article 6. al 1.

[71] With regard to the establishment of diplomatic relations, the High Representative (HR/VP), in agreement with the Council and the Commission, decides to open or close a delegation. The HR/VP negotiate an establish agreement with the Third country or international organisation that will grant the delegation diplomatic privileges and immunities referred in Vienna Convention of Diplomatic Relations (VCDR) as the EU itself is not empowered to accord them with such status. 2010/427/EU: Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service. OJ L 201, 3.8.2010. 30–40. [EEAS Decision] Article 5 (1); (6). Kuijper, Pieter Jan – Wouters, Jan – Hoffmeister, Frank – Baere, Geert De – Remopoulos, Thomas: *The Law of EU External Relations. Cases, Materials and Commentary on the EU as an International Legal Actor*. Oxford University Press, Oxford, 2015. 40–41.

[72] Wouters – Duquet, 2011. 16.

[73] Proposal, Article 9.

[74] Cf. ETD Presidency reflection paper, 9–11.

[75] Austermann, Frauke: *European Union Delegations in EU Foreign Policy. A Diplomatic Service of Different Speeds*. Palgrave Macmillan, New York, 2014. 39.; 175.

management towards third States and empowering the delegations with this task notifying the EU ETD uniform format to third countries and providing them with EU ETD specimens[76] also contributes to only to a comprehensible EU diplomacy concerning unity and uniform protection of EU citizens but a better administration of consular protection policy and completing indirect level of administration with an effective and proactive direct level. The increasing involvement of delegation's service,[77] in the future, it may also lead to the reception of certain simple neutral, non-state specific consular functions,[78] like the issue of EU ETD. Given the fact, that proportionality and subsidiarity reasons supported the Proposal on a uniform and binding format and a detailed regulation on the procedure of cooperation of the authorities involved in the process of issue of the emergency travel document to guarantee a better protection of citizens while referring to its compulsory nature,[79] rationality may lead to further developments in the future.[80] As in recent years, budgetary or other reasons many consulates were closed and their tasks were entrusted to consular services in a neighbouring region. The presidency reflection paper of 17 September 2015 called the attention to the fact that if this trend continues, it will have medium- or long-term consequences for the issuing of emergency travel documents to unrepresented citizens as in fact, there is a need for assistance, it was a major motif for the adoption of the Consular Protection Directive in 2015[81] Therefore, the Luxemburg Presidency has already suggested that the Member States consider the future role that the European delegations could possibly play as regards the issuing of the ETD.[82]

IV.2. Avoiding fragmentation of the administrative service for a better administration of consular protection

Beyond the probability of increasing recognition by third countries, the improved security features would also contribute to ending fragmentation among the EU Member States in the

[76] Proposal, Article 12.2–3.

[77] See also, Directive 2015/637, Article 11. Union delegations shall closely cooperate and coordinate with Member States' embassies and consulates to contribute to local and crisis cooperation and coordination, in particular by providing available logistical support, including office accommodation and organisational facilities, such as temporary accommodation for consular staff and for intervention teams. Union delegations and the EEAS headquarters shall also facilitate the exchange of information between Member States' embassies and consulates and, if appropriate, with local authorities. Union delegations shall also make general information available about the assistance that unrepresented citizens could be entitled to, particularly about agreed practical arrangements if applicable. See also Article 12–13.

[78] Practicing consular functions are originally the extensions of State sovereignty on nationals abroad within the consent of the receiving State and in respect of its laws and regulations, but according to the relevant domestic norms of the State of the national. Cf. VCCR Article 5.; See also par. ex.: Maftei, Jana: The Normative Interaction between International and National in the Consular Law. *Acta Universitatis Danubius Juridica*, 12 (2016) 1, 68.

[79] Proposal, 3–4.

[80] See, Lequesne, Christian: At the Centre of Coordination: Staff, Resources and Procedures in the European External Action Service and in the Delegations. In: Balfour, Rosa – Carta, Caterina and Raik, Kristi (eds.): T*he European External Action Service and National Foreign Ministries*. *Convergence or Divergence*? Ashgate, Burlington, 2015. 48–49.

[81] Impact Assessment, 21.

[82] ETD Presidency reflection paper, 4.

issuance of the EU ETD and such objectives cannot be achieved by Member States alone, so the proportional measures serve the legal basis of the acceptance of the proposal.[83] The Consular Protection Directive intends for a frame of cooperation, a scheme for Member State authorities in case of consular protection of unrepresented EU citizens, although it does not go into procedural details and it does not go beyond the equal treatment clause with harmonisation efforts of the substance of consular protection.[84] It does not make any layout for territorial competency limit among the represented Member States in third States, it creates parallel jurisdiction by stating that "[u]nrepresented citizens shall be entitled to seek protection from the embassy or consulate of *any* Member State."[85] As regards the different consular protection service ensured by different Member States, even in case of emergency travel documents as the practice of issue is also different, it gives the possibility of *forum shopping*.

It shall be noted that the application of the ETD under the regime established by 96/409/CSFP could not establish a common practice: for emergency cases Member States uses various types of documents and some countries even issue more than one type emergency travel document.[86] The costs of issue of emergency travels documents is not harmonised, Member States use the same charges and fees as they normally charge for issuing an emergency passport and it varies from one Member State to another, ranging from EUR 1,55 to EUR 150.[87]

The EU ETD issued according to the provisions of the Proposal would also contribute to the reduction of the risk of fragmentation in practice and prevent forum shopping. The impact assessment prepared for the Proposal clearly pointed out on the tendency of citizens seeking for emergency travel documents from one Member State and not another because the documents of certain Member States are more widely recognised, cheaper or easier to obtain than those of other Member States.[88] In addition, the current regime requires Member States to provide the documents with a centralized numbering system, combined with the initials of the issuing Member State, but it is a domestic issuing system and not a European one. The Proposal envisages active communication between the State of nationality and the State that issues the EU ETD including strict obligation for asking to return and destruction of the EU ETDs prevent the risk of abuse of documents and frauds and the visa-like nature of the identifier sticker would also contribute to that aim.[89]

[83] Impact assessment, 14.

[84] Article 23 TFEU is based on the equal treatment of non-nationals and obliges Member States to treat them as they would treat their own nationals. CARE report, 7. cf. Poptcheva, Eva-Maria: *Multilevel Citizenship. The Right to Consular Protection of EU Citizens Abroad*. PIE Peter Lang, Brussels, 2014. 71–74. On generalising the principle of non-discrimination ratione personae and its limits see: Wollenschläger, 2007. 8–12.

[85] Directive 2015/637, Article 7.1. Emphasis added by Author.

[86] Eight Member States issue more than one type of ETD. Emergency travel document as a paper is used by 9 Member States, as a booklet by 3 Member States, *laissez passez* in paper format is used by 3 Member States, in booklet format by one; under the term provisional/temporary passport 7 Member States uses booklet form and as emergency passport 2 Member States use paper format and 6 Member States use booklet format. ETD Presidency reflection paper, 9.

[87] ETD Presidency reflection paper, 9.

[88] Proposal, 4.

[89] Proposal, Article 4.

Non-binding guidelines[90] on consular protection of EU citizens in third countries were issued by the Council in to implement Article 20 of the Treaty establishing the European Community (current Article 23 TFEU)[91] and the former decision of 95/553/EC with a view to strenghtening European solidarity.[92] These soft, non-binding measures fitted the ancient non-governmental regime, but are now considered as unsatisfactory.[93] The detailed provisions on cooperation including strict deadlines for each procedural action from the reception of the claim for EU ETD until its issue shows an improvement even compared to the cooperation and coordination measure provisions of the Consular Protection Directive. Predefined, uniform procedural rules instead of guidance and various national administrative procedural rules are strengthening the European administrative procedure of a piece of European consular protection while reducing the variety and possible deliberate or unintentional discrimination of EU citizens which is due to the different national rules on administration of this consular protection measure. The provisions on the interaction of competent authorities of different Member States is a further step towards the good administration of consular protection and they are contributions to the guarantee of the *right to good administration*.[94] Meanwhile, in the view of procedural rights in the case of a non-national on the territory of a third State may require further clarification for example the first and most obvious is the potential language barriers between the client and the authority which would challenge the deadlines of action but regarding the horizontal administrative cooperation, it is a definitive development.

[90] Guidelines on Consular Protection of EU Citizens in Third Countries. PESC 534 COCON 14 10109/2/06 REV 2 Brussels, 16 June 2006; Guidelines for further implementing a number of provisions under Decision 95/553/EC. PESC 833 COCOM 10 11113/08, Brussels, 24 June 2008; Guidelines on Consular Protection of EU Citizens in Third Countries. COCON 40 PESC 1371 15613/10 Brussels, 5 November 2010. See also CARE Report, 39–40.

[91] European Union – Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community. OJ C 321E, 29.12.2006. 1–331. Article 20 Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

[92] Guidelines for further implementing a number of provisions under Decision 95/553/EC. PESC 833 COCOM 10 11113/08, Brussels, 24 June 2008. 2.

[93] Impact assessment, 59.; Proposal, 5.

[94] EU Charter, Article 41 Right to good administration 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language. Csatlós, 2017. 91–92.

IV.3. With less fragmentation towards more open questions of rights

The right to get consular help in third States illustrates the concrete benefits connected with the status of EU citizenship: assistance for unrepresented EU citizens extends the rights granted by EU citizenship beyond the EU's borders.[95] In a general sense, this right aims to treat the people of Europe equally given the fact that they arrive from the EU as a unit, "*an ever closer union among the peoples of Europe*"[96] so every one of them shall be ensured the same help and assistance not just the lucky ones whose nation States have widely expanded external relations and representations around the world.[97] It does not mean that the EU citizens have the right to get emergency travel document. The obligation deriving from EU consular policy require Member States to ensure equal protection for all unrepresented EU citizens, the same treatment for nationals and non-national EU citizens who submit claim for consular protection. The scope of service depends on the domestic consular law of the requested Member State, the EU law refers only to equal treatment which "*may include assistance*, *inter alia*, *in the following situations*"[98] The ETD Decision 96/409/CSFP facilitates the service by the promotion of a common format although there are Member States which does not regulate the issue of temporary travel documents,[99] and the decision does not create obligation for them either to do so. Thus, the practice of consular protection may vary from consular office to consular office in the same third State, depending on the consular law of their own States' consular law.

The other factor that makes the EU consular protection policy execution colourful is the circle of beneficiaries. According to the TFEU, and consequently the EU Charter, the right to get consular protection in third State is inherent to the *EU citizens*.[100] This citizenship status is a derivative of the nationality of Member States.[101] meanwhile, the personal scope

---

[95] Impact assessment, 14.

[96] Treaty on European Union. OJ C 191, 29.7.1992. 1–112. [Maastricht Treaty] preamble.

[97] According to statistics prepared in 2010 and cited in the Impact Assessment to the Directive 2015/637, France has the largest number of representations, followed by Germany and the UK after Italy and the Netherlands. Less than one third of the Member States are relatively well represented with 50–80 representations, one third has around Two thirds of the Member States (at that time) have 30–40 representation and one third has around or even below 10 representations in Third States. Commission staff working paper. Impact Assessment accompanying the document 'Proposal for a Directive of the Council on coordination and cooperation measures regarding consular protection for unrepresented EU citizens'. COCON 11 PESC 1686 COTRA 19 18821/11 ADD2. Brussels, 19 December 2011. 8.; detailed information on the existence of representations in third States: 39–48.

[98] Directive 2015/637, Article 9. The former regime framed by Decision 95/553/EC provided that "[*t*]*he protection referred to in Article 1 shall comprise* (…)" in Article 5 but this list did not include the issue of emergency travel document.

[99] ETD Presidency reflection paper, 9.

[100] See, TFEU 20; 23.; EU Charter, Article 46.

[101] TFEU, Article 20. *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* [1992] ECJ, 7 July 1992, Case 369/90, ECR I-4239. point 10.; *Belgian State v. Fatna Mesbah* [1999] ECJ, 11 November 1999, Case 179/98, ECR I-7955. point 29.; *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECJ, 19 October 2004, Case 200/02, ECR I-9925. point 37.; *Rottmann v. Bayern* [2010] ECJ, 2 March 2010, Case 135/08, ECR. I-1467. point 39. Meantime, recently, the jurisprudence of the CJEU in mainly the Rottmann and Zambrano cases is approaching to a sort of harmonisation to avoid the negative effects of the variety of legislation. Cf. *Rottmann v. Bayern*, 2010. point 41; 48.; *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECJ, 8 March 2011, Case 34/09, ECR I-01177. point 42;

of protection was expanded by the Directive 2015/637 that entered into force this year, the 1st of May 2018. Under its innovative provision, consular protection shall be provided to family members, who are not themselves citizens of the Union, accompanying unrepresented citizens in a third country, to the same extent and on the same conditions as it would be provided to the family members of the citizens of the assisting Member State, who are not themselves citizens of the Union, in accordance with its national law or practice.[102] It is a logical consequence of Article 7 and 24 of the EU Charter and the relevant case-law of the European Court of Justice on extending the principal benefits of EU citizens' rights to their third country national family members to ensure the full effectiveness of those rights. The *Consular Protection Directive* was adopted within this spirit.[103] However, it does not establish right to non-EU citizen family members *in general* but obliges Member States to ensure equal treatment if their domestic consular law allows the consular protection of non-national family members of their nationals. In addition, the '*family member*' is not defined by consular policy rules of the EU. Directive 2004/38/EC establishes derivative rights for *family members* (spouse, partner, direct descendants and dependent ascendants, all under different conditions),[104] of EU citizens whose precise scope has repeatedly been controversial,[105] it covers a narrower category than the Strasbourg practice,[106] and individual State practice might also be different on the notion,[107] so, the fragmented picture of practice is inevitable. Meanwhile, there is a tendency to expand different aspects of citizenship rights

Gyenei, Laura: Uniós polgárság: a piacorientált szemlélettől való elszakadás göröngyös útja, A Rottmann-, a Zambrano-, a Mccarthy- és a Dereci-Ügyek Analízise. *Iustum Aequum Salutare*, 8 (2012) 2, 142–144.

102 Directive 2015/637, Article 5.

103 Impact Assessment to Directive 2015/637, 24.

104 Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EUOJ L 158, 30.4.2004. 77–123, Article 2 point 2. ; cf. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003. 12–18. Article 4. conflicts may also occur from the EU norms of family reunificatio, see: Article 4. 4.: „*In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spous*e."

105 Bogdandy, Armin von – Arndt, Felix: European Citizenship. Max Planck Encyclopedia of Public International Law [MPEPIL] Article last updated: January 2011. Accessed via the database of the Hague Peace Palace Library, http://opil.ouplaw.com.peacepalace.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e615?print=pdf (17.20.2018). 2 (b) 6., see also: Stavera, Anne: Free Movement and the Fragmentation of Family Reunification Rights. *European Journal of Migration and Law*, 15 (2013) 1, 7275; see also the comparative chart of page 77.

106 Schiffner, Imola: Az uniós polgár és családtagjainak jogi helyzete az Európai Bíróság esetjogában. *Acta Universitatis Szegediensis : forum : acta juridica et politica*, 4 (2014) 1, 222.; Compared to the EU definition, the ECTHR practice rather relies on the term 'family life' to draw the line around family members, however, it does not include only social, moral or cultural relations; it also comprises interests of a material kind (similarily as in the EU), as is shown by, among other things, like maintenance obligations or positions according to the domestic legal systems (inheritor). *Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence*. Council of Europe, European Court of Human Rights, Starsbourg, 2018. https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (17.20.2018.) 62.

107 In Hungary, for example, the 'family member' has a narrow and an extended meaning, ie. 'close relative' shall mean spouses, next of kin, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents, and siblings; and the 'relative' shall mean close relatives, domestic partners, spouses of the next of kin, spouse's next of kin and siblings, and spouses of siblings. Act V of 2013 on the Civil Code, Section 8:1, point 1–2. nevertheless, the Hungarian Act on consular protection provides for help only to EU citizens. See, Act XLVI of 2001 on consular protection, Article 3 (4)–(5).

on non-EU citizens; already there are rights enjoyed as own and not as derivative ones,[108] so, in a wider context, following the line of legal development shown by *Schiffner*,[109] along with the Strasbourg – conform interpretation of the *right to family life*,[110] a sort of pressure towards a harmonised practice can also be estimated in this issue of consular protection of family members.

Anyway, States ensure consular protection for non-nationals, and there are Member States that declares that their residents and even their registered asylum seekers are entitled to enjoy their consular service abroad and now, the EU consular protection policy institutionalize this practice and enrols it under the equal treatment clause to protect the accompanying family member of the non-national EU citizen. Meanwhile, the *right to respect for family life*[111] is interpreted in a positive manner to enjoy rights guaranteed by EU law itself.[112] In fact, the protection of the family unity has a strong motif on EU law interpretation[113] an even if a situation is not covered by EU law, it should be analysed in the light of the same provisions of the *European Convention on Human Rights*.[114]

It is to be noted that the right to consular protection in third States is strictly attached to EU citizens and their third-country national family members but ordinary third State nationals who hold a residence permit are not entitled to these rights. From the moment, he/she holds a residence permit valid for at least one year and has reasonable prospects of obtaining the right to permanent residence, he/she may also submit an application for family reunification,[115] but it does not mean that his/her rights are the same as that of EU citizens. They have certain rights[116] but different from EU citizens' rights and despite some

[108] Schiffner, Imola: A harmadik államok állampolgárainak jogi helyzete az Európai Unióban, avagy az uniós denizenship jogállása. *Miskolci Jogi Szemle*, 10 (2015) 1, 74–77., see also: Wiesbrock, Anja: Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship? *European Journal of Migration and Law*, 14 (2012) 1, 68.

[109] See, Schiffner, 2014. 222–232.

[110] Even if a situation is not covered by EU law, „[*a*]*ll the Member States are*, *after all*, *parties to the ECHR which enshrines the right to respect for private and family life in Article 8*," which treats the issue of right to family life more excessively than the EU norms. See, C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734. point 73.; Schiffner, Imola: Az uniós polgár családtagjainak jogi helyzete az Európai Bíróság legújabb jogeseteiben, különös tekintettel a Zambrano-doktrína alkalmazására. *Jogelméleti Szemle*, 2018/1, 150.

[111] EU Charter, Article 7; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003. 12–18. preamble (2).

[112] Pierluigi, Simone: Nationality and Regional Integration: the Case of the European Union. In: Forlati, Serena – Annoni, Alexandra (eds): *The Changing Role of Nationality in International Law*. Routledge, London, 2013. 182.; Together with the right to private life, the right to family rights as interpreted by the ECtHR is also a strong pressure on States. See, Thym, Daniel: Respect for Private And Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay? *International and Comparative Law Quarterly* (2008) 57, 87–112.

[113] Gyenei, 2012. 164.

[114] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, 213 U.N.T.S. 222 [ECHR] Article 8. Pierluigi, 2013.182.

[115] Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification. Brussels, 3.4.2014. COM(2014) 210 final. 3–4

[116] See, ECRE Note. Information Note on Family Reunification for Beneficiaries of International Protection in Europe, ECRE, June 2016. http://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-

standardizing EU rules, Member States have broad discretion in regulating this field.[117] However, the 2010 Guidelines on consular protection of EU citizens in third countries expanded the protection of the EU on these third country nationals if their nation State and one of the EU Member States have bilateral consular agreement, but only if evacuation is needed.[118] In addition, the guideline are not legally binding documents and the *Consular Protection Directive* does not contain provision on such cases.

In strict sense, if EU law is the obstacle for equal treatment, then what else should be needed what else can be required under non-discrimination and equal treatment? Are Member States' and their consular authorities obliged to act to search for help for non-EU citizen family members? Even if the answer would be positive, it is to be noted that fundament rights related to private life and family requires equal treatment, but they oblige the Member State not the third States and acting in protection of a non-national can be denied or may lead political conflicts. The question leads us back to the basic problem of CFSP policies: further negotiations are needed not just among member States but with the third Sates as the EU is not entitled to act as a foreign policy actor in a single voice to conclude arrangements with third States. In addition, in CFSP areas, the Council is the legislator and can adopt non-legislative acts but only unanimously.[119] So, is it better and more efficient than the former regime especially in the view of fundamental rights protection? May the flexibility clause extend the competences to this foreign policy area to serve better the execution of an EU policy, in fact, the protection of EU citizens in third States? The expansion of EU influence on domestic competences to serve fundamental right is dynamic and now, EU citizen rights are also invoked in purely domestic affairs.[120] The whole history of the European integration is, in fact, a series of expanding EU competences for better implementation of common objectives. So, perhaps it is only the question of time that *ERTA doctrine* will be allowed to help to eliminate certain deficiencies of consular protection: once the Union exercises its internal competences, its parallel external competences become exclusive.[121]

The Proposal provides for EU citizens as beneficiaries of the EU ETD but allows Member States to introduce and use the EU ETD format to other, different categories of possible claimants. It recognizes the advantage and utility of using the same format for own citizens, thus the EU ETD may be issued to (a) its own nationals or residents; (b) to family members of unrepresented citizens, who are not themselves citizens of the Union, accompanying unrepresented citizens, in accordance with Article 5 of Directive (EU) 2015/637; (c) to nationals of another Member State which is represented in the country where those nationals seek to obtain the EU ETD (d) to EU citizens and their family members within the territory of the Union; and also (e) to other persons connected with it and whom it is willing to admit.[122] So, there is no exact, *expressis verbis* obligation towards

on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf (21.12.2018.) 9–12.

[117] Schiffner, Imola: Az uniós polgárság hatása a tagállami állampolgársági politikákra. *De iurisprudentia et iure publico*, 9 (2015) 2, 14.

[118] Guideline, 2010. 2; Poptcheva, 2014. 167–168.

[119] TEU, Article 24.

[120] Schiffner, 2015. 4.

[121] Schütze, Robert: The ERTA Doctrine and Cooperative Federalism. In: Schütze, Robert: *Foreign Affairs and the EU Constitution. Selected Essays*. Cambridge University Press, Cambridge, 2014. 287.

[122] Proposal, Article 7.

ensuring emergency travel document for all. At present, the majority of the Member States do not issue the common format ETD to family members who are not citizens of the Union or to refugees or stateless persons, either because the national legislation does not allow it or because there is no specific legal framework for it, and Germany, Ireland, Greece, France, Croatia and the United Kingdom do not issue emergency travel document simply because they do not issue emergency travel documents at all.[123] However, certain Member States acknowledge that they issue national emergency documents (laissez-passer, passport or foreign travel certificate) with limited validity to persons who are married a national, or are permanent residents, or hold a travel document issued by the national authorities (passport for foreigners, stateless persons or refugees). National emergency documents may exceptionally be issued in crisis situations or as part of the provision of humanitarian aid under the auspices of the *Red Cross* and/or the *International Organisation for Migration*. When the proposal of the ETD reform was formulated, hardly any Member States said that those who do not hold EU citizenship must apply to their own authorities, i.e. consulates, to obtain a travel document, and State does not see any problem in issuing this type of travel document within the EU as well in cases where citizens are in distress and are unable to access their consulate.[124] These circumstances suggest that the Member States are not in general against the idea of expanding the personal scope of this consular protection measure, although it does not define 'family member' in this view and the widely expanded usage of the common EU format for that end inside and outside the borders of the EU. The acceptation and recognition of such practice would be supported by the Proposal's way of negotiating and communicating the specimens by the delegations of the EU instead of the single Member States.[125]

Member States have wide margins, and it may contribute to significant inequality and disparity if there is no further negotiation among them and this may reveal discriminative situations. The Proposal wish no effect on the *more favourable national provisions* in so far as they are compatible with the Directive 2015/637 and it wish not to preclude Member States from issuing EU ETDs in other situations, considering national law and practice. In fact, there are certain EU Member states that offer consular protection for not only their own citizens,[126] while others do not even have domestic law on the issue.[127] However, since the EU law expands on consular protection in third States and regulates it as a fundamental right, all Member States shall ensure the full benefit of this right including the rights related to good administration thus for that end Member States need to undertake positive action to benefit the individuals.[128] Fundamental right constitutes

[123] ETD Presidency reflection paper, 3.

[124] ETD Presidency reflection paper, 5.

[125] See Proposal, Article 12. cf. Directive 2015/637, 2015, preamble (19); Art. 7. and preamble (6).

[126] Danish consular law, for example, offers consular protection to aliens permanently residing in Denmark, to unrepresented Nordic nationals and aliens permanently residing in the other Nordic countries, namely Finland, Iceland, Norway and Sweden and vica versa. CARE Report 149. The Netherlands' consular protection is available ratione personae to Dutch Nationals and tot he first grade relatives of Dutch nationals: spouses, parents and chirdren according to Dutch Law. CARE Report 512.

[127] Belgium, Cyprus, Luxemburg, UK and Austria. CARE Report, 852–585.

[128] Poptcheva, 2014. 79.

general principles of the EU,[129] therefore their influence on interpretation of obligations is crucial.

Differences of domestic provisions on the substantive law of consular protection may devaluate those efforts which were achieved by the procedural uniformization, and as there is a tendency of acknowledging more and more equal rights for non-EU citizens within the EU, such problems will arise soon. It leads back to the uniformized procedural issues and a very important element of the procedure: the legal remedy options in the procedure.[130]

V. Concluding remarks

The legal background for adoption a council directive on the EU ETD is the same as it was for the 2015 directive: the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection. While the 2015 directive only outlined a cooperation pattern, it is clearly seen that the Proposal contains exact procedural provisions including deadlines for the cooperation of authorities and for the issue of the ETD; it is a notable step towards administrative procedural harmonisation as the Proposal practically and optimistically opens the road toward the establishment of a sort of EU passport with the expansion of the group of recipients. By establishing task and competences which links the Member States, the Commission and the and delegations, the proposal keeps on strengthening the existence of the European administrative system of consular protection; the European administration of a legal area which is outside the scope of EU legislation but is continuously been Europeanised via its relationship with other policies. Variety is delighting while the success of the acquis keeps on developing it to a colourful unity.

References

95/553/EC Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations OJ L 314, 28.12.1995. 73–76. [No longer in force]

96/409/CSFP Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, Official Journal L 168, 06/07/1996. 4–11.

Act V of 2013 on the Civil Code.

[129] TEU Article 6 (3). Wiesbrock highlighted this fact also via pre-Lisbon case-law (C-29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419, para. 7; Joined Cases C-7/56 and 3/57 to 7/57 *Algera and Others v. Common Assembly* [1957] ECR 39, para. 55; and C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR 1-2629, para.14.) Wiesbrock, 2012. 64. footnote 61.

[130] Cf. definition of public administrative procedure. Harlow, Carol – Rawlings, Richard: *Process and Procedure in EU Administration*. Hart Publishing, Oxford, 2014. 4.

Act XLVI of 2001 on consular protection

Annexes to the Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP. 9643/18, COCON 9, VISA 134, FREMP 90, Brussels, 1 June 2018.

Austermann, Frauke: *European Union Delegations in EU Foreign Policy. A Diplomatic Service of Different Speeds*. Palgrave Macmillan, New York, 2014.

Battini, Stefano: The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection. In: Chiti, Edoardo –Mattarella, Bernardo Giorgio (eds.): *Global Administrative Law and EU Administrative Law*. Springer-Verlag, Berlin – Heidelberg, 2011. 177–178.

Bauman, Robert E: *The Passport Book. The Complete Guide to Offshore Residency*, *Dual Citizenship and Second Passports*, The Sovereign Society, Delray, 2009.

Becánics, Adrienn: Konzuli védelem és segítségnyújtás az Európai Unió perspektívájából. In: Karlovitz, János Tibor (ed.): *Fejlődő jogrendszer és gazdasági környezet a változó társadalomban*. International Research Institute s.r.o., Komárno, 2015. 25–30. http://www.irisro.org/tarstud2015aprilis/index.html (18.12.2018.)

Belgian State v. Fatna Mesbah [1999] ECJ, 11 November 1999, Case 179/98, ECR I-7955.

Bogdandy, Armin von – Arndt, Felix: *European Citizenship*. Max Planck Encyclopedia of Public International Law [MPEPIL] Article last updated: January 2011. Accessed via the database of the Hague Peace Palace Library, http://opil.ouplaw.com.peacepalace.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e615?print=pdf (17.20.2018).

C-29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419.

C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR 1–2629.

CARE Final Report. Consular and Diplomatic Protection. Legal Framework in the EUMemberStates.2010.http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf (18.12.2018.) [CARE report]

Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012. 391–407. [EU Charter]

Commission Implementing Decision C(2018) 674 of 9 March 2018 as regards further technical specifications for the uniform format for visas and repealing Commission Decision C(2010) 3191.

Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP, Brussels, 31.05.2018. SWD(2018) 273. [Impact Assessment]

Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification. Brussels, 3.4.2014. COM(2014) 210 final.

Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, 13–390. [TEU]

Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 47–390. [TFEU]

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, 213 U.N.T.S. 222 [ECHR]

Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service. OJ L 201, 3.8.2010. 30–40 [EEAS Decision]

Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC OJ L 106, 24.4.2015. 1–13. [Consular Protection Directive]

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003. 12–18.

Csatlós, Erzsébet: Consular Cooperation in Third States: Some Aspects Concerning Europeanisation of Foreign Service for EU Citizens. *Bratislava Law Review*, 1 (2017) 1, 71–83.

Csatlós, Erzsébet: Consular Protection Policy of the EU in the View of Good Administration. In: Csatlós, Erzsébet (ed.): *Recent Challenges of Public Administration*. *Papers Presented at the conference of* '*Contemporary Issues of Public Administration*', 26th April, 2017. Iurisperitus, Szeged, 2017. 85–96.

Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EUOJ L 158, 30.4.2004. 77–123.

ECRE Note. Information Note on Family Reunification for Beneficiaries of International Protection in Europe, ECRE, June 2016. http://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf (21.12.2018.)

Emergency Travel Document (ETD) – Presidency reflection paper. COCON 14, CFSP/PESC 523, COTRA 13, 11955/15, Brussels, 17 September 2015. [ETD Presidency reflection paper]

EU Citizenship Report 2017, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening Citizens' Rights in a Union of Democratic Change Brussels, EU Citizenship Report 2017, 31.1.2017, COM(2017)

Gerardo Ruiz Zambrano v. Office national de l'emploi [2011] ECJ, 8 March 2011, Case 34/09, ECR I-01177.

Guidelines for further implementing a number of provisions under Decision 95/553/EC. PESC 833 COCOM 10 11113/08, Brussels, 24 June 2008.

Guidelines on Consular Protection of EU Citizens in Third Countries. 10109/2/06 REV 2 PESC 534 COCON 14. Brussels, 5 November 2010.

Guidelines on Consular Protection of EU Citizens in Third Countries. PESC 534 COCON 14 10109/2/06 REV 2 Brussels, 16 June 2006.

Guidelines on Consular Protection of EU Citizens in Third Countries. COCON 40 PESC 1371 15613/10 Brussels, 5 November 2010.

Guild, Elspeth: *The right to leave a country*. Issue Paper by the Council of Europe Commissioner for Human Rights, 2013. https://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2015/07/31/Ayrilma.pdf (20.12.2018.)

Gyenei, Laura: Uniós polgárság: a piacorientált szemlélettől való elszakadás göröngyös útja, A Rottmann-, a Zambrano-, a Mccarthy- és a Dereci-Ügyek Analízise. *Iustum Aequum Salutare*, 8 (2012) 2, 141–164.

Hagedorn, Cornelia: Passport. In: *Max Planck Encyclopedia of Public International Law*. Oxford Public International Law, January 2008. http://opil.ouplaw.com (24.12.2018)

Hargitai, József: *Az útlevél és a külföldre utazáshoz való jog nemzetközi jogi alapjai*, Magyar jog, 42 (1995) 12, 710–718.

Harlow, Carol – Rawlings, Richard: *Process and Procedure in EU Administration*. Hart Publishing, Oxford, 2014.

ICAO Doc 9303 Machine Readable Travel Documents (MRTD). Part 2: Specifications for the Security of the Design, Manufacture and Issuance of MRTDs https://www.icao.int/publications/Documents/9303_p2_cons_en.pdf (20.12.2018.)

International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171 [ICCPR]

Joined Cases C-7/56 and 3/57 to 7/57 *Algera and Others v. Common Assembly* [1957] ECR 39.

Kuijper, Pieter Jan – Wouters, Jan – Hoffmeister, Frank – Baere, Geert De – Remopoulos, Thomas: *The Law of EU External Relations*. *Cases*, *Materials and Commentary on the EU as an International Legal Acto*r. Oxford University Press, Oxford, 2015.

Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department [2004] ECJ, 19 October 2004, Case 200/02, ECR I-9925.

Lee, Luke T.: *Consular Law and Practice*. Frederick A. Praeger, New York, 1961.

Lequesne, Christian: At the Centre of Coordination: Staff, Resources and Procedures in the European External Action Service and in the Delegations. In: Rosa Balfour – Caterina Carta and Kristi Raik (eds.): *The European External Action Service and National Foreign Ministries*. *Convergence or Divergence*? Ashgate, Burlington, 2015. 45–54.

Liu, Guofu: *The Right to Leave and Return and Chinese Migration Law*. Brill, Leiden, 2007.

Maftei, Jana: The Normative Interaction between International and National in the Consular Law. *Acta Universitatis Danubius Juridica*, Vol. 12. No. 1. 2016. 65–73.

Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria [1992] ECJ, 7 July 1992, Case 369/90, ECR I-4239.

Odigitria AAE v Council of the European Union and Commission of the European Communities [1996] ECJ, 28 November 1996, Case 293/95, ECR II-02025.

Pierluigi, Simone: Nationality and Regional Integration: the Case of the European Union. In: Forlati, Serena –Annoni, Alexandra (eds.): *The Changing Role of Nationality in International Law*. Routledge, London, 2013. 169–192.

Poptcheva, Eva-Maria: *Multilevel Citizenship. The Right to Consular Protection of EU Citizens Abroad*. PIE Peter Lang, Brussels, 2014.

Proposal for a Council directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP Brussels, 31.5.2018. COM(2018) 358 final [Proposal]

Proposal for a Directive of the Council on coordination and cooperation measures regarding consular protection for unrepresented EU citizens'. COCON 11 PESC 1686 COTRA 19 18821/11 ADD2. Brussels, 19 December 2011.

Protocol (No 7) on the privileges and immunities of the European Union. Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. 266–272.

Protocol n°4 of the ECHR, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16.11.1963, Strasbourg, ETS 46.

Public consultation on the EU Emergency Travel Document (EU ETD) https://ec.europa.eu/info/consultations/public-consultation-eu-emergency-travel-document-eu-etd_en (20.12.2018.)

Rottmann v. Bayern [2010] ECJ, 2 March 2010, Case 135/08, ECR. I-1467.

Schiffner, Imola: *A diplomáciai védelem gyakorlásának eszközei, avagy a fogalom-meghatározás és az elhatárolás problémái*. Acta Universitatis Szegediensis de Attila József Nominatae Sectio Juridica Politica, 72 (2009) 18, 523–544.

Schiffner, Imola: A harmadik államok állampolgárainak jogi helyzete az Európai Unióban, avagy az uniós denizenship jogállása. *Miskolci Jogi Szemle*, 10 (2015) 1. 70–93.

Schiffner, Imola: Az uniós polgár családtagjainak jogi helyzete az Európai Bíróság legújabb jogeseteiben, különös tekintettel a Zambrano-doktrína alkalmazására. *Jogelméleti Szemle*, 2018/1, 132–150.

Schiffner, Imola: Az uniós polgár és családtagjainak jogi helyzete az Európai Bíróság esetjogában. *Acta Universitatis Szegediensis. Forum acta juridica et politica*, 4 (2014) 1, 221–235.

Schiffner, Imola: Az uniós polgárság hatása a tagállami állampolgársági politikákra. *De iurisprudentia et iure publico*, 9 (2015) 2, 1–17.

Schütze, Robert: The ERTA Doctrine and Cooperative Federalism. In: Schütze, Robert: *Foreign Affairs and the EU Constitution. Selected Essays*. Cambridge University Press, Cambridge, 2014. 287.

Stavera, Anne: Free Movement and the Fragmentation of Family Reunification Rights. *European Journal of Migration and Law*, 15 (2013) 1, 69–70.

Thym, Daniel: Respect for Private And Family Life Under Article 8 ECHR in Immigration Cases: A Humanright to Regularize Illegal Stay?. *International and Comparative Law Quarterly* (2008) 57, 87–112.

Torpey, John: The Invention of the Passport, Surveillance, Citizenship and the State. Cambridge University Press, Cambridge, 2000.

Traveller Identification Program: ID Management Solutions for More Secure Travel Documents. https://www.icao.int/Security/FAL/TRIP/Pages/default.aspx (20.12.2018.)

Treaty on European Union. OJ C 191, 29.7.1992, 1–112. [Maastricht Treaty]

UDHR, Universal Declaration of Human Rights, 10 December 1948, Paris, UN GA Res 217A

Vienna Convention on Consular Relations, Vienna, 24 April 1963, 596 UNTS 261 [VCCR]

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331. [VCLT]

Vigni, Patricia: The Protection of EU Citizens: The Perspective of International Law. In: Larik, Joris – Moraru, Madalena (eds.): *Ever-Closer in Brussels – Ever-Closer in the World*? *EU External Action after the Lisbon Treaty*. EUI Working Papers, Law 2011/10.

Wiesbrock, Anja: Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship? *European Journal of Migration and Law*, 14 (2012) 1, 63–94.

Wollenschläger, Ferdinand: *The Europeanization of Citizenship*. *National and Union Citizenships as Complementary Affiliations in a Multi-Level Polity*. Paper presented at the EUSA Tenth Biennial International Conference Montreal, Canada, May 17 – May 19, 2007. http://aei.pitt.edu/8025/1/wollenschlager-f-03h.pdf (20.12.2018.)

Wouters, Jan – Duquet, Sanderijn: The EU, EEAS and Union Delegations and International Diplomatic Law: New Horizons. Leuven Centre for Global Governance Studies, Working Paper No. 62. Leuven, 2011. https://ghum.kuleuven.be/ggs/publications/working_papers/2011/62WoutersDuquet (20.12.2018.)

Zieck, Marjoleine: *Refugees and the Right to Freedom of Movement*: *From Flight to Return*, Michigan Journal of International Law, 39 (2018) 1, 19–116.

LECTIONES IURIDICAE

Sorozatszerkesztő:
Balogh Elemér egyetemi tanár

1. *Az Alkotmánybíróság és a rendes bíróságok – 20 év tapasztalatai*. Szeged, 2011.
2. *Kérdőív az alkotmányozásról*. Szeged, 2011.
3. *A szerződés interdiszciplináris megközelítésben*. Szeged, 2012.
4. *Az államok nemzetközi jogi felelőssége – tíz év után. ln memoriam Nagy Károly (1932–2001)*. Szeged, 2013.
5. *A jó állam aspektusai, perspektívái. Az önkormányzatok változó gazdasági, jogi környezete*. Szeged, 2012.
6. *Das neue ungarische Grundgesetz*. Szeged, 2012.
7. *Opuscula Szegediensia 5. A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók ötödik konferenciája*. Szeged, 2013.
8. *Az alapjogvédelem nemzeti, nemzetközi és jogösszehasonlító aspektusai*. Szeged, 2013.
9. A *mi Alapvetésünk. A Szegedi Tudományegyetem Állam – és Jogtudományi Kara alkotmányjogi tudományos diákkörének tanulmányai az Alaptörvény Alapvetéséhez.* Szeged, 2014.
10. *Geistiges Eigentum und Urheberrecht aus der historischen Perspektive*. Szeged, 2013.
11. *Opuscula Szegediensia 6. A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók hatodik konferenciája*. Szeged, 2014.
12. *Jogvédelmi kaleidoszkóp. A jogvédelem elmúlt öt éve (2009–2014) Magyarországon*. Szeged, 2015.
13. *Fundamental Rights in Austria and Hungary. Research Seminar*. Szeged, 2015.
14. *A történeti alkotmánytól az Alaptörvényig*. Szeged, 2015.
15. *Jogalkotás és kodifikátorok. Vladár Gábor emlékülés*. Szeged, 2016.
16. *Alapjogok diákszemmel. A Szegedi Tudományegyetem Állam- és Jogtudományi Kara alkotmányjogi tudományos diákkörének tanulmányai egyes alapjogok magyar és nemzetközi vonatkozásairól*. Szeged, 2016.
17. *Húsz év mérlegen. Közbeszerzésünk múltja, jelene és jövője*. Szeged, 2017.
18. *A modern állam 21. századi közjogi kihívásai. Az állami funkciók változásai az európai integrációban.* Szeged, 2017.
19. *Recent Challenges of Public Administration. Papers Presented at the Conference of* '*Contemporary Issues of Public Administration*'. Szeged, 2017.
20. *Recent Challenges of Public Administration 2. Papers Presented at the Conference of* '*2nd Contemporary Issues of Public Administration*'. Szeged, 2018
21. *Válási mediáció a gyerekek szempontjából*. Szeged, 2018.
22. *Gazdasági tendenciák és jogi kihívások a 21. században*. Szeged, 2018.
23. *Recent Challenges of Public Administration 3. Papers Presented at the Conference of* '*3rd Contemporary Issues of Public Administration*'. Szeged, 2019.