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## ABOUT THE JOURNAL

The Slovak Yearbook of European Union Law is scientific journal focused on the issues of European Union law, analysis of the examples of the transposition and implementation of EU law (from the legislative and executive perspective), the enforcement of EU law in the judicial system and case law important from the EU perspective (interpreting treaties and secondary law) as well as from the national perspectives. The comparative perspective of analyses is welcome.

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# EDITORIAL

In 2021, the Slovak Republic celebrated 15 years of its membership in the European Union. And although the story of the accession process from the beginning to the signing of the Accession Treaty was ultimately successful, the shifted starting line vis-à-vis neighbouring countries was a constant "catch-up". Fulfilment of the Copenhagen criteria and the decision on the accession of the Slovak Republic to the EU also meant the acceptance of the obligation to apply the law of the European Union on the territory of our country, supreme to the laws of the Slovak Republic, as provided by Article 7, para. 2 of the Constitution of the Slovak Republic.

For 15 years, the Slovak Republic has become one of the EU Member States, which not only committed, but also practically through their representatives participate in the preparation and adoption of EU legislation, their transposition into national law, as well as their implementation in decision-making bodies, public administration, and the judiciary. In this context, the Slovak Yearbook of European Union Law provides the first scientific insight as well as practical view of European law, not only in the Slovakia but also in a comparative perspective with other Member States. European law is a scientific discipline which has, due to its development, the relatively broad interpretative jurisdiction of the Court of Justice of the EU, and creates space for scientific analyses, comparison of applied practice or theoretical analyses with considerations for further research but also practice.

The first issue of the Slovak Yearbook of European Union Law introduces various topics related to EU law, and strengthens the sense of the legal community, focused on this specific branch of law.

For the whole team we wish you pleasant reading and inspiration for the next years of the Slovak Republic's membership in the EU.

Prof. Lucia Mokrá
Editor in Chief

# STUDIES

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# TORPEDOING V. CARPET BOMBING: MUTUAL TRUST AND THE RULE OF LAW / Adam Máčaj

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The paper was prepared within the activities of Jean Monnet Centre of Excellence "Rule of Law in the European Union" supported by the European Union (grant No 620758-EPP-1-2020-1-SK-EPPJMO-CoE).

Abstract: *The aim of this paper is to assess the most recent developments in the arising threats to the rule of law, in particular from the viewpoint of their impact on the judicial cooperation in light of the principle of mutual trust in the European Union. The paper analyses the development of this principle, the position of the Court of Justice of the European Union on the issue, and its views on recent challenges to the rule of law as a fundamental value of the EU, along with positions of other judicial bodies. The assessment then seeks to establish the impact the arising threats to rule of law in the EU, including judicial independence, may exert on the future application of the principle of mutual trust amongst judicial authorities of the Member States, and outline the implications arising therefrom.*

Key words: *rule of law, judicial cooperation, mutual trust, European Union, judicial independence*

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## 1. INTRODUCTION

The status of rule of law protection, and predominantly the crisis it faces across the European Union (hereinafter "EU") nowadays, have become well-entrenched talking points in legal and political, as well as academic discourse. What has been coined as rule of law crisis and is closely associated with broader crisis of European values has been a matter of concern for a considerable period of time, with Hungary and Poland being notoriously subjected to intense scrutiny (Mos, 2020, p. 280; Scheppele, Kochenov, and Grabowska-Moroz, 2021, p. 119). Yet soon, the third time charm could manifest in Slovenia, where government has been accused of attacking press freedom, judiciary, and even work of the EU's European Public Prosecutor's Office since last year (Herszenhorn and von der Burchard, 2021). With the potential for new threats arising in yet another Member State, while the EU is far from finding a satisfactory way of addressing the already existing concerns, not entirely restricted to actions of Hungarian and Polish governments, one can only wonder whether indeed *"each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".*[1]

[1] Court of Justice of the European Union, opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 168.

Inextricably linked to the implications of questioning whether at least the most rudimentary agreement exists about the fundamental characteristics of these *prima facie* common values is then the question how do these doubts then impact the mutual trust that is entrenched as an underpinning principle in a plethora of EU legal regimes. This includes those concerning free movement and fundamental aspects of economic integration, the operations of EU private international law (Rizcallah, 2021), or matters of cooperation of Member States even in area of freedom, security and justice, criminal procedures, asylum procedures, and treatment of third-country nationals (Willems, 2016, 2019; Xanthopoulou, 2018). The principle of mutual trust is cornerstone of these areas due to the simple fact that in order to make such mechanisms operable, their legitimacy is based on the premise that other Member States comply with the same fundamental standards, as regards protection of human rights (Spieker, 2019, p. 1192). Moreover, the Court of Justice of the European Union (hereinafter "CJEU") established that mutual trust also precludes Member States from second-guessing each other and their policies as regards level of national human rights observance, but also its specific application in individual cases, save for exceptional situations.[2]

The question which this paper aims to explore is therefore whether, in light of the recent developments shaking the very core understandings of rule of law and shared EU values with the strength of the eponymous carpet bombing, can mutual trust be operationalized amongst Member States and their judiciaries not as a ground for cooperation, but a safeguard of these common values. The hypothesis to be verified through assessment of the CJEU jurisprudence and human rights standards in comparison with situation in various Member States is that the presumption of equivalent level of human rights protection can be rebutted when significant deficiencies in rule of law and protection of human rights threaten the values EU declares as shared among the Member States.

## 2. STATE OF PLAY – EU INSTITUTIONS, ARTICLE 7 OF THE TREATY ON THE EUROPEAN UNION, AND THE RULE OF LAW

The full and complex description of all threats and perceived violations of rule of law and EU values would require a considerably more extensive account and detail than is viable and pertinent for this paper, even should the analysis focus on conduct of single or a handful of states that are considered to be the most responsible for violations of art. 2 of the Treaty on the European Union (hereinafter "TEU"). Nevertheless, a concise summary of gravest concerns ban be ascertained not only through academic viewpoint, but also in findings of a multitude of organizations and institutions. These provide a birds-eye view on the scope of the issues threatening the ability of Member States to trust each other in providing an equivalent protection to the values they all hold in high regard, at least as far as law in books is concerned.

For one, Poland has been condemned for systemic threat to the rule of law concerning its reform of the Constitutional Tribunal, as regards not only its composition, but effectiveness of its procedure, and implementations of its rulings,[3] as well as changes to functioning and procedure of general courts, attacks on judicial independence, and

[2] Court of Justice of the European Union, opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 192.
[3] European Commission, Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland (C/2016/5703); Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 (C/2016/8950).

reforms forcing appointed judges out of their positions.[4] These concerns were similarly noted in the opinions of European Commission for Democracy through Law (hereinafter "Venice Commission"),[5] which also cautioned against the attempts of legislature and government of Poland to strip the judiciary of powers in ruling on issues of constitutional importance and hamper its capacity to safeguard the constitution.[6] Same points have been raised by the European Commission in support of its proposal to find Poland in clear risk of a serious breach of the rule of law as one of the values shared by the EU and its Member States.[7]

In a similar manner, Hungary has been a matter of concern for the institutions of the EU even before the situation in Poland, when rule of law and democracy, conjoined under the overarching narrative of the EU values as soon as 2011, were in the spotlight in the context of media plurality and freedom of expression in Hungary,[8] as well as the creation of a new Hungarian constitution.[9] Like a forebearer of things to come in Poland, the reasons for caution soon expanded into many other values, including protection of human rights, equality, and non-discrimination, in light of attacks on judicial independence, lowering the retirement age of judges, termination of their mandates before statutory envisaged periods, but also shielding legislation from judicial review, or hampering exercise of religious freedom.[10] The Venice Commission voiced its concerns similarly, firstly in a fairly conciliatory manner, praising attempts to reform the Hungarian constitution, although warning about lack of transparency,[11] before switching to a substantially more critical narrative later on, similarly citing the abovementioned concerns.[12] The sheer volume of opinions adopted by the Venice Commission since then concerning Hungary speaks, pun intended, volumes. At the time of writing the paper, twenty country-specific opinions overall concerned Hungary, nineteen of them adopted since the process of writing a new constitution was initiated. On a quantitative basis, the situation in Poland has generated only six opinions from the Venice Commission since 2015, in the course of six years, less than one third of opinions concerning Hungary adopted in the course of ten years.[13]

The response and alarms, once again, were not confined to bodies dealing with rule of law or human rights, but raised wider political implications. Similarly, these culminated in the resolution calling on the Council to find Hungary in clear risk of a serious breach of values of the EU, citing all of the concerns referenced above, as well as privacy

[4] Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146 (C/2017/5320).
[5] European Commission for Democracy through Law, Opinion no. 833/2015 Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016, CDL-AD(2016)001.
[6] European Commission for Democracy through Law, Opinion no. 860/2016 Poland opinion on the act on the Constitutional Tribunal, 14 October 2016, CDL-AD(2016)026.
[7] European Commission, Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017, COM(2017) 835 final.
[8] European Parliament, Resolution on media law in Hungary, 10 March 2011, P7_TA(2011)0094.
[9] European Parliament, Resolution on the Revised Hungarian Constitution, 5 July 2011, P7_TA(2011)0315.
[10] European Parliament, Resolution on the recent political developments in Hungary (2012/2511(RSP)), 16 February 2012, P7_TA(2012)0053.
[11] European Commission for Democracy through Law, Opinion no. 614/2011 on three legal questions arising in the process of drafting the New Constitution of Hungary, 28 March 2011, CDL-AD(2011)001.
[12] European Commission for Democracy through Law, Opinion no. 621/2011 on the new Constitution of Hungary, 20 June 2011, CDL-AD(2011)016.
[13] European Commission for Democracy through Law, Documents by opinions and studies. Opinions (country specific). List of countries for which there are opinions. Retrieved from: < https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?lang=EN >, last accessed 17 September 2021.

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protection, academic freedom and other concepts interlinked with Art. 2 of the TEU.[14] In the case of Hungary, however, unlike the situation in Poland, the call upon the Council came from the European Parliament (hereinafter "EP"), not the Commission.

What both situations have in common is the stasis the EU institutions found themselves ever since procedure under Art. 7(1) of the TEU had been initiated. Both countries have been subject of multiple hearings in the Council, yet so far, no result has been reached, with European Parliament criticizing the Council not only for lack of any result concerning the hearings, but also informal and irregular structure of the hearings, lack of participation of the EP in the hearings, and even overly narrow scope of the issues which Commission raised against Poland when initiating Art. 7 procedure.[15] The lack of results has been similarly criticized by civil society as well (Ligue de Droits de l'Homme, 2021), however the latest hearings in June 2021 still do not imply any development in the outcomes, with meetings laconically stating that "substantive scope of the hearing[s] was the reasoned proposal of the European Commission that triggered it" (Council of the European Union, 2021).

## 3. WAY FORWARD – TOWARDS A JUDICIAL ENFORCEMENT AND EMPOWERMENT OF MEMBER STATE COURTS?

With the results of the political process under Art. 7 being manifestly lackluster, it is no wonder that various actors started to utilize their powers in a way that is not reliant on political bodies, but legal process. Apart from substantial role of the infringement proceedings, initiated mostly by the European Commission (cf. Blauberger and Kelemen, 2017; Bogdanowicz and Schmidt, 2018), judicial bodies in Member States are exploring the possibilities of utilizing the EU law to protect shared values within the sphere of their jurisdiction, especially when it is connected to legal orders of states notorious for their flouting of EU values, as outlined above. This judicial approach was not attempted only by the courts in Poland or Hungary,[16] but even in courts of other Member States, when confronted with protection of human rights or the rule of law outside of their own countries (Canor, 2013; von Bogdandy and Spieker, 2019).

As already outlined above, the national judges facing these cases have to bear in mind however the principle of mutual trust and its limitations on the possibility to question other Member States' conduct. Mutual trust has always played an important role in schemes related to judicial cooperation between the respective Member States, and it was determined by the CJEU that not only courts in one Member State are precluded from examining jurisdiction of courts in another,[17] but also the principle of mutual trust precludes derogations from the *lis pendens* rule, even if the court first seized of an action cannot rule on the matter within a reasonable time, which in itself creates a violation of right to a fair trial.[18] On the other hand, not even mutual trust was strong enough to override the rules on exclusive jurisdiction recognised in EU private

[14] European Parliament, Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), 12 September 2018, P8_TA(2018)0340.
[15] European Parliament, European Parliament resolution on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP)), 16 January 2020, P9_TA(2020)0014.
[16] Cf. Court of Justice of the European Union, A. K., CP and DO, joined cases no. C-585/18, C-624/18 and C-625/18, judgment of 19 November 2019, ECLI:EU:C:2019:982.
[17] Court of Justice of the European Union, Overseas Union Insurance, case no. C-351/89, judgment of 27 June 1991, ECLI:EU:C:1991:279, § 25.
[18] Court of Justice of the European Union, Gasser v. Misat, case no. C-116/02, judgment of 9 December 2003, ECLI:EU:C:2003:657, § 72.

international law, and courts can examine whether exclusive jurisdiction is respected by the court first seized of the dispute in another Member State, before resorting to application of the *lis pendens* rule.[19]

Mutual trust and mutual recognition are also closely interlinked,[20] to the concept of *ordre public* and the public policy exception, which exists as a counterweight to the presumption that all Member States in the EU comply with a set of common standards and values (cf. Böse, 2015).

More extensively, *ordre public* could be construed even as a measure designed to establish a common standard of protection of human rights across all Member States, in order to protect fundamental values and rules adopted at the EU level itself (Corthaut, 2012, p. 257). It would then imply that protection of public policy is nowadays not purely internal affair of each individual Member State (Mezeiová, 2018, p. 73), but rather a responsibility shared between all of them. For example, the principle of non-discrimination is used as an example of grounds for application of public policy exception, as the measure is often regarded as tool to enforce protection of human rights in cross-border situations (Kiestra, 2014, p. 20). A fortiori, the interplay of mutual trust, human rights, and flouting of common values then manifests in judicial cooperation concerning matters outside the scope of private international law, such as asylum law, or cooperation in criminal matters, where executing states are with increasing frequency arriving at conclusions requiring them to exercise judicial oversight even in matters concerning respect for human rights in the issuing state (cf. Böse, 2015, pp. 144–145).

## 4. CASES INVOLVING MUTUAL TRUST AS A MEASURE OF PROTECTING THE RULE OF LAW

With the Member State courts given power to protect rule of law and values of the EU, even against other Member States where they are all bound by the same set of standards and the principle of mutual trust, comes with an important caveat. The essential question to be answered in order to determine whether mutual trust can be used as a vehicle to enforce EU values is how evident should the disregard for them be in order to allow other Member States to "lose" the trust they have in the legal systems of other Member States. In other words, the viability of this method of value protection must be assessed through the lens of standard of proof in cases coming before the courts. To answer comprehensively when can the presumption that other Member States comply with human rights standards and, by extension, EU values, be rebutted, jurisprudence of European courts provides a substantial interpretive guidance, explored below.

### *4.1 Cases involving detention conditions and treatment of persons deprived of their liberty*

European Court of Human Rights (hereinafter "ECtHR"), although not an EU institution or a part of the EU judicial system, dealt with cases concerning mutual trust between EU Member States, in particular in the context of asylum and removal of third country nationals. The seminal judgment of *M.S.S. v. Belgium and Greece* provided an opportunity for Member States to question the mutual trust when it established that if a "general situation" in Member State is known to the authorities, individuals "should not be

[19] Court of Justice of the European Union, Weber, case no. C-438/12, judgment of 3 April 2014, ECLI:EU:C:2014:212, § 60.

[20] Cf. Court of Justice of the European Union, LM, case no. C-216/18 PPU, judgment of 5 July 2018, ECLI:EU:C:2018:586, § 36.

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expected to bear the entire burden of proof"[21] to demonstrate their treatment would breach the prohibition of ill-treatment under Art. 3 of the European Convention on Human Rights (hereinafter "ECHR"). Thus, the state authorities, in the view of the ECtHR, cannot merely "assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough".[22]

Such standard of proof seems incomplete, especially considering the fact that it does not specify the standard of proof beyond the "real risk" test established in its previous jurisprudence.[23] It merely shifts the burden of proof from the prospective applicants to state authorities, requiring them to take active part in assessment of the conditions in the requesting state, once they can ascertain deficiencies in the general situation in other Member States. Without more precise determination of what deficiencies can lead the Member States to refuse cooperation, such a blank check for courts could lead to increase in cases where general considerations of certain countries would allow courts to question, or override, the principle of mutual trust in the EU, and turn it inside out.

More detailed guidance can therefore be found in also in the jurisprudence of the CJEU, which held that removal of asylum seekers to other Member State cannot take place where "they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment".[24] This interpretation provides several significant qualifications for application of "real risk" in cases involving EU Member States. Firstly, the i) systemic deficiencies must exist in Member State, ii) the second Member State authorities cannot be unaware of them, and iii) these deficiencies create at least substantial grounds to believe the real risk of ill-treatment would be present in case of removal. These deficiencies were recently considered by the ECtHR once again to rebut the presumption of equivalent protection in treatment of detainees in Romanian prisons, where not even investigations of the executing French authority could satisfy the presumption in light of available information about conditions in Romanian prisons and lack of safeguards and assurances of the requesting state.[25]

Assessing this test from the viewpoint of situation concerning rule of law in Poland and Hungary, it can be well concluded, as many bodies have, that deficiencies have a systematic character, and given the notoriety the two states have across the EU as regards their rule of law status, other Member States would certainly face an uphill battle arguing that their authorities were unaware about the deficiencies. On the other hand, concerning these states, while real risk of ill-treatment may be present in respect of certain individuals, it is not an issue associated with rule of law in those countries.

[21] European Court of Human Rights, M.S.S. v. Belgium and Greece, app. no. 30696/09, judgment (GC) of 21 January 2011, ECLI:CE:ECHR:2011:0121JUD003069609, § 352.
[22] European Court of Human Rights, M.S.S. v. Belgium and Greece, app. no. 30696/09, judgment (GC) of 21 January 2011, ECLI:CE:ECHR:2011:0121JUD003069609, § 359.
[23] Cf. European Court of Human Rights, Soering v. the United Kingdom, app. no. 14038/88, judgment (Plenary) of 7 July 1989, ECLI:CE:ECHR:1989:0707JUD001403888, § 91.
[24] Court of Justice of the European Union, N.S. and others, joined cases nos. C-411/10 and C-493/10, judgment of 21 December 2011, ECLI:EU:C:2011:865, § 94.
[25] European Court of Human Rights, Bivolaru and Moldovan v. France, app. nos. 40324/16 and 12623/17, judgment of 25 March 2021, ECLI:CE:ECHR:2021:0325JUD004032416, §§ 122-126.

*4.2 Cases of rule of law and judicial independence in relation to mutual trust*

Considerations of rule of law rather relate to Art. 6 of the ECHR, and question posed accordingly should be under what circumstances the Member States can consider deficiencies in rule of law so grave that they can refuse cooperation under the principle of mutual trust. In the context of extradition in criminal proceedings, the Othman case was the first actual judgment of the ECtHR in which it found extradition in fact would result in a flagrant denial of justice, having regard to the fact that upon extradition, the applicant would be tried with the use of evidence obtained by torture.[26] Having regard to the extreme rarity of cases where extradition would result in flagrant denial of justice in violation of the ECHR, it is evident that such test is a strict one and "goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of [fair trial]".[27]

Such test remains applicable even in cases where the judicial bodies of two states are participating in a cooperation under the EU law, as although the EU law obliges Member States to presume equivalence in protection of fundamental rights, and EU law leaves no discretion to the Member States, the courts can nevertheless rebut this version of Bosphorus presumption, even in cases of flagrant denial of justice and extradition, on concrete facts of individual cases. Apart from "real risk" of flagrant denial of justice, the applicants must, however, present a serious and substantiated complaint and establish that EU law does not allow them to remedy the situation.[28]

In light of the fact that rebuttal of the Bosphorus presumption is permissible under the ECHR only in cases where EU law itself does not allow such remedy, the content of CJEU jurisprudence must therefore be assessed. Similarly to the ECtHR, the cases deal both with issues of ill-treatment, as well as violations of right to a fair trial. In the former group, it has been recalled that mutual recognition and mutual trust are essential in operation of the area of freedom, security and justice, and has been held that only exceptionally, the circumstances warrant a derogation from those principles.[29] After reiterating the standard of real risk of ill-treatment, the CJEU also outlined useful list of evidence to be used in the determination, including judgments of international courts and other documents of international organizations like the Council of Europe, or the United Nations. Nevertheless, when assessing the standard of proof in demonstrating the real risk, the CJEU held that general information about e. g. detention conditions in the Member State of the issuing authority cannot in and of itself suffice to refuse extradition, and individual circumstances of the person concerned must be assessed,[30] a consideration not assessed by the CJEU in cases dealing with treatment and systematic deficiencies of asylum systems (von Bogdandy et al., 2021, pp. 398–399).[31]

[26] European Court of Human Rights, Othman (Abu Qatada) v. the United Kingdom, app. no. 8139/09, judgment of 17 January 2012, ECLI:CE:ECHR:2012:0117JUD000813909, §§ 282-285.
[27] European Court of Human Rights, Othman (Abu Qatada) v. the United Kingdom, app. no. 8139/09, judgment of 17 January 2012, ECLI:CE:ECHR:2012:0117JUD000813909, § 260.
[28] European Court of Human Rights, Pirozzi v. Belgium, app. no. 21055/11, judgment of 17 April 2018, §§ 62-64.
[29] Court of Justice of the European Union, opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 191-192; Court of Justice of the European Union, Aranyosi and Căldăraru, joined cases nos. C-404/15 and C-659/15 PPU, judgment of 5 April 2016, ECLI:EU:C:2016:198, § 82.
[30] Court of Justice of the European Union, Aranyosi and Căldăraru, joined cases nos. C-404/15 and C-659/15 PPU, judgment of 5 April 2016, ECLI:EU:C:2016:198, §§ 88-94.
[31] Cf. Court of Justice of the European Union, N.S. and others, joined cases nos. C-411/10 and C-493/10, judgment of 21 December 2011, ECLI:EU:C:2011:865.

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Interestingly, in cases concerning rule of law specifically, the CJEU established that mutual trust and its implementation through the judicial cooperation and the European Arrest Warrant (hereinafter "EAW") is contingent upon independence of the issuing authorities, as right to a fair trial and not only ECHR and Charter, but also Art. 19 of the TEU requires such independence of Member State authorities. The real risk of being tried by a tribunal that is not independent therefore may pose obstacle from acting upon an issued EAW,[32] which is a situation not *per se* recognized by the ECtHR in is cases concerning possible flagrant denial of justice. Nevertheless, even such cases require specific individual assessment to establish, whether the particular person concerned would be in real risk of trial before court that is not independent or impartial. The generalized concerns about judicial systems in other Member States are not therefore sufficient grounds for national courts to override the mutual trust.[33] Not even concerns about independence of particular courts with jurisdiction in specific proceedings can bring about such override in absence of the individual assessment part of the test (Biernat and Filipek, 2021, pp. 413–414).

With the individual assessment firmly standing and binding national courts, another attempt to challenge the mutual trust in respect of countries flouting the rule of law came by questioning the judicial nature of courts issuing the EAWs due to the attacks on their independence. The approach was partly justified and initiated by the cases in which the CJEU refused to grant the status of judicial authority to Ministry of Justice in Lithuania and prosecution offices in Germany due to its susceptibility to receiving instructions on particular EAW cases from the executive.[34] Nevertheless, in cases where the issuing authorities were in fact classified as courts, the CJEU refused the option of not recognizing courts as judicial authorities issuing the EAW. In the case of prosecution offices in Germany, it did so "on account of statutory rules and institutional framework", while "systemic or generalised deficiencies" in judicial independence do not warrant such approach, as it would refuse the position of judicial authority to all courts of a Member State, without taking into consideration their actual conduct in each case.[35] Having regard to the plethora of forms and numbers of measures of curtails strangling the judicial independence in Poland (von Bogdandy et al., 2021, p. 392), it is conceivable that some of them might be construed as statutory rules and institutional framework that could deprive individual courts in Poland of their status as an issuing judicial body by courts in other Member States, yet such possibilities have not been explored by the CJEU in the L and P judgment. The requirement of individual assessment of conditions relating to fair trial and judicial independence was upheld yet another time.

## 5. CONCLUSION

The principle of mutual trust in the EU Member States is staunchly defended as a background against which a plethora of cooperative efforts of the Member States take place. Nevertheless, it has been, at least potentially, conceded that it can serve as a vehicle for national courts to check situation in other Member States as regards

[32] Court of Justice of the European Union, LM, case no. C-216/18 PPU, judgment of 5 July 2018, ECLI:EU:C:2018:586, §§ 58-60.
[33] Court of Justice of the European Union, LM, case no. C-216/18 PPU, judgment of 5 July 2018, ECLI:EU:C:2018:586, § 68.
[34] Court of Justice of the European Union, Kovalkovas, case no. C-477/16 PPU, judgment of 10 November 2016, ECLI:EU:C:2016:861; Court of Justice of the European Union, OG and PI, joined cases nos. C-508/18 and C-82/19 PPU, judgment of 27 May 2019, ECLI:EU:C:2019:456.
[35] Court of Justice of the European Union, L and P, joined cases nos. C-354/20 PPU and C-412/20 PPU, judgment of 17 December 2020, § 48.

protection of EU values and the rule of law, before resorting to trusting the judicial system of the issuing Member States. To put such control in practice, however, far more is required of the executing courts than finding a real risk of human rights violations, as required by the ECtHR in cases of extradition into third countries. Refusal to execute an EAW, or, *mutatis mutandis*, even other measure of judicial cooperation built upon the principle of mutual trust, on grounds associated to rule of law or judicial independence, faces a stringent test developed in the LM judgment, one that is not easily satisfied in all its three steps (Biernat and Filipek, 2021, p. 419).

Concerning the general deficiencies in rule of law or judicial systems in Hungary and Poland, there is ample evidence to consider these deficiencies proven in most cases that could appear before courts in the EU (see part 2). Even concerning the specific judicial bodies, evidence casting doubt on their institutional independence has been recognized by the CJEU, and it even asked urged the national courts to disapply the conflicting provisions under the primacy of EU law.[36] Nevertheless, in the area of mutual trust and judicial cooperation, the proof of individual being specifically affected by the changes to the judicial system broadly undermining the rule of law, is still a stringent test that is most likely to remain unfulfilled in a variety of cases. With further developments in both the attacks on rule of law, and in the institutional response, as well as resulting judicial proceedings in international and national courts, the upcoming application of the test in practice is likely to change as well, warranting further research.

At the same time, the CJEU also leaves the proverbial ball in the European Council's hands, when it outlined the possibility that it could potentially suspend operation of the EAW as a consequence of procedure under Art. 7(2) of the TEU, and execution of all subsequent EAWs would then automatically have to be refused by national courts in respect of the impacted Member State. The CJEU provided *de facto* guidelines on what potential sanctions could be adopted, should the remaining institution ever find consensus on the matter. In the absence of one, the individual assessment of real risk remains the rule.[37]

A second avenue for questioning the strength and viability of mutual trust opened via questioning whether the politicized courts are to be regarded as judicial authorities capable of issuing requests for mutual cooperation, in the light of such status being denied to prosecution offices liable to take instructions from the executive. While the CJEU seems to have brushed off such argument for now, the eponymous torpedo could be launched from Strasbourg, with the ECtHR already declaring that the independence and impartiality of a court goes hand in hand with the question of a "tribunal established by law", and grave deficiencies in the principles of judicial independence and impartiality must be a part of the assessment in cases questioning whether the court, whose independence is challenged, is in fact established by law.[38] Through such assessment, it found already that applicants were deprived of right for a trial before tribunal established by law in various situations. The similar conclusions were made, on the face of specific facts, as regards Constitutional Court, Disciplinary Chamber of the Supreme Court, as well as Chamber of Extraordinary Review and Public Affairs of the Supreme Court, three separate bodies of judiciary in Poland that were reformed or created since the start of

[36] Cf. Court of Justice of the European Union, A.B. and others, case no. C-824/18, judgment of 2 March 2021, ECLI:EU:C:2021:153.
[37] Court of Justice of the European Union, LM, case no. C-216/18 PPU, judgment of 5 July 2018, ECLI:EU:C:2018:586, §§72-73.
[38] European Court of Human Rights, Xero Flor w Polsce sp. z o. o., app. no. 4907/18, judgment of 7 May 2021, ECLI:CE:ECHR:2021:0507JUD000490718, § 247.

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assault on Polish courts.[39] With such determinations becoming apparently the new trend of disputing the judicial reforms assaulting rule of law, the question to be answered in future litigations and potentially preliminary rulings is, whether absence of tribunal established lawfully is an indication of deficient "statutory rules and institutional framework" that made the bodies concerned subjected to the executive.[40] If a court were to make such a finding, it could then deny the affected courts standing under the instruments of mutual cooperation, a nuclear option to be made in order to urge Member States to conform to EU values. Whether any national court would resort to launching such a torpedo, and whether CJEU would consider such approach compliant with the EU law under the most recent developments of its own jurisprudence and judgments of the ECtHR, remains to be seen.

In sum, it is evident that mutual trust, as proposed by the hypothesis above, is not a principle to be followed blindly, and it comes with its own set of obligations to be maintained if judicial cooperation is to remain functional. However, the presumption concerning mutual trust remains a strong one, and even though most actors have by now asserted the potential to overrule it, divergencies in approach to individual cases can be identified, which makes the possibility to rebut the mutual trust subject to strict caveats. Both the CJEU and the ECtHR recognize presumption of equivalent protection as a particularly strong one, albeit rebuttable. In recent times, the ECtHR in fact found several instances of such presumptions being rebutted. On the other hand, the CJEU, having jurisdiction over preliminary rulings, steers Member State courts towards stringent approach that impacts the possibilities of national judges making a finding as impactful as the most recent judgments of the ECtHR, finding several courts in Poland to be unlawfully established. In light of such limitations through preliminary rulings, it remains to be seen whether mutual trust finds its day in court in Member States, or will still be subject of frequent preliminary rulings and applications to the ECtHR. The answer to the question this paper sought to explore is therefore that mutual trust can eventually find itself with Art. 7 of the TEU, or Art. 258 of the TFEU, among a group of instruments that could be operationalized to protect the EU values. However, this particular tool has been historically regarded as strongly supporting cooperation among Member States, not a torpedo to be launched against one another. Such strong historical roots prevent the full potential of mutual trust in protecting the EU values to fully flourish yet. More importantly, even if the current rule of law crisis results in a paradigm change and mutual trust will be eventually utilized in enforcement of the EU values, it remains to be seen whether it can sink the battlecruiser of what has been dubbed the illiberal democracy, or barely make a dent in its hull.

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[39] European Court of Human Rights, Xero Flor w Polsce sp. z o. o., app. no. 4907/18, judgment of 7 May 2021, ECLI:CE:ECHR:2021:0507JUD000490718, § 290; European Court of Human Rights, Reczkowicz v. Poland, app. no. 43447/19, judgment of 22 July 2021, ECLI:CE:ECHR:2021:0722JUD004344719, § 281; European Court of Human Rights, Dolińska-Ficek and Ozimek v. Poland, app. nos. 49868/19 and 57511/19, judgment of 8 November 2021, ECLI:CE:ECHR:2021:1108JUD004986819, § 354.

[40] Cf. Court of Justice of the European Union, L and P, joined cases nos. C-354/20 PPU and C-412/20 PPU, judgment of 17 December 2020, § 48.

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# ARTICLES

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# PROTECTION OF WHISTLEBLOWERS BY THE EUROPEAN UNION, THE COUNCIL OF EUROPE, AND THE EUROPEAN COURT OF HUMAN RIGHTS / Sára Kiššová

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Abstract: *Whistleblower protection in the European Union is undergoing significant developments. The new Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of Union law sets a minimum standard for the protection of whistleblowers. It is awaiting implementation in Member States' national law by December 2021. However, a certain level of protection is also guaranteed by the European Court of Human Rights case law principles. Reports of illegal activities provided from close internal sources can strengthen the protection of the EU's financial interests. Adequate protection is needed to prevent retaliation against whistleblowers. As the deadline for transposing this directive approaches, the article aims to analyse the Directive 2019/1973 and compare it with the protection guaranteed by Article 10 of the European Convention on Human Rights.*

Key words: *Whistleblowing; whistleblower; Article 10; ECHR; ECtHR; Directive 2019/1937*

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## 1. INTRODUCTION

The role of the European Union ("EU") in controlling the budget is to ensure that the EU budget is used correctly, to protect the Union's financial interests, and to combat fraud. Beginning with the creation of the "Anti-Fraud Coordination Unit" working group in July 1988, which was later renamed OLAF,[1] a body with complete independence in internal and external investigations was set up (Committee of Independent Experts, 1999, pp. 9-10). From a legislative point of view, it was the Convention on the protection of the European Communities' financial interests, introduced in October 2002 by the Council Act of 26 July 1995, drawing up the Convention on the protection of the European Communities' financial interests. In addition, several secondary pieces of legislation have been introduced in recent years to increase the protection of the EU's financial interests.[2] The establishment of the European Public Prosecutor's Office (EPPO), through enhanced cooperation, provides for a system of shared competences between the EPPO and national authorities in the fight against criminal offenses affecting the financial interests

[1] June 1999.

[2] For example: Establishing enhanced cooperation in setting up a European Public Prosecutor's Office.

of the Union.[3] This cooperation certainly strengthens the protection of the EU's financial interests, and we will be able to examine its possible effectiveness in the near future. In addition, negotiators of the Council of the EU and the European Parliament (EP) reached an agreement at the end of 2020 on a new general conditionality regime to protect the EU budget in response to concessions from the individual Member States (Council, 2020). From this point of view, it can be said that the EU has made progress in creating mechanisms to protect its financial interests.

However, it is also necessary to look at the protection of the European Union's financial interests from a non-institutional point of view, referring to staff who could be in contact or work with the Union's finances. Most of the Union's funds are managed in the beneficiary's country of origin, so it is up to national governments to ensure that they are appropriately spent. At the national level, each Member State has a system of protection for EU funds, whether it is a well-established administrative control procedure or effective channels for criminal investigations. However, until the year 2019, the EU and the many Member States lacked one essential part of the system of non-institutional protection, namely the protection of whistleblowers (Nielsen, 2013). Things have only moved in 2017 as open public consultations (see European Commission, 2017) have taken place after several revelations of whistleblowers.[4] All this led to the fact that in April 2018, a directive on the protection of whistleblowers was proposed and later adopted in October 2019.[5] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of whistleblowers ("the EU Whistleblowers Directive") entered into force in December 2019, and its implementation period ends in December 2021.

Until then, the only protection guaranteed at the European level to whistleblowers (besides countries having some sort of such protection) is provided by Article 10 of the European Convention on Human Rights (the Convention) and the principles established by the case-law of the European Court of Human Rights (ECtHR).

For these reasons, this article aims to analyse the current protection of whistleblowers at the European Union level by analyzing and synthesizing available sources. The available literature, which deals with the issue, the EU legislature, the ECtHR case-law, and the sources devoted to Article 10 of the Convention will be analysed. The analysis should result in an assessment of whether the protection of whistleblowers at the Union level will be sufficient after the transposition of the EU Whistleblowers Directive and whether the transposition of the EU Whistleblowers Directive into national law will provide protection similar to that guaranteed by the ECtHR.

## 2. PROTECTION OF WHISTLEBLOWERS AT THE EUROPEAN LEVEL: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE COUNCIL OF EUROPE DOCUMENTS

Whistleblowing is a mechanism by which an employee, whether in the public or private sphere, becomes aware of a breach of the law that undermines a public interest that would not have been disclosed without such notification to the competent authorities. However, for a notification to be made, a whistleblower must be protected from possible sanction/retaliation by the employer. Until the EU Whistleblower Directive

[3] 13 recital of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation for the establishment of the European Public Prosecutor's Office.

[4] For example the Volkswagen emissions scandal in 2015 or Lux Leaks at the end of 2014.

[5] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

is implemented, a whistleblower is protected through Article 10 of the ECHR on freedom of expression in each Member State, unless a Member State has established its national protection. However, the applicable principles of the ECtHR case law are the only way for whistleblowers in several Member States to achieve justice. Therefore, the following text will address the freedom of expression enshrined in Article 10 of the Convention and how the Council of Europe influences and creates the protection of whistleblowers in Europe (see also Andreis, 2019).

*2.1 Article 10 of the European Convention on Human Rights*

As the ECtHR ruled in Handyside v. the United Kingdom, freedom of expression is one of the fundamental pillars of a democratic society and one of the fundamental conditions for its progress and the development of every human being.[6] Professor Svák also describes freedom of speech as "*a person's desire to present his identity*" while at the same time having many meanings associated with the self-realization of man (2019, p. 234). Within the framework of freedom of speech, we can promote our political, cultural, or religious views through an increasing number of information channels. However, this freedom has a much greater impact than it seems at first glance.

There are many divisions within the subjects of speech. However, within this article, subjects according to social status are relevant: journalists, nongovernmental organizations, civil servants, armed forces, judges, lawyers, and doctors.[7] Within this division, the relevant entity is the civil servants within whom the notion of whistleblowing originally appeared. It is a conflict of loyalty with the obligation to inform about illegal activity in the civil service. It was the case of Tierbefrierer and others v. Germany[8] where the ECtHR moved the protection of freedom of expression to the horizontal private sphere and granted the protection of freedom of expression to a whistleblower from the private sphere (Svák, 2019, p. 265). The ECtHR, therefore, derives several freedoms from Article 10 of the Convention. It includes the freedom to disseminate and receive information and ideas as well as the freedom of the press. The scope of article 10 of the Convention has gradually extended to whistleblowing in the workplace,[9] and its protection applies to public and private workers (Svák, 2019, pp. 263-266).

However, freedom of speech has its limits. According to Article 10(2) of the Convention, the exercise of the right to freedom of expression carries duties and responsibilities and may therefore be subject to certain restrictions. Interference with freedom of expression can only occur if three cumulative conditions are met. The Court assesses whether the intervention is (1) prescribed by law, (2) pursues a legitimate aim, and (3) is necessary in a democratic society (Svák, 2019, p. 115). With regard to whistleblowing, the ECtHR, in examining the fulfilment of conditions, focuses mainly on the fulfilment of the last, third condition - whether the intervention was necessary in a democratic society (Yurttagül, 2021, p.115).

[6] ECtHR, Handyside v. the United Kingdom, app. no. 5493/72, 7 December 1976, para. 49.
[7] *Ibid.*, p. 253.
[8] ECtHR, Tierbefreier and others v. Germany, app. no. 45192/09, 16 January 2014.
[9] ECtHR, Guja v. Moldova [GC], app. no. 14277/04, 12 February 2008, para. 52; ECtHR, Kudeshkina v. Russia, app. no. 29492/05, 26 February 2009, para. 85; ECtHR, Herbai v. Hungary, app no. 11608/15, 5 November 2019, para. 36; ECtHR, Soares v. Portugal, app. no. 79972/12, 21 June 2016, para. 39 and more.

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*2.2 The Council of Europe and the Protection of Whistleblowers*

Several reports have been issued at the Council of Europe level on whistleblower protection in the Member States. Since 1990, the Council of Europe has taken steps to protect whistleblowers as an action plan against corruption (Multidisciplinary Group on Corruption, 1996). As part of this action plan, the Council of Europe declared that corruption significantly undermined the fundamental values on which our society is built. Its steps subsequently led to the adoption of two essential documents in 1999: the Criminal Law Convention on Corruption[10] and the Civil Law Convention on Corruption.[11]

In 2009, the report was issued by the Council of Europe's Committee on Legal Affairs and Human Rights (Committee on Legal Affairs and Human Rights, 2009) which pointed out the diversity of rules on the protection of whistleblowers in the Council of Europe's Member States. Resolution 1729 (2010) is considered the first step towards common standards for the protection of whistleblowers in Europe. Through it, the Council of Europe called on all Member States to review their legislation on the protection of whistleblowers, pointing out certain fundamental principles they should incorporate into legal orders (see Council of Europe, 2014, p. 16, 20 et seq). Parliamentary Assembly Resolution 1729 (2010) and Recommendation 1916 (2010) offer the Member States several guiding principles which should be incorporated into national law. Among the principles is defined, inter alia, the need to determine protected reports in good faith before various types of retaliation. It also defines who should be protected by this legislation, emphasizing public and private sector workers. In individual areas of law, protection against unfair dismissal is recommended in labour law, and protection against criminal prosecution for defamation or breaking of official or commercial secrecy is recommended in criminal law. The later adopted Recommendation of the Committee of Ministers CM / Rec (2014) 7 on the protection of whistleblowers, adopted on 30 April 2014, aimed to guide member States in reviewing their national rules on the protection of whistleblowers or in creating such rules.

*2.3 The Case Law of the European Court of Human Rights – The Protection of Whistleblowers*

In the context of the protection of human rights and thus the protection of whistleblower rights at the European level, it is necessary to look into the European Court of Human Rights decision-making practice. The Court has taken a few crucial decisions concerning whistleblower reporting, which set out the key principles to be applied when assessing the right to freedom of expression enshrined in Article 10 of the Convention. In its case law, the ECtHR determines the scope of protection of whistleblowers and the conditions for providing protection under Article 10 of the Convention.

As regards the scope of protection guaranteed by Article 10 of the Convention and the ECtHR, its decision-making process, the ECtHR dealt with cases where a violation of Article 10 of the Convention was sought by persons working in the state sphere,[12] at the same time, the ECtHR also granted protection between employer and employee relations, which were governed by private law rules.[13] Therefore, in material terms, the

[10] Criminal Law Convention on Corruption no. 173 of 1 July 2002.

[11] Civil Law Convention on Corruption of the Council of Europe no. 174 of 1 November 2003.

[12] ECtHR, Guja v. Moldova [GC], app. no. 14277/04, 12 February 2008, para. 52; ECtHR, Vogt v. Germany [GC], app no. 17851/91, 26 September 1995, para. 53.

[13] ECtHR, Heinisch v. Germany, app no. 28274/08, 21 July 2011, para. 44.

protection of whistleblowers is not materially limited, and the Court has provided protection to whistleblowers in various (labor) areas.[14]

*2.3.1 Guja v. Moldova - Six Criteria*

One of the most significant cases before the ECtHR is Guja v. Moldova, in which the Court identified six basic criteria for assessing proportionality to whistleblower's freedom of expression interference, ruling that Moldova violated Article 10 of the Convention by firing a civil servant disclosing public interest information politicians about influencing the judiciary.

In 2002, criminal proceedings were instituted against four police officers accused of ill-treatment and illegal detention of ten people suspected of parliamentary election crimes.[15] Following the opening of the proceedings, the four officers wrote to the President, the Prime Minister, and the Deputy Speaker of Parliament requesting protection from prosecution. Shortly afterward, the President issued a public statement calling on law enforcement to ignore any attempts by public officials to put pressure on them.[16] As a result, criminal proceedings against the nationals were stopped, and a few days after the President made his statements, Iacob Guja, then head of the General Prosecutor's Office's press department, presented two non-confidential letters written by the vice-president and deputy interior minister to the newspaper Jurnal de Chisinau.[17] One of the letters spoke of the effective release of one of the accused police officers. On 31 January 2003, the Jurnal de Chisinau took photographs of the two letters, together with an article alleging that the Vice-President of Parliament had intimidated prosecutors and protected four police officers.[18] After hearing the Prosecutor General regarding the origin of the letters, Mr. Guja commented that he had sent them to combat the abuse of influence. As a result, Mr. Guja and the prosecutor suspected of providing letters to Mr. Guja have been dismissed.[19]

Mr. Guja claimed, inter alia, that the letters were not classified as secret under the law, that he was therefore not required to consult with the heads of other departments before contacting the press, and that his release violated his right to freedom of expression.[20] As a result, the Chisinau Court of Appeal dismissed the lawsuit,[21] and the Supreme Court upheld the decision on appeal, arguing that obtaining information by abusing a person's status was not part of freedom of expression.[22]

Mr. Guja, therefore, turned to the ECtHR, arguing that his release for publishing the contested letters had violated his right to freedom of expression and, in particular, his right to disseminate information and ideas to third parties under Article 10 of the Convention.[23] Therefore, according to Mr. Guja, the publication of the letters had to be

[14] See for instance: ECtHR, Bucur and Toma v. Romania, app. no. 40238/02, 8 January 2013; ECtHR, Marchenko v. Ukraine, app. no. 4063/04, 19 February 2009; ECtHR, Soares v. Portugal, app. no. 79972/12, 21 June 2016.

[15] ECtHR, Guja v. Moldova [GC], app. no. 14277/04, 12 February 2008, para. 9.

[16] *Ibid*., para. 11.

[17] *Ibid*., para. 13.

[18] *Ibid*., para. 15.

[19] *Ibid*., paras. 19 and 21.

[20] *Ibid*., para. 22.

[21] *Ibid*., para. 23.

[22] *Ibid*., para. 25.

[23] *Ibid*., para. 48.

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regarded as a notification of an infringement,[24] claiming that he had acted in good faith and was convinced that the information disclosed concerned the commission of a serious crime by the Vice-President of Parliament for corruption and "trafficking in influence."[25] Furthermore, the Government argued that since the letters were internal documents that Mr. Guja would not commonly have accessed based on his function, it should therefore be understood that Mr. Guja has stolen this information.[26]

In assessing this case, the Court monitored the fulfilment of the six criteria that must be met for the whistleblower to be protected. First, the published information should be in the public interest and second, at the same time, its authenticity.[27] Third, the channels of disclosure should be respected.[28] The Court examines the whistleblower's ability to report these proceedings before making this information public. Therefore, disclosure of information should be made in the first instance to the superior or, if possible, to the competent authority or body. Thus, it can be said that the whistleblower should prioritize reporting violations internally (European Court of Human Rights, 2020, p. 67, para 362). Whistleblowers should therefore report to the competent authorities if internal channels do not respond, and they should only go public as a last resort, i.e. if the previous two steps were unsuccessful (the channel did not respond to the report). Fourth, the whistleblower should act in good faith, and his reporting should not be motivated by goals such as personal or economic gain.[29] Fifth, the Court assesses the damage suffered by the employer and examines whether the public interest in obtaining information balances it.[30] Sixth, the ECtHR examines the severity of the sanction imposed on a whistleblower and its consequences.

## 3. THE EU WHISTLEBLOWERS DIRECTIVE AND ITS MAIN ELEMENTS

Until 2019, at the level of the European Union, there was no legislation governing the protection of whistleblowers. Protection has been (and still is until the end of the transposition period of December 2021) left in the hands of the Member States and, as mentioned above, guaranteed by Article 10 of the Convention and the principles of the ECtHR. However, the path to the ECtHR is relatively complex, and there is a need for a potential whistleblower to be protected from the moment of his decision to report illegal activity. Several EU countries either have absent legislation in this area at the national level or relatively weak existing legislation. For these reasons, the EU has decided to create a basic level of protection, however, the Union's financial interests remain the main object of protection in this case.

The new Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law provides a basic harmonizing framework for protection. As with other legislation, it is possible to note certain advantages and disadvantages of this directive. In the following sections, the EU Whistleblower Directive will be analysed. I will focus mainly on three elements of the legislation: the scope of the directive, the conditions for the protection to

[24] *Ibid*., para. 60.
[25] *Ibid*., para. 61.
[26] *Ibid*., para. 64.
[27] *Ibid*., para. 77.
[28] *Ibid*., para. 73.
[29] *Ibid*., para. 77.
[30] *Ibid*., paras. 74–76.

be granted, and reporting channels. I chose these elements because of the need to compare them with the protection guaranteed by ECtHR.

*3.1 Scope of the EU Whistleblower Directive*

The material scope of the EU Whistleblower Directive is relatively narrow, as it applies only to breaches of EU law or to areas of EU competence.[31] These include public procurement, consumer protection, and, above all, infringements that harm the Union's financial interests.[32]

In its personal scope, the EU Whistleblower Directive applies to whistleblowers in the private and public sectors, including persons with worker status within the meaning of Article 45(1) TFEU, civil servants, and persons with the status of self-employed persons who carry out activities within the meaning of Article 49 TFEU.[33] Furthermore, this directive shall also apply to shareholders and persons belonging to administrative, management, supervisory bodies, trainees, and volunteers.[34] Interestingly, protection should also apply to persons whose employment relationship has yet to begin, i.e., a person in a pre-contractual relationship, if he has become aware of the infringements/illegal activities at this stage.[35] In addition, the EU Whistleblower Directive protects intermediaries or third parties who are associated with the reporting person (colleagues, relatives), as well as legal entities that the reporting persons own, work for, or are otherwise connected within a work-related context.[36]

*3.2 Conditions for the Protection*

The EU Whistleblower Directive does not establish any condition for the protection to be granted. Neither good faith is not necessary to provide when reporting a breach. Therefore, courts of the member states will not examine such a condition.

*3.3 Reporting Channels*

If an employee discovers certain irregularities in the course of his work, such as mismanagement of EU funds, he must have enough channels to report if he decides so. The EU Whistleblower Directive sets out three reporting levels to create a hierarchy between internal and external reporting and sets the timeframe for feedback. Under the directive, Member States encourage whistleblowers to report through internal reporting channels and use external channels if the whistleblower considers a risk of retaliation. In addition, public publication/publication after internal and external announcements can be made after certain conditions are met. The directive allows a whistleblower to go public as a first step if it fulfils the conditions for a reasonable suspicion that the infringement may constitute an immediate or manifest danger to the public interest, for example, in

[31] Art. 5 (1), (i) and (ii) of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

[32] See: Annex no. I of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

[33] Art. 4 (1), (a) and (b) of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

[34] *Ibid.*, Article 4 (1), (c).

[35] *Ibid.*, Art. 4 (3).

[36] *Ibid.*, Art. 4 (4).

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the event of an emergency or the risk of irreversible damage or the risk of retaliation in the event of an external report.

## 4. COMPARISON OF THE EU WHISTLEBLOWER DIRECTIVE WITH THE PROTECTION GUARANTEED BY THE ECTHR

In the last part of this article, we will compare the different levels of protection for whistleblowers, comparing the protection provided by the EU Whistleblower Directive with the protection guaranteed by the ECtHR. I will therefore focus on the differences that I noticed during the analysis and describe them briefly.

### *4.1 Scope*

First, I will focus on the differences in the material and personal scope of both levels of protection. In its material scope, the EU Whistleblower Directive is relatively narrow as it only applies to breaches of EU law or areas of EU competence, precisely to the protection of the financial interest of the EU. Nevertheless, protection under the principles of the ECtHR is not materially limited, and the ECtHR has granted protection to various kinds of whistleblowers in different areas with dissimilar facts of the case, provided that the whistleblower procedure has passed the test of the six criteria mentioned above.

The European Union is therefore not seeking to create general protection of whistleblowers and their freedom of expression, but it aims to protect the Union's financial interests through the directive in question. The mere fact that the material content is aimed solely at the financial interests of the Union cannot be blamed on the Union. However, it is also worth considering some of the disadvantages of such a delimitation: when the EU Whistleblower Directive is incorporated into national law, protection of whistleblowers will be de facto guaranteed only in relation to proceedings against the interests of the Union. A whistleblower may thus find himself in a situation where he is unsure whether he is reporting an infringement related to the interests of the Union, which may deter him from reporting. Of course, this statement is only relevant in the case of a scenario if a Member State transposes into its legislation only the framework required by the directive.

In the context of the personal scope, the directive is very detailed and provides a minimum standard of protection for a wide range of exhaustively appointed entities. At the same time, the ECtHR divides these entities only vertically and horizontally thus does not provide an exhaustive list of subjects. Moreover, in its decision-making, the ECtHR dealt with cases where there was a violation of Article 10 of the Convention and protection was exercised by persons working in the state sphere. Still, at the same time, it also granted protection to the relations between the employer and the employee, which were governed by private law norms.

### *4.2 Conditions for the Protection*

Another aspect that will be compared is the conditions that must be satisfied for the protection to be granted. The motive of the reporting whistleblower is to be one of the factors examined by the ECtHR, and at the same time, the report cannot be motivated by personal guilt or intolerance (European Court of Human Rights, 2020, p. 65). In addition, it should not be done in order to obtain personal benefits, including monetary benefits. Furthermore, the ECtHR focuses on the authenticity of the information published/reported and therefore tests this factor. The ECtHR examines whether the

whistleblower has borne the burden of freedom of expression and whether he has verified that information in terms of accuracy and reliability.

On the other hand, the EU Whistleblower Directive defines "breach information" as information, including reasonable suspicions of actual or potential breaches that occur or are very likely to occur in the organization where the notifier works or has worked. The directive, therefore, reduces the requirements for the verification of information and its accuracy to such a level that it is sufficient to protect a whistleblower, which cannot be viewed as the right direction to take in today's society. The reputation of companies, government agencies, and those responsible for them is at stake.

Therefore, it is necessary to reconsider whether the whistleblower's protection should be set so that a whistleblower has minimal to zero liability for incorrect reporting or publication. Furthermore, in my opinion, it is necessary to reconsider whether a condition of good faith and the authenticity of information should be part of the directive as a guarantee against fraudulent, fouled reports, which will otherwise ultimately only burden the reporting system set up by the Member States.

### *4.3 Reporting Channels*

As I mentioned earlier, a whistleblower has to have sufficient channels to report actions that seem to breach law. In making its decision, the ECtHR examines the possibility of the whistleblower notifying such actions before deciding to disclose this information. Therefore, disclosure should be made in the first instance to the superior or, if possible, to the competent authority or authority. The ECtHR thus operates on a two-tier model of disclosure channels, as it maintains internal and external reporting at the same (first) level. As a last resort, information may be made available to the public only if it is manifestly impracticable. Therefore, the Court must examine whether the applicant had other effective means of reporting at his disposal.

The EU Whistleblower Directive introduces a slightly different approach but is still essentially governed by the case law of the ECtHR. However, unlike the ECtHR procedure, the directive allows a whistleblower to use the public publication as a first step if it fulfills the conditions for a reasonable suspicion that the infringement may constitute an immediate or manifest danger to the public interest, for example, in the event of an emergency or the risk of irreversible damage or the threat of retaliation in the event of an external report. The directive, therefore, simplifies the public publication of published information, which is effective when EU funds are primarily in the hands of public authorities, so there could be a risk of failure of external investigations.

## 5. CONCLUSION

Whistleblowers undoubtedly help detect illegal activity, which can constitute a criminal offense. Therefore, their protection against retaliation is very important, and it is appropriate that it be guaranteed at the European Union level in every Member State. However, it is questionable how the individual Member States will create the final national legislation. An analysis of the objectives set has shown that protection at the European level is more general than that proposed by the EU Whistleblowers Directive. The biggest stumbling block in the European Union's legislation is its material scope. While the European level does not materially limit protection, the EU creates legislation that sets only a minimum protection standard. The directive only provides for substantive scope for notifications concerning EU matters, and the Member States do not have to extend the substantive scope in their legislation.

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Protecting the EU's financial interests through whistleblowers has great potential if the EU Whistleblower Directive is sufficiently implemented in national law. However, there is a strong need for the Member States to extend protection under their national legislation to as many areas as possible and to implement the directive in a 1: 1 ratio, i.e., only to proceedings related to EU finances. The EU Whistleblower Directive sets a minimum standard for whistleblowers and, in a way, complements the protection guaranteed by Art. 10 of the Convention. However, the EU must ensure that a potential whistleblower is not afraid to report infringements solely because he is unsure whether the violation falls within EU law or is outside that scope. The directive gives Member States and employers the obligation to establish external and internal channels to facilitate the reporting of infringements, which is a positive element. However, it is questionable how the reduced requirement for verification of reported information (in the directive, suspicion is sufficient) compared to the requirement set by the ECtHR principles will impact practice. We will soon monitor how the Member States have adapted their whistleblower legislation after December 2021.

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# NEW EU ENLARGEMENT STRATEGY TOWARDS THE WESTERN BALKANS AND ITS IMPACT ON RULE OF LAW / Marina Matić Bošković, Jelena Kostić

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Abstract: *The rule of law is incorporated in the EU Founding Treaties and case-law of the Court of Justice of the EU and was included as a key requirement already in 1993 Copenhagen accession criteria. The EU enlargement is not only territorial increase, but also transposition of EU acquis to third countries. Since 1993, the monitoring mechanism of the rule of law reform in the EU accession countries was enhanced, including two specific negotiation chapters, Chapter 23 – judiciary and fundamental rights and Chapter 24 – justice, freedom and security. Over the last two decades, the EU was struggling to develop an adequate mechanism in this area, from mechanism for coordination and verification, to action plans for Chapter 23, to more specific tools like perception and experience surveys of the judiciary and functional reviews. Due to the challenges to measure progress and track record in the rule of law, in February 2020 the European Commission presented the new approach to EU Enlargement that aims to push reforms forward. The intention is to make the accession negotiations more credible, predictable and dynamic and criteria for assessing reforms in the accession countries will be based on the clearer criteria and more concise EU requirements. The article examines how EU enlargement policies influenced the rule of law reforms in Western Balkan countries over the years and what could be expected from the new approach. The research hypothesis is based on the correlation between Enlargement strategy towards the Western Balkans and its impact on rule of law in countries of the mentioned region. The methodological approach applied in the assessment is based on analysis of Enlargement strategy and other EU and national documents, as well as results of the work of judicial institutions in order to provide insight into the bottlenecks of the state rule of law in Western Balkan countries and enable identification of recommendations for improvement. The authors concluded that the new methodology would improve the measurability of the achieved results in the rule of law area, however, the approach might slow down the accession process of Serbia and Montenegro as a frontrunners in the process.*

Key words: *Enlargement policy; rule of law; Western Balkans; reform of judiciary; accession negotiations*

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## 1. INTRODUCTION

The Treaty Establishing the European Economic Community (Treaty of Rome) from 1957 defined the goals of the European Community through the establishment of a common market, development of uniform economic policies of member states and promotion of balanced development of economic activity, with development of stability, improvement of living standards and connection of member states.[1] The preamble to the Charter of Fundamental Rights of the European Union speaks of the rule of law, while the existence of the Union is based on the indivisible universal values of human dignity, freedom, equality, solidarity and the principles of democracy and the rule of law.[2] To enable adequate protection of human rights and social progress, it is necessary to establish and improve the work of institutions important for maintaining and improving the rule of law not only in the member states, but also in the states aspiring to the European Union membership.

The rule of law is of great importance for peace, security, prosperity, social and economic progress. An efficient judiciary is a guarantor of legal certainty, which has a positive effect on business environment, economic development, and above all on encouraging investment (Anderson, Bernstein and Gray, 2005). These values are common to each Member State and to societies ruled by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.[3] The preamble to the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Economic Community from 2007 states that universal values of the inviolable and inalienable human rights, freedom, democracy and the rule of law have developed from the cultural, religious and humanistic heritage of Europe.

To ensure that candidate countries are sharing the same values as the EU member states, the rule of law as an accession requirement was incorporated already in the Copenhagen accession criteria adopted in 1993. Although in the 1990s, during preparation for the biggest EU enlargement that took place in 2004,[4] rule of law was not the primary measure for assessing the progress of the countries in the negotiations, it was one of the key elements. The countries applying for membership were required to meet the criteria for building stable institutions that can guarantee democracy, the rule of law, human rights and respect for and protection of minorities, an efficient market economy, ensuring market competition to strengthen the common market of the European Union, as well as the ability to effectively implement the obligations arising from membership, including obligations arising from the common political, economic and monetary union. During 2006 the rule of law was mentioned as the key element of the EU accession process of Romania and Bulgaria. Based on experience with application of Cooperation and Verification Mechanism with Romania and Bulgaria the European Commission established a new approach to the rule of law during 2012.[5] The new approach puts rule of law at the heart of the accession process and implies reforms in

[1] Article 2 of the Treaty establishing the European Economic Community (EEC). Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0023&from=EN (date of access: 23.11.2021).
[2] The Charter of Fundamental Rights of the European Union, 2007/C 303/01.
[3] Article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/1.
[4] Eight Central European Countries (two former Soviet republics, four former satellites of the USSR and former Yugoslav republic) and two Mediterranean islands (Malta and Cyprus) joined EU on May 1, 2004, which was the biggest enlargement of the EU (from 15 to 25 member states).
[5] Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0600&from=EN (date of access: 23.11.2021).

the accession states with the aim to improve the rule of law and fundamental freedoms. Chapters 23 and 24 are therefore of particular importance to enable monitoring of reforms and compliance with EU standards. The 2015 EU Enlargement Strategy reconfirms that rule of law is the core issue of the EU access process and that countries aspiring to join the Union need to establish and promote from an early stage the proper functioning of the core institutions necessary for securing the rule of law.[6] In March 2020 the Council of European Union adopted the European Commission proposal for the new enlargement methodology with more focus on fundamental reforms to ensure improvement of the effectiveness of the accession process.[7]

The subject of this paper is an analysis of the influence of EU enlargement policies on the rule of law reforms in the Western Balkan countries over the years and expectations from the new approach. In the first chapter, we start from the assumption that the new approach is justified and that the measures taken so far to monitor the achieved level of rule of law have not given expected results, as well as that it has had a negative impact on citizens' trust in the judiciary. Another assumption is that the implementation of reforms in this area requires political dialogue and a high level of commitment of political leaders. That is why in the first part of the paper we start from the development of the principle of the rule of law as a key element in the process of joining the EU. Having in mind the specificity of the Western Balkans, the paper first looks at the results of the mechanism of cooperation and verification of progress that has been applied in relation to Romania and Bulgaria. Based on the analysis of the European Commission's report on the progress of these countries, we seek to make recommendations for improving the approach to the process of harmonization with EU standards in Serbia and Montenegro. These countries were selected, since they opened negotiation in the rule of law according to one methodology, and recently agreed to apply the new methodology. Therefore, fulfilling the conditions for membership with the application of the new methodology will be a special challenge for them.

Bearing in mind that we also assume that modest progress has been made in the area of judicial reform in Serbia and Montenegro, in the next chapter we analyse the European Commission's progress report, the Venice Commission's Opinion and the reports of various international organizations on progress in this area. Within this part of the paper, we pay special attention to the reports on corruption in the judiciary, as well as the reports on citizens' perceptions of corruption in this area. In this way, we want to point out that the new approach of the European Union is justified and that should contribute to the increased responsibility of countries in terms of meeting the criteria in the rule of law. In this way, we want to point out the justification for the adoption of new tools important for assessing progress in the field of rule of law, which should provide insight into the results achieved in practice.

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Enlargement Strategy, COM (2015) 611 final. Retrieved from:
https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52015DC0611(01)&from=EN
(date of access: 23.11.2021).

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the Accession Process – A Credible EU Perspective for the Western Balkans, COM (2020) 57 final. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0057&from=EN (date of access: 23.11.2021).

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## 2. THE RULE OF LAW AS A KEY ELEMENT FOR EU ACCESSION

The rule of law was mentioned as a key condition for EU accession in 2004, when Romania and Bulgaria accession was postponed due to the challenges in the rule of law area, specifically the reform of judiciary and fight against corruption (Pejović, 2016, pp. 14-15). Such an approach was introduced by the Decision of the European Commission on the establishment of a mechanism for cooperation and verification of progress for Romania in order to establish specific criteria in the field of judicial reform and the fight against corruption.[8]

Although Romania was due to become a member of the European Union less than a month after the establishment of above-mentioned decision, the Commission concluded on the basis of its latest report from 2006 on its progress in the Stabilization and Association Process that progress still needed to be taken. At the national level was necessary to strengthen the accountability and efficiency of the judicial system, as well as to improve the capacity of taking adequate measures to protect the internal market, as well as the areas of freedom, security and justice. If Romania would not be able to adequately meet the accession criteria in these areas, the Commission would have been able to apply the measures in accordance with the Accession Treaty. These measures involved non-recognition of Romanian judgments and court decisions such as European arrest warrants in accordance with European Union regulations.[9]

Accordingly, Romania needed to improve the transparency and efficiency of judicial proceedings, and in particular to improve the capacity and accountability of the High Judicial Council. In addition, it was necessary to supervise the application of the Code of Civil Procedure, establish an independent agency for verification of the property origin and potential conflicts of interest, and for professional and independent investigations of high-level corruption. In addition, it was necessary to take measures in the field of prevention and fight against corruption, and subsequently at the level of local self-government units. The above-mentioned represents the criteria on the basis of which Romania's progress in assessing the responsibility and efficiency of the judicial system, and the area of freedom, security and justice was assessed.

In line with the Decision, Romania was obliged to report to the Commission by 31 March each year on progress in areas where it needed to make additional efforts to meet the membership criteria. In this regard, the Commission undertook to provide technical assistance through various activities, including the exchange of information regarding the achievement of benchmarks in the disputed areas. In addition, the Commission had the right to organize an expert mission in Romania at any time to verify the fulfilment of the disputed membership criteria, while the obligation of the Romanian authorities and competent authorities was to support the European Commission in verifying the fulfilment of criteria in the disputed areas.[10] In order to keep the European Parliament informed of Romania's progress, the Commission was obliged to report to it

[8] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, *Official Journal of the European Union,* L 354/56. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0928&from=EN (date of access: 23.11.2021).
[9] *Ibid.,* Paragraph (7).
[10] *Ibid*., Article 1.

regularly every six months on the progress in the disputed areas as long as there was a need to undertake such activity.[11]

The similar Decision was adopted during the 2006 for Bulgaria.[12] The criteria that Bulgaria was supposed to meet were the adoption of constitutional amendments that would remove any impact on the independence of the judicial system, and which should also improve accountability in this area. Bulgaria had an obligation to ensure greater transparency and efficiency of the judicial system by adopting and implementing a new law governing the judicial system, as well as a new Criminal Procedure Code, regularly reporting on the implementation of the new Criminal and Administrative Procedure Code, and in particular the implementation of the new Criminal Procedure Code during the pre-trial proceedings.

In addition, the criteria are defined as continuous reform of the judicial system in order to improve professionalism, accountability and efficiency, measuring the impact of these reforms and annual publication of results, conducting and reporting on professional and independent investigations into high-level corruption, taking further measures in the field of prevention and the fight against corruption, especially at the level of local self-government units, implementing the anti-corruption strategy, with a special focus on serious crimes, money laundering, as well as the confiscation of criminal assets and reporting on new and ongoing investigations, charges and judgments in that area.[13] Reports on Cooperation and Verification Mechanism proved that it is not enough just to monitor progress in relation to the existence of legal acts and strategic documents, but that it is necessary to analyse the results achieved in practice. In addition, the above examples show that in order to improve the principles of the rule of law at the national level, it is necessary to have political will and inter-institutional cooperation.[14]

Accession negotiations with Bulgaria and Romania revealed that shortcomings in key areas such as reform of the judiciary and the fight against organised crime and corruption had not been fully overcome. To remedy the identified shortcomings in the enlargement process, the 2005 negotiating frameworks for Croatia and Turkey introduced a specific chapter 23 - "judiciary and fundamental rights" - in addition to the previously existing and then renumbered chapter 24 - "justice, freedom and security" (Butković and Samardžija, 2014, pp. 91-108). Both chapters cover key rule of law issues, in particular reform of the judiciary and the fight against organised crime and corruption.

[11] *Ibid.*, Article 2.

[12] Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, *Official Journal of the European Union,* L 354/58. Retrieved from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:354:0058:0060:EN:PDF (date of access: 23.11.2021).

[13] *Ibid.*

[14] Report from the Commission to the European Parliament and the Council on Progress and Verification Mechanism, COM(2018) 851 final and Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, COM(2019) 499 final; Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Cooperation and Verification Mechanism, COM(2019) 498 final. Retrieved from: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en (date of access: 23.11.2021).

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Despite certain drawbacks, the introduction of opening and closing benchmarks as a novelty in the accession negotiations has proved an effective tool.

Lessons learned from previous enlargements influenced on introduction of the rule of law as a key element for the EU enlargement.[15] The new approach to negotiations in the areas of justice, fundamental rights, freedom and security has already had an impact on the negotiating framework adopted in 2012 for Montenegro and later applied also to Serbia. Based on the experience with Croatia, the EU developed the "new approach", which included placing priority on the fundamental areas (the rule of law and fundamental rights, justice, freedom and security), demanding track record, introducing interim benchmarks during the negotiations to tackle the emerging issues, and a suspension clause in case of the serious breach of countries' commitments (Marić and Bajić, 2018). With regard to the judicial system, countries aspiring to membership had to ensure the independence of the judiciary, objectivity, accountability, as well as respect for the principles of fairness. One of the requirements they had to meet was to improve the efficiency of the judicial system, with special reference to a trial within a reasonable time.[16]

However, during 2020, a new methodology was adopted for Northern Macedonia and Albania.[17] Bearing in mind that Serbia and Montenegro were already in the process of accession negotiations, they had the opportunity to determine whether further negotiations would be continued according to the existing or new methodology. Both countries voted for the second option. According to the new methodology, the new chapters will not be able to be closed before the transitional criteria concerning the rule of law are met, and with the possibility of applying corrective measures if problems arise during the negotiations. The new methodology envisages that Chapters 23 and 24 will close the last, and open between the first to provide enough time for the necessary negotiations. Within the new methodology, a special novelty in the negotiation is clustering chapters (six clusters in total), which in relation to Serbia implies the grouping of already existing negotiating areas. The cluster on fundamentals (rule of law, economic criteria and public administration reform) will take a central role and sufficient progress will need to be achieved before other clusters can be open.

## 3. IMPACT OF THE ACCESSION PROCESS ON THE JUSTICE REFORM

Consequently, countries aspiring to the EU membership were obliged to implement judicial reforms to align judicial legislation and practice with the EU standards on independent, accessible and efficient judiciary. However, after almost two decades of the judicial reform in the Western Balkans countries, the EU is still reporting that these countries remain moderately prepared to apply the EU acquis and the European standards in the Chapter 23 area and that have made limited progress overall.[18] This is

[15] Communication from the Commission to the European Parliament and the Council, "Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0600&from=EN (date of access: 23.11.2021).
[16] *Ibid*.
[17] Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the regions, 2020 Communication on EU enlargement policy. Retrieved from: https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52020DC0660 (date of access: 23.11.2021).
[18] Montenegro 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

specifically worrying for Montenegro and Serbia, since these two countries were seen as frontrunners in the EU accession process.[19] Both, Serbia and Montenegro adopted three judicial reform strategies as a key policy documents that are defining framework and direction of reforms.

The assessment of the accession process impact on justice sector is focused on two Western Balkans countries that were recognized as frontrunners. Also, negotiation process on Chapter 23 has been opened in Montenegro since December 2013 and in Serbia since July 2016, which enable stronger influence on the reforms through Screening report, approval of Action plan for Chapter 23 and monitoring of its implementation.

*3.1 Impact on the Judiciary*

Key reforms included changes of the legislative framework and the introduction of new institutions and new judicial professions. Adoption of new Constitution or amendments to the Constitution were needed in all Western Balkan countries to guarantee independence of judiciary and removal of political influence over the process of appointment of judges and prosecutors. The Venice Commission is the main EU partner and the EU relies on their opinions in relation to independence of judiciary and legislative reforms. When it comes to the efficiency of the justice system, the EU is partnering with the Council of Europe Commission for the Efficiency of Justice (CEPEJ) that is active in setting indicators and standards for judicial efficiency and quality (Albers, 2008, pp. 9-25). However, all these efforts and reforms in candidate countries had limited and mixed results.

Although Serbia adopted a new Constitution in 2006,[20] which in many aspects meet European standards, further adjustments are required to align with the European standards. Many recommendations stipulated in the 2005 Venice Commission Opinion were adopted and implemented into the 2006 text.[21] However, the Venice Commission in its Opinion from 2007 underlined that there is still an overall impression of an excessive

2020 Communication on EU Enlargement Policy, Brussels, 2020; Serbia 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 2020; Bosnia and Herzegovina 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 2020; North Macedonia 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 2020; Albania 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 2020; Kosovo 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 2020.

[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Credible Enlargement Perspective for Enhanced EU Engagement with the Western Balkans, COM (2018) 65 final, p. 7. Retrieved from: https://ec.europa.eu/info/sites/default/files/communication-credible-enlargement-perspective-western-balkans_en.pdf (date of access: 23.11.2021).

[20] *The Official Gazette of the Republic of Serbia,* no. 98/2006.

[21] Venice Commission, Comments on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, CDL (2005) 072, Opinion No. 349/2005, 4 October 2005. Retrieved from: https://www.venice.coe.int/webforms/documents/?pdf=CDL(2005)072-e (date of access: 23.11.2021).

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influence of parliament on the judiciary.[22] To ensure direction and systemic approach to the reforms, several policy documents on judiciary were adopted and implemented with the mixed results. The first National Judicial Reform Strategy covered the period 2006 - 2011. Under this policy document, a legal and institutional framework for the judiciary was established, as well as the process of significant reorganization of court network and re–appointment of judges and public prosecutors in 2009 (Rakić Vodinelić, Knežević Bojović and Reljanović, 2012) which was carried out in an unconstitutional manner (International Commission of Jurists, 2016, p. 5). The High Judicial Council and State Prosecutorial Councils were established in 2009 with the aim to guarantee independence and autonomy of judiciary. However, some key issues had not been resolved. The full transfer of competencies to the Councils had never happened and as a result governance over the judicial system is split between the Ministry of Justice and the Councils,[23] which in some segments have impact on independence of judiciary (i.e. financial independence, management of human resources). In addition, the capacities of the Administrative offices of the Councils are lacking analytic staff that could support policy development and implementation of reform activities.

The second wave of reforms in Serbia are framed by the National Judicial Reform Strategy for period 2013-2018. The aim of the reform was to increase the quality of justice, efficiency, effectivity and independence. The new court network was established in January 2014[24] to enable a reduction of the case backlog, and to provide more equitable case distribution. During the implementation of the 2013 Strategy, a new judicial professions were introduced (notaries and bailiffs) and transfer of some of the court's competencies to the new professions; transparency of the judicial system increased, through the publishing of the HJC and the SPC decisions, and development courts and public prosecutor offices (PPOs) websites. In addition, numerous services for citizens were established to improve access to justice, including the e-Justice portal and free legal aid system.[25] In the area of independence of judiciary, the Councils had challenges in establishing mechanisms for the protection of judges and prosecutors against undue influences. Only in 2017, the State Prosecutorial Council introduced Commissioner for autonomy which was recognized by the European Commission as an elaborated mechanism to react in cases of undue influence on the work of public prosecutors and deputy public prosecutors (European Commission, 2020, p. 21). However, after expiration of mandate of the first Commissioner, the new was not appointed, which raise consideration for sustainability of the mechanism. The HJC was also oriented towards the establishment of the ethical boards as permanent bodies that should protect independence of judges, however, the Ethical board reaction in cases of undue influences was limited (European Commission, 2018b, p. 14).

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[22] Venice Commission, Opinion No. 405/2006, Opinion on the Constitution of Serbia, 19 March 2007, para. 60. Retrieved from: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e (date of access: 23.11.2021).

[23] Serbian Judicial Functional Review 2014. Washington: World Bank. Retrieved from: https://www.mdtfjss.org.rs/archive//file/Serbia%20Judicial%20Functional%20Review-Full%20Report.pdf (date of access: 23.11.2021); and Functional Review of the Prosecution System in Serbia (2019). Washington: World Bank. Retrieved from: https://www.mdtfjss.org.rs/archive/file/SRB%20Prosecution%20FR%20December%202018.pdf (date of access: 23.11.2021).

[24] *The Official Gazette of the Republic of Serbia*, no. 101/2013.

[25] USAID (2018). Rule of Law Project. Assessment of the Implementation of the National Judicial Reform Strategy 2013-2018, 1 November 2018 pp. 5-6. Retrieved from: https://en.rolps.org/public/documents/upload/Assessment%20of%20the%20NJRS%20Implementation,%20short%20version,%20ENG,%20final,%2001112018.pdf (date of access: 23.11.2021).

A range of legal safeguards were introduced during previous years to protect the independence of the judiciary, but reforms to remove vestiges of dependence have been delayed, since the Constitutional reform has been put on hold due to the lack of social consensus. Among other changes, draft Constitutional amendments which have been proposed would remove the Assembly's approval of judicial appointments.[26] Challenges in practice, like exercise of undue influence and public comments by government officials on investigations and ongoing court proceedings impacted Serbia ranking on world indices (European Commission, 2018b, p. 14). The 2019 World Economic Forum's Global Competitiveness Report[27] ranked Serbia's judiciary 101st out of 141 countries for judicial independence. Serbia fell behind all EU countries except Croatia and Poland. The results are similar in the 2019 Bertelsmann Transformation Rule of Law Index,[28] in which Serbia ranked below all the countries of the EU11: its score for Serbia's judicial independence was 6.0 out of 10 in 2014 and remained unchanged from 2009.[29]

A similar impact of the reforms and EU accession process as a key driver could be noticed in Montenegro. Reforms started with the amendments to the Constitution in 2013. After XVI constitutional amendments, most of them related to the judiciary, a rationalization of parts of the judicial network was conducted from 2013 to 2015, alongside the introduction of the Prosecutorial Council in 2013. Montenegro's Parliament adopted its second Strategy for the Reform of the Judiciary in April 2014,[30] and the same year private bailiffs were introduced as a new judicial profession that should contribute to the improvement of efficiency of the judiciary. In 2015 the Center for Training in Judiciary and State Prosecution was established as an autonomous body, while the new system for a judicial appointment was introduced in October 2016. Despite numerous legislative changes, the application of the law in practice remains a concern. The decision of Judicial Council to re-appoint the President of the Supreme Court for the third mandate and six presidents of the basic court for another term, despite article 124 of the Constitution that stipulates that "*the same person may be elected the president of the Supreme Court no more than two times*" was a major judicial issue in 2020. However, it presents only the culmination of the malpractice and lack of integrity demonstrated by the Judicial Council and other judicial stakeholders thought the last decade. The Council of Europe Group of States against Corruption (GRECO) has already recommended abolishing the ex-officio participation of the Minister of Justice in the Council, by providing for no less than half of the Council's membership to be composed of judges who are elected by their peers and by ensuring that the presiding function is given to one of those

[26] Venice Commission, Opinion No. 921/2018, Opinion on the draft amendments to the constitutional provisions on the judiciary, 25 June 2018.
Retrieved from: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)011-e (date of access: 23.11.2021.).

[27] The Global Competitiveness Report 2019 assesses the competitiveness landscape of 148 economies via over 15,000 Executive Opinion surveys with 15,000. Its definition of independence includes influences on judicial decision-making from members of government and firms. Retrieved from: https://reports.weforum.org/global-competitiveness-report-2018/ (date of access: 23.11.2021).

[28] The Bertelsmann Stiftung's Transformation Index (BTI) analyses and evaluates the quality of democracy, a market economy and political management in 137 developing and transition countries. It measures successes and setbacks on the path toward a democracy based on the rule of law and a socially responsible market economy. For more details see BTI: Transformation Index. Methodology. Available at: https://www.bti-project.org/en/methodology.html#country-selection (date of access: 23.11.2021).

[29] The lowest score in the EU11 is Hungary's, which scored 7.0. Estonia and Lithuania received top marks of 10.

[30] First Judicial Reform Strategy was adopted for period 2007-2012.

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judicial members.[31] Despite GRECO recommendations, the independence of the Judicial Council remains questionable since the composition of the Council is still not in line with EU criteria for ensuring independence. The fact that the Minister of Justice and the President of the Supreme Court are still *ex officio* members, is the primary concern that makes Judicial Council prone to political influence. In addition to that, another jeopardy presents the fact that four of the eight were judges elected by their peers, while the remaining four were elected from among distinguished lawyers by a qualified majority of the Parliament.

Many recommendations of Consultative Council of European Judges (CCJE), and GRECO are still not implemented and since Judicial Council remains the main internal stakeholder, there is no doubt that it is the most accountable and that affairs surrounding it alongside reluctance to engage in more profound judicial reforms had a great impact on the perception primarily by citizens. The case-law of the European Court of Human rights acknowledges that a judicial council may have a mixed composition of judges and non-judges, but only if most of its members are judges elected by their peers, which was not the case in Montenegro. The CCJE and GRECO also recommend that the chair of the Judicial Council be a judge, but in Montenegro, the chair had to be one of its non-judge members. Moreover, the fact that the Minister of Justice is one of the Council's ex officio members could lead to the placement of undue political pressure on the other Council members. Contrary to CCJE and GRECO's recommendations that the chair of the Judicial Council should be a judge, Montenegro's current constitutional arrangements stipulate that the chair of the Judicial Council will be elected from among its non-judge members, which also posed a risk for the politicization of this important judicial governance body.

However, a number of challenges remained at the time, specifically in the area of judicial independence and efficiency of the judiciary. In particular, challenges related to balancing the process of electing judges and public prosecutors in order to strike an adequate balance between independence and accountability, including specific challenges such as the immunity of judicial officials and the reduction of large backlogs. In addition, enforcement of court decisions is still a challenge in both Serbia and Montenegro.

Although authorities in Western Balkan countries were putting efforts to strengthen rules on the appointment of judges and court' presidents, effective implementation is lacking. In Montenegro on January 1st, 2016, provisions of the Law on Judicial Council and judges regulating the appointment procedure came into force. It provided regulation regarding terms and procedure for the election of judges and presidents of courts, Plan of vacant positions, promotion and appraisal. The Judicial Council implemented for the first time the procedure concerning the appointment of judges and presidents of courts through the adoption of the plan of vacant positions for judges and by establishing a committee that participates in the election process, and by having internal and public announcements of vacancies. In the first elections of judges according to the unique list of candidates in October 2016, in the election of 3 candidates

[31] In addition to this recommendation, GRECO report also mentioned: establishing objective and measurable selection criteria for non-judicial members which would endorse their professional qualities and impartiality; and setting in place operational arrangements to avoid an over-concentration of powers in the same hands concerning the different functions to be performed by members of the Judicial Council, see GRECO (2019).

Judicial Council, without any explanation, did not apply Plan of vacant positions adopted in 2015.[32]

In Serbia to improve the efficiency of the judiciary, a number of procedural laws were amended, such as Criminal Procedure Code, Civil Procedure Law, Bankruptcy Law, Law on General Administrative Procedure, Law on Non–Contentious Proceedings. Amendments to the law on enforcement and security of July 2019,[33] which entered into force in January 2020, transferred additional types of enforcement cases from courts to public enforcement agents. However, a new appeal system to better protect individual debtors and strengthen court control over public enforcement agents was introduced but was not followed by additional human resources in courts. Although this reform led to a reduction of old cases (in 2018 in total 311,018 old cases were resolved out of which 140,452 were enforcement cases, and in 2019 in total 214,234 cases were resolved, out of which 112,473 were enforcement cases), there are still some 252,210 cases in basic courts and 1,184 in second instance courts older than 10 years, mostly dealing with civil matters (European Commission, 2020, p. 23). Timeliness of case processing, measured via the CEPEJ disposition time indicator, significantly improved nationally although individual court types reported mixed results. The total disposition time of all Serbian courts astoundingly decreased from 580 days in 2014 to 267 days in 2019. In 2016, it reduced temporarily even more, to 253 days, due to the reductions in enforcement backlogs triggered by the transfer of large number of the cases from the courts to private enforcement bailiffs. Although timeliness increased overall, the highest disposition time per court type in Serbia in 2019 was 20 times greater than the lowest.[34] The total congestion ratio of courts in Serbia improved considerably and dropped to 0.73 in 2019, but the court system was not handling its pending stock as efficiently as it could have. As a consequence of mixed reform results the European Commission 2020 Report on Serbia recognized there had been advances in efficiency and backlog reduction but warned of the high number of pending backlog cases and significant differences in workloads across the country (European Commission, 2020).

Montenegro judiciary put a lot of effort into the period between 2013 and 2018 to address the issue of the backlog and judicial efficiency. There was given the legal possibility of the temporary transfer of judges to another court was used as well as the delegation of cases and overtime,[35] including the adoption of Law on Courts.[36] However, the Law on the Protection of the Right to Trial within a Reasonable Time that was adopted to improve efficiency demonstrated a number of deficiencies.[37] Compared to the Council of Europe average duration of cases, the Montenegro judiciary stands well. In CEPEJ report 2020 (2018 data), disposition time in civil and commercial litigious cases at first

[32] Human Rights Action and Monitoring and Research Center (2017). Report on implementation of Judicial Reform Strategy 2014-2016, Podgorica: HRA Montenegro, CEMI. Retrieved from: https://cemi.org.me/wp-content/uploads/2017/04/IZVJE%C5%A0TAJ-O-REALIZACIJI-STRATEGIJE-REFORME-PRAVOSU%C4%90A-2014-2016.pdf (date of access: 23.11.2021).

[33] *The Official Gazette of the Republic of Serbia*, no. 54/2019.

[34] Supreme Court of Cassation, Annual report: the highest disposition time in 2019 per court type was reported by the Administrative Court with 665 days (an improvement from 2018 but still roughly 100 to 200 days higher than from 2014 to 2017); the lowest was reported by the Appellate Misdemeanour Court at 34 days.

[35] Strategy for the Reform of the Judiciary 2019-2022, Montenegro Ministry of Justice, Podgorica. Retrieved from: https://www.gov.me/dokumenta/deb3e3ae-7b6a-4963-9b3e-b5892118c8c8 (date of access: 23.11.2021.).

[36] Law on Courts, *Official Gazette*, no. 11/2015, 76/2020.

[37] Vebsajt RTCG (2019). ZAKON O ZAŠTITI PRAVA NA SUĐENjE U RAZUMNOM ROKU: Neophodno unapređenje Zakona jer ne daje potrebne rezultate. In: *Paragraf Lex MNE*. Retrieved from: https://www.paragraf.me/dnevne-vijesti/20112019/20112019-vijest2.html (date of access: 23.11.2021).

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instance in Montenegro was 229 days, with the European average being 233. Furthermore, the disposition time of first instance criminal cases in Montenegro was 199, while the European average was 199 (European Commission for the Efficiency of Justice, 2020). While the average duration of the case is not long, the amplitudes in durations are substantial, which is confirmed in the ECtHR decisions. Montenegrin judicial system struggles to comply fully with ECHR requirements of the right to a fair trial within a reasonable time and in 2020 only, 8 out of 10 judgments of ECtHR determined the violation of the right to a fair trial within a reasonable time. On top of that, out of 120 complaints Judicial Council received during 2020, a significant part of the referred to the long duration of the procedure.[38]

*3.2 Impact on Anti-corruption*

Despite numerous anti-corruption initiatives and some improvements in the normative and institutional frameworks, prevention of judicial corruption and impunity remained an issue of concern in Serbia. There still was no effective coordination mechanism in place for the prevention of and reduction or elimination of corruption. In October 2020 the GRECO found that since 2015, Serbia had satisfactorily implemented only two of GRECO's 13 recommendations regarding "Corruption prevention in respect of members of parliament, judges and prosecutors,"[39] which led to the evaluation of the situation as 'globally unsatisfactory'."[40]

Although the fight against corruption was among the Government priorities over the last decade, the corruption remains the area of concern according to Serbia ranking in international indices and European Commission Reports on Serbia (European Commission, 2020, p. 6). Serbia ranked 94 out of 180 countries in the 2020 corruption perception index, while it was 91 in 2019 and 87 in 2018.[41] Also, according to the 2020 USAID Citizens' Perceptions of Anti-corruption Efforts in Serbia, 54% of the respondents believe that corruption is greatly and extremely widespread in Serbia,[42] while 44% have a perception that corruption exists in judiciary.[43] While 57% of the respondents from Belgrade believe that corruption is present in judiciary to a large extent, 35% of the respondents from Central Serbia share the same view.[44] Also, 72% believe that the Public Prosecutors' Office is not at all committed to fighting corruption, and that corruption is present in this institution to a large extent.[45] In addition, roughly 10 percent of citizens reported they gave a gift, paid a bribe or did a favour for personnel in courts and

[38] The Supreme Court took some steps in order to assess reasons for the extensive duration of judicial proceedings in civil law matter. Two Analyses of court cases have been conducted in Pilot courts in Kotor and Podgorica. The focus was on the cases older than five years; however, the results of this analysis are not available, which presents the issue for a potential wider debate on this matter.

[39] Group of States against corruption (2020). GRECO's Fourth Evaluation Round, "*Corruption prevention in respect of members of parliament, judges and prosecutors*" Second Compliance Report, Strasbourg: Group of States against corruption and Council of Europe, para 80 and 86. Retrieved from: https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a07e4d
(date of access: 23.11.2021.).

[40] *Ibid.*

[41] Serbia shares this position with Brazil, Ethiopia, Kazakhstan, Peru, Sri Lanka, Suriname and Tanzania. For more details see Transparency International (2020).

[42] USAID (2020). Opinion Poll Report: Citizen's Perceptions of Anti-Corruption Efforts in Serbia 2020 (III Cycle), November 2020, p. 12. Retrieved from: https://www.odgovornavlast.rs/wp-content/uploads/2020/12/USAID-GAI-Citizens'-Perceptions-of-Anticorruption-Efforts-in-Serbia-2020-1.pdf (date of access: 23.11.2021).

[43] *Ibid.*, p. 29.

[44] *Ibid.*, p. 28.

[45] *Ibid.,* p. 29.

prosecution offices.[46] Among those, the majority said they offered a bribe to obtain faster service, while others wanted a service they were not entitled to, or sought to avoid responsibility for their actions.

In Montenegro lack of integrity, alongside lack of effective monitoring and accountability of the work of judicial professionals, are preventing Montenegro from improving rankings within the relevant international lists and indexes. At the Transparency international index list 2020, Montenegro is ranked 45th out of 180 countries for the fourth consecutive year. A significant drop in the WGI Index for the areas of Voice and Accountability and Control of Corruption was recorded from 2018 to 2019. This fall is rather insightful since the accountability of the members of the judiciary, primarily judges and prosecutors in conjunction with corruption presents substantial problems that Montenegro is struggling with for a long time.

The perception of corruption in the judicial system of Montenegro polarizes providers and users (World Bank Report, 2018, p. 95). On the one side, according to citizens, corruptive practices are present to a large extent while according to judges and prosecutors it seems it is a very rare phenomenon. It is striking that almost all providers of court services state that there is no corruption in the judiciary, while more than 60% of users and 29% of lawyers believe that corruption is present.

Several affairs regarding corruption and judiciary occurred during 2019 and 2020, especially the "envelope" affair and the affair of the free apartments given to some public officials. These and other similar high-profile cases should be taken with great caution since they influence heavily the citizens' perception. Conducting an appropriate investigation and, if necessary, trial, or failing to do so are indicated in the perception of the state of the judiciary and the fight against corruption in the country. For example, while the judicial outcome of the "envelope" affair occurred in 2021, the entire process demonstrated the essence of the mistrust in judicial independence in Montenegro (Tomović, 2021).

In relation to the accountability, the disciplinary systems for judges and prosecutors in Montenegro are complex and were not invoked often. Despite some improvement in the number of cases, track records on the enforcement of the codes of ethics and disciplinary accountability for judges and prosecutors remain poor.[47]

## 4. MEASURING PROGRESS IN THE RULE OF LAW AREA

One of the key preconditions for successful reforms in the justice sector and management of judiciary is existence of the robust evidence and analysis underpinning the design of reforms. Stakeholders are now interested if policies, programmes and projects led to desired outcomes and results (Kusek and Rist, 2004). It is widely accepted by all relevant stakeholders that for building results-based monitoring and evaluation systems and making necessary decisions in the process of justice reforming there should be necessary statistical data which would be strong ground for doing reforms in the right directions (Matić Bošković, 2017, pp. 77-92). Statistical data should be valid, verifiable, transparent and widely available to the government and interested stakeholders.

The European Commission in assessing progress in the judicial reforms relies on national judicial statistics on the countries aspiring to the EU membership. In addition, the EU develop its own tools to oversight progress and also used external sources such

[46] *Ibid.*

[47] Annual report of the Judicial Council on overall situation in judiciary for 2020, Montenegro Judicial Council, 2021.

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as opinions of the Venice Commissions on the Constitutions and relevant judicial laws, GRECO evaluation reports on anti-corruption efforts and judiciary (IV evaluation round), ranking in the international indices, such as rule of law index.

In the case of Bulgaria and Romania EU accession, the European Commission used the Cooperation and Verification mechanism, as *ex post* control after accession to the EU (Gateva, 2016, p. 83). Use of this mechanism represents the exception and requires extensive engagement of the European Commission. The Cooperation and Verification Mechanism progress reports on Romania took into consideration four main criteria: judicial independence and reform, integrity, high-level corruption and corruption at all levels. Each of these areas are finely and profoundly analysed and the reports present both positive and negative aspects. Recommendations are the most important elements of these CVM reports because they reflect the European Union conception on the rule of law. In the progress reports the European Commission was assessing practice and implementation of laws, including process of appointment of judges, successful prosecution and conviction for high level corruption cases. However, the experience with Romania showed that internal democratic backsliding cannot be counteracted by the Cooperation and Verification Mechanism (European Commission, 2018a, p. 1).

Experience with Bulgaria and Rumania in which significant shortcomings remain after accession to the EU, influence on the amendments of the Commission approach and introduction of approach that opening benchmark for Chapters 23 is adopted an Action plan that should provide the answer on recommendations from the Screening report and should lead to achievement of the interim benchmarks. This approach was applied in the accession process of Montenegro and Serbia.

The method of assessing progress is linked to the implementation of the Action plan for Chapter 23.[48] The Action plan for Chapter 23 for Serbia listed activities that are relevant for reform of judiciary in Serbia: amendments of Constitution to improve independence and accountability of judiciary, including selection, promotion and dismissal of judges and public prosecutors, appointment of court presidents and introduction of mechanism for prevention of political influences; role of National assembly in the appointment of members of the High Judicial Council and State Prosecutorial Council could be only declaratory and composition of the Councils should be pluralistic. Both, Montenegro and Serbia, established structures for implementation of the Action plan, but also for reporting on implementation. The Ministries of Justice in both countries were leading the process, while European Commission prepares bi-annual reports: Annual progress reports on progress (each April) and Non-papers on Chapters 23 and 24 (each November). However, the reports on implementation of the Action plan for Chapter 23 were activity based and the Commission got into the situation that Serbian reports on implementation showed that more than 70 percent of the activities related to the judiciary were implemented and additional 10 percent are partially implemented,[49] while the European Commission annual reports on Serbia are recognizing only moderate or no progress.

These tools used in Serbia and Montenegro showed weaknesses in measuring impact, especially in relation to achievements of interim benchmarks. To overcome these challenges and to enable measuring of reforms impact the European Commission developed additional tools such as Regional Justice Survey and Justice Dashboard

[48] Action plan for Chapter 23. Retrieved from: https://www.mpravde.gov.rs/tekst/9849/finalna-verzija-akcionog-plana-za-pregovaranje-poglavlja-23-koja-je-usaglasena-sa-poslednjim-preporukama-i-potvrdjena-od-strane-evropske-komisije-u-briselu-.php (date of access: 23.11.2021).

[49] Statistical report on implementation of the Action plan for Chapter 23, July 2018. Retrieved from: https://www.mpravde.gov.rs/files/Statistical%20report%20on%20implem%20entation%20of%20AP%20for%20CH%2023.pdf (date of access: 23.11.2021).

(Council of the EU, 2021). The Regional Justice Survey is implemented for the first time in Western Balkans countries in 2020 with the aim to set-up a baseline against which the progress will be measured regularly. The Regional Justice Survey is based on an analysis of the perceptions and experiences of citizens, businesses and lawyers and service providers (judges, prosecutors and court staff). The comprehensive survey methodology will enable measuring of impact of the judicial reforms in the area of efficiency, quality, independence and integrity. Justice Dashboard will complement the surveys by providing reliable statistics and analysis of justice data.

## 5. THE NEW ENLARGEMENT STRATEGY AND THE RULE OF LAW

Given the challenges facing countries aspiring to EU membership, as well as the long-term nature of reforms, the chapter on justice, fundamental rights, the rule of law, freedom and security, this should be addressed at an early stage of the negotiations to enable that countries have sufficient time to establish adequate legislation, institutions and prove compliance with the criteria before closing negotiations. The new approach introduced the possibility of applying corrective measures during the negotiation process, in order to ensure balance in all chapters. This approach provided greater transparency and inclusiveness in the negotiations and the reform process, while encouraging stakeholder consultation to ensure support in their implementation. The new approach emphasizes that strengthening the rule of law and public administration are the basis for approaching the EU and eventual full membership. The Commission is of the opinion that strengthening the rule of law and democratic administration are crucial for the enlargement process, and that the fulfilment of conditions in the area of justice, freedoms and security of the rule of law, including the fight against organized crime and corruption, will be assessed at an early stage. Negotiation process on Chapters 23 and 24 should be closed only at the end of the process to enable the countries aspiring to EU membership to adopt adequate regulations and improve the work of institutions at the national level within a reasonable period of time with dialogue and financial support provided by the EU from IPA funds.

The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the Accession Process – A Credible EU Perspective for the Western Balkans from 5 February 2020 proposed revised enlargement methodology. The new methodology should make the process of accession to the European Union more credible, predictable, dynamic, and politically driven as opposed to what was previously considered a "technocratic" process of meeting certain EU technical requirements and standards. Candidates are now required to be credible in terms of their sincere commitment to the fight against corruption, respect for rule of law, ensuring the proper functioning of democratic institutions and public administration, harmonisation with EU common foreign policy instruments, and strengthening regional cooperation and good neighbourly relations. The new methodology also mentions the possibilities of suspending negotiations, rewarding successful candidates, and sanctioning those who do not progress at the expected pace. The largest change introduced by the new methodology is grouping negotiating chapters into six clusters. The essence of this new approach is that key sectors to address the EU accession process should be more strongly emphasised instead of individual chapters, thus establishing a framework for political dialogue and the engagement of political leaders. The first cluster is the most important and deals with the "Fundamentals", which include criteria regarding rule of law, public administration reform, and the economic criteria. This cluster will have a special

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role in the further course of accession negotiations because the overall course of negotiations will depend on the fulfilment of the obligations undertaken in this cluster (Ćemalović, 2020, pp. 281-298).

New methodology was open for Serbia and Montenegro to accept it, while it is obligatory for Albania and North Macedonia. After Serbia and Montenegro accepted a new enlargement methodology, the Council agreed on the application of the revised enlargement methodology to the accession negotiations with Montenegro and Serbia (European Council, 2021). The main advantage of the new methodology is a possibility of the European Commission or member states to request suspension of negotiations if candidate country does not fulfil its obligation in time. While the suspension of negotiations was also included as an option in the old methodology, the way of reaching decisions on suspension is now simplified and based on the decision of the so-called "reverse qualified majority". Another change is that the eventual reopening of this cluster will be more complicated and time-consuming as compared to the existing practice. Simplification of suspension of negotiations should become powerful tool in the EU accession process and implementation of difficult reforms such as those in the rule of law area.

## 6. CONCLUSION

Given the experience of the European Union in the accession process of Romania and Bulgaria, it can be concluded that a new approach for the countries of the Western Balkans was expected. Fulfilment of the rule of law criteria requires, above all, the existence of a satisfactory political dialogue at the national level and an adequate level of engagement of political leaders. The absence of the above was noticed in Romania, where, after many years of efforts, the results achieved in the area of the rule of law the backsliding have been noticed. When it comes to Serbia and Montenegro, it can be concluded that insufficient progress has been made in the area of judicial reform and anti-corruption. Therefore, additional efforts are needed in these areas. A special problem in the Republic of Serbia is the difference in the data presented in the national reports on implementation of the Action plan for Chapter 23 which are activity based compared to the impact assessments in the European Commission reports. Until the adoption of the new methodology of the European Union, such a practice was possible because the previous tools for measuring the level of reforms in the field of justice were inadequate. Research shows that there is a high degree of citizens' distrust in the work of judicial institutions both in Serbia and Montenegro. Therefore, it seems that the introduction of new tools for measuring the fulfilment of criteria in the field of rule of law is of great importance.

An adequate assessment of progress should be contributed by a regional survey based on an analysis of the perceptions and experiences of citizens, businesses, lawyers, service providers and judges, prosecutors and judicial staff. Only in this way is it possible to measure the impact of judicial reforms on efficiency, independence and integrity. In addition to the above, the use of a judicial dashboard is envisaged, which should complement the mentioned surveys by providing reliable statistics and analysis of judicial data.

If we look at the experiences of Romania and Bulgaria, it can be concluded that the process of meeting the criteria and standards of the European Union in the field of rule of law is a long process. Therefore, the approach contained in the new methodology seems justified. The opening of chapters on justice, fundamental rights, rule of law, freedom and security at an early stage should enable not only the harmonization of

legislation, but also the work and coordination of institutions and proving the fulfilment of criteria. The adoption of a new methodology for grouping negotiation chapters into six areas (clusters) enables the establishment of a framework for political dialogue and a way of engaging political leaders. However, the new approach contains stricter measures. They are reflected in the simplification of the decision to suspend negotiations, while the reopening process is more complex and time-consuming. It should therefore be borne in mind that this is a great responsibility of the countries in the process of negotiating for EU accession, especially having in mind that the negotiation processes started according to a different methodology. Despite the challenges, it should be stressed that EU accession is not only a territorial enlargement, but also implies acceptance of its acquis at the level of candidate countries.

It can be concluded that based on the research applied in this paper, we confirmed the initial assumptions. The new methodology will certainly improve the measurability of the results achieved in the area of rule of law. Although, the new stricter approach might slow down the accession process, Serbia and Montenegro should make the necessary efforts in a timely manner so that new activities do not undermine the previously achieved progress in the rule of law.

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# MARITIME CONCESSIONS IN ITALY: THE NEW PERSPECTIVE AFTER THE TWIN RULINGS OF THE COUNCIL OF STATE / Raffaele Caroccia

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Abstract: *The paper deals with the treatment – both legislative and judicial – of maritime concessions in Italy. It first analyses legal provisions regarding the term of duration of such concessions and then focuses on some recent sentences. The first of them could have made stronger the conflict between the Italian legal environment and the EU one, as the legislative automatic prorogation of concessions was deemed to be legitimate. Luckily, further rulings stated that this legislative statute is not in line with the EU law and so has to be non-applied. The Council of State solved the question very recently: not only Italian legal discipline was sentenced not to be in line with the EU law, but also some guidelines were given to step out the impasse. Judicial review so proved out to be once again the key element to grant rule of law, even when relationships between different legal environments are concerned.*

Key words: *Maritime concessions; non-application; freedom of establishment; judicial review; Italian law.*

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## 1. INTRODUCTION

The brief contribution hereafter presented will concern a topic that has been occupying both the legislator and the Italian administrative judge for about a decade. It concerns maritime public concessions for tourism purposes and constitutes a point of potential conflict with European law.

In particular, the Italian legislator has taken care to grant extensions to beneficiaries from time to time. This favourable choice was prompted by the importance of the balneator's lobby, by the importance of the tourism sector in the Italian economy and by the fact that the original long duration of the concessions had led to the construction of irremovable structures with major investments.

The topic has taken on particular importance in the last year: the crisis linked to COVID has in fact particularly affected the tourism sector and the legislator has, as a consequence, introduced protection measures for the latter. However, the emergency provisions were immediately questioned as deemed not to be in line with the provisions of EU law.

The topic of compatibility of current legislation with EU law had already been addressed by national jurisprudence not in a unique way, until in November, a twin pronunciation of the Council of State intervened.

These rulings have clarified the picture and given both to the legislator and to single Administrations important guidelines on how to apply freedom of establishment principle.

## 2. LEGISLATIVE ORIGINAL PICTURE AND ITS EVOLUTION TILL BEFORE COVID CRISIS

But let's try to go in order.

The discipline of the matter is found in the so-called Navigation Code, which dates back to 1942.[1]

It provides that the Administration can attribute to an operator the exclusive use of public property maritime areas for a set period of time. The discipline provides that, at least in the case of several requests relating to the same portion of the territory, a competitive comparison must be carried out. The provisions on the subject are rather sparse and very old fashioned.

Scholars have, for this reason, never particularly deepened them (for example, Agusto, 2020; Armenante, 2020; Benetazzo, 2016; Giannelli, 2017; Magri, 2016).

In the 90s, a right of insistence was introduced in favour of the concessionaire: in the event of renewal of the concession even by tender, the outgoing concessionaire would have been preferred. An automatic mechanism for the renewal of concessions for 6 years was then introduced in 2001. As a result, the European Commission launched an infringement procedure against Italy.

The right of insistence was therefore abolished.

A new infringement procedure also led to the abrogation of the "theoretical" automatic renewal criterion, which took place in 2011. At the same time, a commitment was agreed with the EU institutions to bring the Italian legislation into line with the European one.

However, a temporary dual regime was already in place since 2009. For the new concessions, the obligation to tender was introduced. Instead, for the existing concessions, the following provisions were envisaged:

a) a renewal of the overall discipline (never occurred), which should have taken into account both the principle of free competition and the legitimate expectations of the concessionaires also in relation to the investments made;
b) an extension until 31.12.2012.

This date was then extended to 31.12.2015 and then to 31.12.2020.

The Court of Justice ruled on this dual regime introduced in 2009 with the Promoimpresa and Melis rulings of 2016.[2] With them, the intervention of the Italian legislator was not deemed legitimate because it violated the freedom of establishment principle.

In particular, the automatic extension was considered equivalent to renewal without a tender. Particular importance in the two decisions was given to the freedom of establishment principle and the Bolkestein Directive. The object of the ruling was the part of the Directive (art. 12), which requires the start of competitive procedures in the event

[1] Royal Decree n. 327/1942, in particular articles 36 and 37.
[2] All rulings of the ECJ can be found on the following site: www.curia.europa.eu.

that the scarcity of natural resources allows a maximum number of authorizations available for a certain activity. This element should have been assessed at the national level, but (not surprisingly) no reflections have been made on this point.

It should be noted that, if it is true that the Navigation Code does not provide for anything in relation to competition, but this is not surprising given the political context in which it was promulgated, unfortunately the Republic legislator was even more deaf to the principles of European law.

The two ECJ decisions considered that an automatic renew was possible only if the concessionaire could legitimately have expected the renewal itself and, for this reason, had made new investments that were not amortized. However, this expectation can only be protected if it arose at a time when the principle that public concessions should have been arranged only by tender was not affirmed.

The Italian Parliament completely ignored the two sentences and in 2016 extended the duration of the concessions to 31.12.2020 and then from 2018 to 2033. So the legislative discipline is completely detached from the principle of competition.

## 3. JURISDICTIONAL STATE OF ART TILL BEFORE COVID CRISIS

The Council of State also acknowledged this in 2019 with sent. n. 7874/19,[3] in which the extension regime was disregarded. This is because it was considered that the various extensions were all vitiated in a derivative way because of contrast with European law since they all contain an automatic extension regime. The reason is that it has already been declared contrary to European law by the Court of Justice.

In particular, it was then considered that a tender would still be necessary also because the portion of the maritime public property subject to concession gives its owner an important (it should be noted) opportunity of economic advantage. Precisely for this reason and without necessary reference to supranational law it would still be necessary – in the application of national law alone, which provides for the principles of transparency and non-discrimination – the experiment of a competitive confrontation.

Consequently, the outgoing holder of the concession does not have any legally relevant interest in the renewal of it, but has a mere factual interest not protected by the legal system. This is also because the prevalence of the rotation principle over the preference of the outgoing beneficiary has been affirmed and in order to avoid position rents.

The Council of State has decided that the act contrary to the European law is not void, but can be voidable. Whoever intends to contest it must act within 60 days from its knowledge.

In an *obiter dictum*, the administrative judge also recalled that the obligation of disregard should lie not only with national judges, but also with all state bodies. So much in application of another principle constantly expressed by the Court of Justice (C-103/88 Fratelli di Costanzo). In this case, therefore, each individual civil servant should disregard national law. Unfortunately, this statement has remained mostly on a theoretical level.

Finally, the Council of State held that the deadline within which a legitimate expectation could mature was that of transposition of the Bolkestein Directive (December 2009). After that date, it is not possible to have legitimate expectations, given that the aforementioned directive has as its focal point the promotion of the freedom of establishment through tender procedures.

[3] All rulings of administrative judges can be found at the following site: www.giustizia-amministrativa.it.

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## 4. LEGISLATIVE INTERVENTION AFTER THE COVID CRISIS AND ITS APPLICATION BY LOCAL ADMINISTRATIVE BODIES

The Italian legislator, however, has continued in its intent to favour concessionaires. In fact, the temporariness of this exceptional regime has even become permanent or - better said - without an end, as a result of the pandemic emergency.

In fact, in May 2020 a further forecast was introduced by law decree n. 34/2020. It confirmed the extension of the concessions until 2033 and prohibited the initiation of new competitive assignment procedures. The provision does not have an express term, a profile that certainly violates the Bolkestein Directive and its transposition in Italy (Legislative Decree 59/10). However, it is thought that it must be linked to the conclusion of the health emergency. Unfortunately, the legislator's decision was in fact another opportunity to block the start of competition in the sector.

The individual Italian administrations are moving in no particular order, despite the alarms and initiatives of the Competition Authority.

In Italy, the competence over public property maritime areas is identified in relation to the ownership of the area itself, which can be municipal, provincial or national. This increases the confusion.

There are only a few fixed points.

The extension should be the result of an express administrative provision and is not tacit or automatic. The measure, however, would not have constitutive effects, but only recognize an effect deriving from the law according to what was established by the Council of State with the sentence already mentioned. It is obvious, however, that public officials do everything to avoid adopting an illegitimate act in contrast with the European legal system. Consequently, in most cases, the adoption of an act is avoided.

This circumstance led to the initiation of some criminal proceedings against both employees and entrepreneurs, which also resulted in seizures of the areas. The trials are still under investigation, so no decisions on the merits have yet been recorded. Instead, the Supreme Court has already confirmed the legitimacy of the seizures.

In the event that an act is adopted, this almost inevitably involves the initiation of a legal administrative dispute. In fact, a new season of trials on the subject began in October 2020.

Another certain element is that the procedures are not subject to the European regulation envisaged for public contracts; consequently, the few selective procedures have a much leaner and non-overlapping discipline. Lastly, this circumstance was underlined by sentence no. 7837/20 of December 2020 of the Council of State.

The last clear aspect is that Administration bodies retain control powers over the use of the property.

## 5. JURISDICTIONAL PICTURE AFTER COVID CRISIS

It is now appropriate to face the most significant decisions, the framework of which is at least varied.

We will focus on both first- and second-degree judgments of the administrative judge and on a decision of the Constitutional Court. The exam will be carried out in a diachronic way.

The first sentence to be examined is n. 1322/20 of TAR (Regional Administrative Tribunal) Lecce of November 2020. This is an important decision for two reasons.

It is completely distant from the prevailing jurisprudence and comes from a “sensitive” judge, whose territorial context of competence is characterized by the

presence of numerous operators in the tourism sector. It states that the denial on an extension to 2033, opposed by a municipality to a concessionaire, is illegitimate.

This is on the assumption that in the context of the sources of law:

a. Bolkestein Directive is not self-executing;

b. the rulings of the European Court could not ascertain the repeal of national laws in contrast with EU law, but only the non-application;

c. ECJ decisions would not always be sources of law, but only integrative criteria of interpretation. On this assumption, it is believed that the 2016 decisions would be sources of law, but not other (surprisingly not cited) decisions, that would require all branches of a Member State not to act in contrast with EU law.

Consequently, the P.A. should legally apply the state law about term extension, even if in conflict with the European one.

The decision aroused alarm among scholars and criticism from the general public because it could indicate a favour with respect to concessionaires no longer only in the legislative but also in the judiciary sector.

There was a fairly strong reaction, which led the subsequent jurisprudence to an immediate withdrawal.

The first expression of this new orientation is a sentence no. 10/21 of January 2021 of the Constitutional Court[4]. The decision concerns a regional law (Calabria), which provided for a general extension of public concessions without a final term.

The Court brings the question back - to avoid triggering a too sharp a contrast - to the different legislative powers recognized to the State and Regions.

The discipline of concessions is brought back to the competence of the State and it is also stressed the necessary respect of the European competition principles, from which Regions cannot depart.

The Calabria provision is therefore declared illegitimate because it constitutes an attempt to award concessions without respecting these criteria. The highest Italian judge held that - in application of the principles deriving from the Treaties and expressed by the European Court - an extension of the concession is not possible and that the same must be assigned after a competitive comparison.

The authoritative voice of the Constitutional Court has extinguished in the cradle the subversive attempts of other judges. In fact, subsequent decisions disavowed the reasoning presented by Lecce TAR.

The first judgment to be aligned with the principle expressed by the Constitutional Court is judgment n. 616/21 of Rome TAR of January 2021. This time, the direct applicability in the Italian legal system of all the decisions of the European Court was expressly established. Consequently, the Italian State must comply with the provisions of the Bolkestein Directive in the allocation of public areas - scarce assets for which a title is required - and, therefore, carry out a tender.

The automatic renewal mechanism was not found to be legitimate.

Even Salerno TAR has aligned itself with sentence no. 221/21 of February. It is of particular interest that the decision indicated that the extension to 2033 is also subject to an obligation of non-application. Obviously, the legislator did not take any inspiration from this ruling.

The Council of State with the decision no. 1416/21 of February reaffirmed the need for a tender, which must be based on the criteria of publicity and transparency in order to avoid the creation of position rents in favour of some operators. In this case, it

[4] It can be read at the following site: www.cortecostituzionale.it. Constitutional judges have confirmed their view in decision no. 139/21.

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has been highlighted that European law has a primary rank, has direct effect and is directly applicable in particular reference with the Bolkenstein directive.

The last decision that deserves to be mentioned is the 363/21 of Florence Regional Administrative Court of last March. The sentence was pronounced on the initiative of the Competition Authority, an administrative Authority that has also the power to initiate judgments against administrative acts damaging to competition. The judgment concerns a general extension of the duration of the concessions in the Municipality of Piombino. The ruling affirms the need to disregard all Italian rules on the extension of concessions. It then goes on to affirm the nature of scarce assets of state-owned areas and the need therefore to start competitive procedures for their assignment, which can only take place with an administrative act due to the characteristic of the property. It points out that the Bolkestein Directive brings about exhaustive harmonization and that the dispute would still be subject to the principle of free movement of services deriving directly from the Treaty due to the certain cross-border interest given the notoriety of the areas.

## 6. THE TWIN RULINGS BY THE COUNCIL OF STATE

The question concerning the legitimacy of a legislative extension of the duration of public maritime concessions until 2033 and the substantial prolongation of the existing assignments without competition found a definitive solution with two articulated decisions of the Council of State in Plenary composition (see Bello, 2021).

These are the twin judgments no. 17 and 18 of 9 November 2021; they were pronounced after the President of the Administrative Appeal Judge himself had raised the problem *ex officio* and requested the maximum composition of the Council of State to intervene on the issue, deemed to be of particular social and economic importance and in order to guarantee a uniformity of discipline on the national territory, after the "escapes" from competition perpetrated by the TAR of Lecce (see Dipace, 2021 for further analysis of the act).

The Italian Administrative judge therefore assumed the role of being responsible for the correct implementation of the EU law and of making up for the absences of the legislator, who proved to be sensitive more than to the reasons of right to the influence of the balneators lobby.

As a result, the Council of State has given guidelines not only to the legislator, but also to individual administrations on how to overcome the *impasse* in which the Italian legal system languishes.

In particular, on this point, it was specified that:

a) the existing concessions will cease to be effective from January 2023;
b) the legislator will no longer be able to extend their duration, and any act of such kind must be disregarded as in contrast with the EU law;
c) the individual administrations will have to carry out selective calls for new assignments, with respect to which the Plenary Assembly has indicated possible *criteria* related to environmental protection, the maintenance of existing employment levels and the enhancement of experience in the sector.

This result was reached through a very articulated argumentative path.

In the first instance, the effectiveness of what was decided by the ECJ in the Promoimpresa ruling was stressed.

This decision is considered to be a clear source of law, so much so that in order to resolve the questions, it is not considered necessary to make a preliminary reference to the Luxembourg Court in the application of the CILFIT doctrine.

It follows from this that the principles of the Bolkestein Directive apply to the concessions in question.

They are interpreted as a title to exercise an entrepreneurial activity and not as a tool to ensure public interest.

The aim of concessions' new legal status is to liberalize and open the tourist services market, also in favour of non-national subjects according to the EU principles.

It was also stressed that the Directive was not adopted to harmonize national legislation in the tourism sector, but to guarantee the freedom to provide services.

The point is specified to stem possible arguments aimed at the non-applicability of the Bolkestein Directive to public property maritime matters.

It was then underlined that maritime concessions must be considered as a whole, have as their object one of the most important naturalistic heritages in the world, play a central role in the Italian economy and consequently constitute a matter of certain cross-border interest and, therefore, subject to competition discipline.

The use of selective calls is also considered an instrument of protection of transparency of administrative choices and a guarantee instrument of better tourist services for citizens.

The judgments address then the issue, thanks to which the TAR Lecce had supported the legitimacy of automatic legal prolongation: the non-self-executing nature of the Bolkestein Directive.

This point is denied: the Directive is immediately enforceable and both the Judge and the Administration must disregard the national rule in contrast with the European source.

Therefore, the Directive is indicated as a direct source of rights.

Above all, Administrations cannot be forced by national law to issue illegitimate acts because they are in contrast with EU rules.

This responds to the first of the needs that had prompted the President of the Council of State to invest the Plenary in the problem and can be summarized in the duty to ensure compliance with European standards not only by the judges, but by all Administrations.

However, the non-application of the national law cannot have criminal consequences for the concessionaires and the fact that legal prolongation was in known conflict with the content of EU law prevents operators from having a legitimate trust in the stability of the title.

Instead, it is not excluded that in future tenders, clauses may be inserted that reward investments made by current concessionaires.

The Plenary then takes care to specify the nature of the legal acts according to which the concessions are extended.

They do not have an innovative force, but they consist in a mere recognition of an effect deriving directly from the law, which is not applicable because it is in contrast with EU law: therefore, the extensions issued should not be cancelled as they constitute simple certifications and not provisions.

The individual Administrations (in Italy concessions are mostly issued by the Municipalities) will have to limit themselves to informing the concessionaires that the provisions issued in their favour will expire on 31 December 2022.

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The prevalence of EU law means that even concessions, on which a *res judicata* has been formed in the abstract favourable to the concessionaire, have this very same fate.

This is in order to guarantee legal certainty and regardless of the moment in which the judgment is concluded.

To give time to the Administrations and to the legislator, whose intervention is in any case hoped for to regulate the topic in an overall way,[5] to adapt to the EU law and to start the procedures, the effects of the Plenary rulings will take effect only from January 2023.

The tenders will have to provide for an increase in the concession fees, which must be determined to be consistent with market values.

The judgments received a good and warm reception, above all because they indicated with certainty the deadline within which the existing concessions will have to expire and provided Public Administration officials with a precise address regarding tenders to come.

However, there was some influential critic remark about judicial activism, which created a general rule in the trial without a democratic legitimacy (see Sandulli, 2021).

## 7. CONCLUSIONS

To sum up, it can be said that in the Italian legal system, in relation to public maritime concessions, there is a strong resistance to the full application of European principles. The subject that is operating the greatest brake is precisely the legislator, who – taking advantage of the pandemic crisis and in an attitude of constant favour for concessionaries – has introduced provisions that are completely not in line with a now established framework.

Not only during the COVID emergency, the Italian legislator acted in violation of an express position by the ECJ. The judiciary power has also suffered a similar temptation. COVID emergence has been improperly used to undermine the correct way of interpreting the relationship between the Italian and European systems. Fortunately, however, sufficient antibodies have been found at the top level of the jurisdictions to stop immediately such attempts. The initiative of the Competition Authority also helped in this.

Therefore, we can conclude that there are adequate safeguards in the Italian legal system capable of guaranteeing the supremacy of European law, despite the fact that this character has not yet been fully metabolized by both the legislator and some sectors of the economic world. The respect of rule of law, even in the relationship between two different legal environments, was once again found through judicial review, which can be defined as the very heart of rule of law.

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# THE DEVELOPMENT OF THE GERMAN IMMIGRATION POLICY AFTER 2015: A BALANCING ACT BETWEEN POPULISM AND EU/ Réka Friedery

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Abstract: *Germany is seen and presented by itself as a welcome country. It is a country of immigration. First, there was the "Gastarbeiter" period when within agreements made by Germany and southern European states several thousand worker arrived in Germany and most of them made the country their permanent home. The country experienced another migration wave when the former Central-European countries became members of the European Union. In 2015, similar to other European States, Germany too experienced a migration-shock which resulted in a political-social turmoil in the German society. Not only politicians, but average people faced the same never-seen-before challenge on different levels, due to the number of migrants arriving in short term onto the territory of the state: one in the everyday life of its community, one in the political and legal perspective. Irrespectively of their reactions or adaptation methods, one common point of these actors was that they had to come to terms with the fact that a huge number of irregular migrants will stay long-term in Germany. However, the wave challenged the "welcome" country attitude both at political and at societal level. The author argues that roles, namely, the country affected by the migration wave, and the country being a leading European Union Member State became contradicted because of the measures introduced after 2015. This is underlined by the normative analysis of the main measures in this article, but because migration policy overlaps other policy areas, for example integration policy, interior policy, these measures touch upon different issues.*

Key words: *Migration; populism; immigration policy; EU policy; Germany.*

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## 1. INTRODUCTION

For today's populism, some authors identify out four root causes: economic problems, cultural causes, the speed of change generated by globalisation and digitalisation, and last but not least the failure of policy to manage a transition to higher welfare, globally and locally (Aiginger, 2020). The distinctive trait of populism is that it claims to represent and speak for 'the people', which is assumed to be unified by a common interest. This common interest, the 'popular will', is in turn set against the

'enemies of the people'- minorities and foreigners (in the case of right-wing populists) or financial elites (in the case of left-wing populists) (Rodrik, 2019).

Germany is not an immigration country in a classical way (Chin, 2007), on the contrary, it is often classified as a typical example of a "*labour recruiting country*" (Gesley, 2017). Next to the resettlement of ethnic migrants, the German-Italian intergovernmental agreement was concluded in 1955, that allowed the recruitment of state-organized foreign labor, and this saw approx. 14 million guest workers arriving between 1955 and 1973 from southern European states, from the ex-Yugoslavia and Turkey (Butterwegge, 2005; Braun, 2021). This created a paradox situation seen already in 1970 that immigration happened without a "destination country" (Bade, 2000), because the Germany political sphere did not perceive Germany as a country of immigration up until 2005. The *terminus technicus* „Willkommenskultur" that appeared around this time, has no legal definition and as a matter of fact it could correlate with migration and integration policy (Bade, 2014) and can be seen more a political and cultural answer to a given situation (Heckmann, 2014).

In 2015, Germany decided to leave German borders open to refugees. The German government based its decision on humanitarian grounds, but the decision had a spill over effect on the ethnic, cultural and religious structure of the country. It triggered heated discussion in several issues like security, identity and society, both at the political and social level and were also reflected by the election results of the parliamentary elections of 24 September 2017 (Glorius, 2018).

## 2. BACKGROUND INFORMATION

To understand the legal and administrative challenges, first of all we shall look into the circumstances of 2015. Germany has been the most popular destination and host countries for asylum seekers in Europe in recent years, admitting approx. 1.5 million asylum seekers between 2014 and June 2017, with the vast majority of asylum seekers arriving between July 2015 and February 2016. And as over 1.2 million first-time asylum applications were lodged in the EU member states in 2015, Germany counted being the first destination country with 890 000 Asylum seekers in 2015. The number of asylum applications continued to increase in 2016 (around 722,000 first time applications), even though the number of arriving asylum seekers dropped since the closure of the Balkan route in March 2016 (Glorius, 2018). By the end of 2017, 970,364 people were recognized as refugees under the 1951 Geneva Convention (compared with 121,837 in Britain and 337,143 in France). In 2015, the main countries of origin were regions in Europe, Asia and the Middle East.

| Date | Refugees Granted Asylum | Annual % Change |
|---|---|---|
| 2015-12-31 | 316115 | 45.69 |
| 2016-12-31 | 669482 | 111.78 |
| 2017-12-31 | 970302 | 44.93 |
| 2018-12-31 | 1063837 | 9.64 |

*Chart 1 Germany Refugee Statistics 2015-2018*

Source: https://www.macrotrends.net/countries/DEU/germany/refugee-statistics

The net migration rate[1] in Germany is 1.5 migrant(s)/1000 population (2020 est.) that puts Germany on the 54th place on the world list (Central Intelligence Agency-CIA, 2020). In 2015, Germany and the Russian Federation hosted the second and third largest numbers of international migrants[2] worldwide (12 million each) (United Nations, 2016). Germany, the second top destination for migrants, has also observed an increase over the years, from 8.9 million in 2000 to 13.1 million in 2019. Germany remained the main OECD destination country in 2016, with over 1.7 million new international migrants (more than double the levels registered in 2000, but with a decrease compared with more than 2 million in 2015) arriving that year (International Organization for Migration, 2020). The country has been the most popular destination and host countries for asylum seekers in Europe in recent years, admitting approx. 1.5 million asylum seekers between 2014 and June 2017, with the vast majority of asylum seekers arriving between July 2015 and February 2016. And as over 1.2 million first-time asylum applications were lodged in the EU member states in 2015, Germany counted being the first destination country. The number of asylum applications continued to increase in 2016 (around 722,000 first time applications), even though the number of arriving asylum seekers dropped since the closure of the Balkan route in March 2016 (Glorius, 2018). By the end of 2017, 970,364 people were recognized as refugees under the 1951 Geneva Convention (compared with 121,837 in Britain and 337,143 in France). In 2015, the main countries of origin were regions in Europe, Asia and the Middle East. We shall point out that the regional distribution of the population with migration background differs as the old West German states, especially the city states of Bremen, Hamburg and Berlin, as well as the federal states of Hesse, Baden-Wurttemberg and North Rhine Westphalia have a high percentage of persons with a migration background: immigrants and their descendants represent more than 26 percent of the population of these states. The cause of this is that these are in an economically better situation. In contrast, the share of persons with migration background is less than seven percent in all the 'New Länder' (Hanewinkel and Oltmer, 2018).

Against this background, when the German borders opened in 2015 as a humanitarian necessity it had a spill over effect on every level of the country. These were also reflected by the election results of the parliamentary elections of 24 September 2017 (Glorius, 2018). The surge in asylum applications in 2015–16 and the success of the far-right Alternative for Germany (AfD)[3] party in regional and in the federal election elections was obvious. There was an anti-immigrant social movement called PEGIDA[4] that had been holding regular rallies in Dresden since 2015 and it support increased, too. The success of AfD and PEGIDA was somewhat shocking to the main political parties, but not surprising in a way that AfD and PEGIDA recognised the aftermath of the migration events, the debates at society, could reach to everyday peoples' concerns and the perfect opportunity to ride the coming wave. The election's results showed a glimpse for a harsh reality regarding differences between the former eastern and western part of Germany: AfD gained strong electoral support in the former East Germany. Besides that, differences

[1] The net migration rate indicates the contribution of migration to the overall level of population change. The net migration rate does not distinguish between economic migrants, refugees, and other types of migrants nor does it distinguish between lawful migrants and undocumented migrants.
[2] Foreign-born people.
[3] The AfD was founded in February 2013 as a single-issue party, criticizing the Euro, and more generally the European Union. In the federal election of 2013, the party gained 4.7 % of the vote, reaching a near-success in such a short time since its founding, but missing the threshold of 5% to enter the parliament. After the election, the AfD began focusing to immigration.
[4] Patriotic Europeans against the Islamization of the West.

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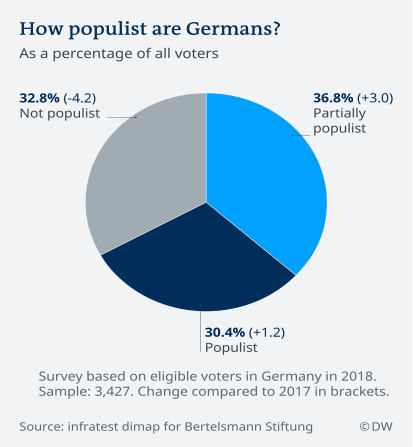
emerged over matters of migration and integration between the so-called sister parties too, the CDU and CSU: it weakened Merkel's latest governing coalition since it was formed in March 2018 (Triadafilopoulos, 2019), whereby the CSU's Seehofer has made irregular migration a policy priority.




*Graph 1*: *How populist are Germans?*
Source: Deutsche Welle, Bertelmanns Stiftung, 2018

Apart of the government's stance in 2015, the diagram shows the stance of German voters nearly three years after the 2015 migration wave. The charts show that two-third of German voters could be seen as populist or partially populist at the end of the 2015's irregular migration wave in 2018. Also, according to the chart we can observe an increase in these two groups compared to 2017.

## 3. LEGAL CHANGES ON THE HORIZON

Following the elections, the Union parties, the FDP and Alliance 90/The Greens started negotiations about a so-called 'Jamaica coalition'. However, the negotiations failed by the end of the year, and no new government was formed in 2017, but the CDU/CSU and SPD started coalition talks, which led to another 'grand coalition' in March 2018. All parties represented in the Bundestag had different concepts on the directions how to handle issues related to the crises. If we look into the central coalition agreement it is quite obvious the government intended to avoid any loss of control in the future: with the aims at reinforcing efforts "to govern and to limit" migration towards Germany and Europe "so that a situation like in 2015 is not replicated" (Thym, 2018).

According to Article 16a of the German Basic Law, persons persecuted on political grounds have the right of asylum.[5] This fundamental right is applicable only to foreigners. People can also be recognised as refugees under the Geneva Refugee

[5] Art. 16 (a) of the Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p. 404).

Convention, which guarantees asylum to people who had to flee a war. Besides these, German authorities can issue subsidiary protection to people who could face danger in their home country or deportation bans. Germany turned to the Dublin III Regulation,[6] when it decided about asylum claims of Syrian citizens without sending them back to the country of first entry in the middle of 2015. According to Article 17, by way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Regulation. However, this was short-lived, and the country has already returned to the standard Dublin procedures in October 2015.After the new-year celebrations of 2015-16 in Cologne and other German cities,[7] several important legislations were introduced: among others the Act on the Introduction of Fast-Track Asylum Procedures (Asylum Package II), the Act on the Faster Expulsion of Criminal Foreigners and Extended Reasons for Refusing Refugee Recognition to Criminal Asylum Seekers. The adoption of the Act was preceded by controversial discussions both within the government coalition and broader society. Especially the restriction on family reunification was widely criticised by civil society groups and by the opposition (Federal Office for Migration and Refugees, 2017). As we can see in the following, they all targeted specific topics, namely, asylum procedure, voluntary and forced returns.

The Act on the Faster Expulsion of Criminal Foreigners and Extended Reasons for Refusing Refugee Recognition to Criminal Asylum Seekers had the aim to handle failed deportation attempts: it contained the conditions for the provision which requires the foreigners authorities to find a balance between the foreigner's interest in staying in Germany and the state's interest in expelling him or her in the individual case. The act lists of typical reasons to assume a particularly serious interest in expelling the foreigner or a particularly serious interest in remaining in Germany. Under serious interest was meant foreigner sentenced for certain offences and who committed using violence, using a threat of danger to life or limb or with guile. Particularly serious interest could be seen among others when the foreigner was sentenced to a prison term or a term of youth custody of at least one year for one of these crimes, and crimes within the meaning of the amended German Criminal Code.[8] Interestingly, a particularly serious interest was regarded the commission of serial offences against property even if the perpetrator did not use violence, threats, or guile.

The Act on the Introduction of FastTrack Asylum Procedures was part of the so-called Asyl Packet II,[9] and introduced stricter asylum measures with the aim to shorten the length of asylum procedures through fast-track procedures. This procedure was planned to take place in special reception centres within a week, and with an appeal within two weeks. Nonetheless, we shall point to the fact that this was in line with Directive 2013/32/EU (The Asylum Procedures Directive)[10] that explicitly provided for such an accelerated examination procedure. Moreover, it also contained stricter provisions

[6] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, pp. 31–59.

[7] Hundreds of women experienced sexual assaults, and among the suspects there were foreign as well as German nationals and among the non-German suspects there were numerous refugees.

[8] For example, sexual assault by use of force or threats.

[9] BGB1 2016 Part 1 no.12 p. 390.

[10] Directive 2013/32/EU Of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

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regarding benefits, namely, only those who stayed in such special centres received benefits (Die Bundesregierung, 2016) and also introduced restrictions to family reunification for certain beneficiaries of subsidiary protection (see Bick, 2018).That is to say, that those with subsidiary protection status were restricted to bring their families to join them for a period of two years. Applicants subject to subsidiary protection are initially granted a residence permit for one year, which could be extended for two additional years, as opposed to the three-year residence permits for asylees.

In 2019, there was an extensive reform of asylum and migration legislation with seven laws enacted and numerous changes were introduced to the Asylum Act, the Residence Act, the Asylum Seekers Benefits, the Skilled Workers' Immigration Act and the Act on Temporary Suspension of Deportation for Training and Employment.

The provisions for admission procedure could be found in the Asylum Procedure Act. Asylum seekers, who are permitted to enter the country or who are found in the country without a residence permit were to be transferred to the nearest reception centre of the relevant state and a nation-wide EASY distribution system were used for initial distribution, and they were assigned to reception centres of the individual German states according to a formula defined in the Asylum Procedure Act (Federal Ministry of the Interior, Building and Community, 2020). It is worth to mention, that so-called 'arrival, decision and return' (AnkER) centres were established in 2018. The main purpose was to centralise all activities at one location and to shorten the asylum procedure, with a concept that was already applied in the 'arrival centres' across Germany and in 'transit centres' set up in three locations in Bavaria. However, most Federal States have not participated in the AnkER centres scheme, and at the end of 2019 only three Federal States had agreed to establish AnkER centres, in most cases simply by renaming their existing facilities so that in many cases all that had changed was the label on such centres (Knight, 2019). In early 2019, it took an average of six months to process asylum applications, contrary to a commitment of maximum of three months. Other provisions contained that the Federal Office for Migration and Refugees provides counselling and legal assistance to asylum seekers, but we shall point out that this raised potential conflict of interests.

The main changes to the Residence Act related to the enforcement of the obligation to leave the federal territory. Overall, the introduction of the Orderly Return Law substantially facilitates the use of 'custody pending departure' under Section 62b with the aim to enforce deportations. The Orderly Return Law or 'Second Law for the Improved Execution of Deportations' reduced the barriers to imposing detention for deportees so that rejected asylum seekers cannot avoid deportation. It gave more power to authorities to apply sanctions against those who do not comply with the lengthy deportation procedures, for example people who are a flight risk can now be detained prior to their deportation or authorities could start proceedings against migrants and refugees who lie on their asylum applications. It created a new type of detention, a 'detention to obtain participation', and foreigners could be detained when they failed to comply to cooperate. The risk of absconding allowed to detain a person for the purpose of deportation.

We also shall mention the introduced possibility to hold pre-removal detainees in regular prisons until June 2022 (ECRE, 2019c) instead of specialised institutions, although detainees will be held in premises separate from inmates.

One of the main amendments regarding the Asylum Seekers' Benefits Act was the extension of the waiting period for applicants to access social benefits with additional three months. Individuals in centres were considered as constituting a 'community of destiny', presuming that they conduct common activities that allow them to save costs. Persons who have already been granted international protection in another EU Member

State, and whose obligation to leave the territory was enforceable, were excluded from all social benefits after a transition period of two weeks.

The Integration Act in 2016 has already emphasised the importance of integration, and presented important positive changes in the integration for asylum seekers and for persons whose deportation has been suspended. The Skilled Workers' Immigration Act of 2019 aimed to create a legislative framework for selective and increased immigration of skilled workers from third countries and to improve the integration of skilled non-European foreigners into the labour market. This concerned both to foreign citizens who have applied for asylum in Germany and to individuals applying for a work visa in a third country (Bathke, 2019). Skilled workers were considered university graduates and highly qualified workers from third countries outside of the EU who have a domestic, a recognized foreign, or an equivalent foreign university degree (skilled worker with academic background) or who have completed domestic or equivalent foreign qualified vocational training (skilled worker with training). The Act is in line with the demographic change and the shortage of skilled labour in some labour markets is gradually resurfacing as an alternative reference point, for which the political dynamics are different, since the general public and most political parties tend to support moderately generous entry rules. Moreover, there can be feedback loops between the rules on labour migration and the debate on asylum (Thym, 2019).

In connection with this, the Act on Temporary Suspension of Deportation for Training and Employment, on the other hand, was passed to provide certain foreigners with legal certainty regarding their residence status and create the prospect of a long-term stay but only for those whose deportation has been temporarily suspended.

## 4. CONFLICTS WITH EU POLICIES AND EU LAW?

As we saw in the above section, Germany tried to find its path to solve the crises internally that was generated by the permissive immigration policy of 2015. However, the policies and actions were inevitable connected to the EU policies and legislation as we shall see below. Although Germany has requested for hotspots established as a criterion for relocation, relocation numbers remained extremely low with only 272 people relocated from Greece and Italy in 2016 out of the 120,000 agreed obligation. This is partly due to the unwillingness of member states to put themselves forward for the challenge and partly due to flaws in the system (Dimitriadi, 2016).

During the crisis, asylum procedures were infamously lengthy and resulted in massive delays and quality deficits despite considerable efforts on the part of the federal asylum office to hire new staff and to increase efficiency. Moreover, swift asylum decisions are to be accompanied by more efficient return procedures, which is hardly surprising given that roughly half of all asylum applications are being rejected, if no protection status under German or European law is granted. As a result, there are more and more people in Germany which are obliged to leave the country, but do not do so, since German authorities are notoriously ineffective in complying with the EU law obligation for an effective return policy.

Because failure to carry out the obligation for deportations, the government focused on deportations which supposedly failed as a result of escaping. To improve the enforcement of the obligation to leave the country new legislation included increased powers for law enforcement authorities to access apartments for the purpose of deportation; new criteria to order detention based on an alleged risk of absconding, a new ground for detention to enforce the obligation to cooperate with the authorities' and the possibility to hold pre-removal detainees in regular prisons until June 2022. However, the

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pre-removal detention place violates the Return Directive: instead, the necessary specialised institutions regular prisons can be used.

Family reunification of asylum seekers living in another Member State with family members in Germany pursuant to the provisions of the Dublin regulation constitutes another problematic issue for example in family reunification procedures with family members trying to join a beneficiary of protection in Germany. Also, the increase in the number of pending family reunification procedures, and waiting periods that can reach up to a year or more are problematic, especially in the case of unaccompanied children.

According to the provisions of the Law for Better Implementation of the Obligation to Leave the Country of 2017, people who pose a danger for life and limb of third parties can be more easily detained prior to deportation and be monitored through an electronic ankle bracelet and data can be exported from laptops and mobile phones to determine the identity and origin of the applicants. Critiques pointed out that all refugees coming to Germany were being treated like potential criminals and subjected to increasing disenfranchisement (ECRE, 2019b). In addition, everyday circumstances will serve as an indicator of a risk of absconding, such as the fact that a person has paid money to come to Germany or that they made false statements at some point, even if these have later been corrected. This is a blatant shift to the disadvantage of those affected and also contradicts the principle that detention should only be used as a last resort (ECRE, 2019a).

In 2018, the issue of "secondary movements" in the German government reached the EU level. Chancellor Angela Merkel preferred a "European solution" in cooperation with the other Member States based on agreements under Dublin III Regulation.[11] Article 36 allows that Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Germany concluded Administrative Arrangements with several countries for example with Greece and Spain. However, such an agreement presupposes the existence of (quasi) permanent border controls. Such controls are not only violating the main principle of the Schengen acquis the free movement within the Schengen area (Hruschka, 2019). We can say that it is rather a binding bilateral treaty establishing obligations that are not in line with the obligations established under the Dublin III Regulation, thus it violates EU law which does not allow national legislation or agreements concluded between states in policy areas of shared competence. In fact,

[11] Administrative arrangements:
1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:
(a) exchanges of liaison officers;
(b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants.
2. Member States may also maintain the administrative arrangements concluded under Regulation (EC) No 343/2003. To the extent that such arrangements are not compatible with this Regulation, the Member States concerned shall amend the arrangements in such a way as to eliminate any incompatibilities observed.
3. Before concluding or amending any arrangement referred to in paragraph 1(b), the Member States concerned shall consult the Commission as to the compatibility of the arrangement with this Regulation.
4. If the Commission considers the arrangements referred to in paragraph 1(b) to be incompatible with this Regulation, it shall, within a reasonable period, notify the Member States concerned. The Member States shall take all appropriate steps to amend the arrangement concerned within a reasonable time in such a way as to eliminate any incompatibilities observed.
5. Member States shall notify the Commission of all arrangements referred to in paragraph 1, and of any denunciation thereof, or amendment thereto.

through such agreements, Germany cooperates with Member States serving as a key point of entry in the EU by creating a "Quasi-Dublin" system creating obligations that go beyond the scope of the Dublin III and limitations that are not foreseen in the Regulation (Poularakis, 2018).

A major concern has been the recognition rates. Officials of the Federal Office for Migration and Refugees made the initial decision about asylum applications and one notices considerable differences if one extrapolates the decision to the 'länd' where they are made (Riedel and Schneider, 2017). The case officers are not only influenced by the credibility of individual requests but preferences and moods that prevail in the land guide their decisions thus decentralised decision making on asylum requests has in all likelihood a considerable discriminatory potential (Riedel and Schneider, 2017). Furthermore, the airport procedure in Germany was in contrast to the Asylum Procedures Directive: in practice e.g., asylum seekers have reduced procedures without comprehensible information and adequate interpretation, persons with disabilities are subjected to lengthy interviews with the BAMF without benefitting from adequate support guaranteed to them.

## 5. CONCLUSION

Although Germany is one of the most prominent advocate for harmonising several aspect of migration policy, with introducing e.g. the Skilled Immigration Act, the direction of not to leave migration policy reform to supranational harmonisation became clearer. Regarding the 2015 events and the later elections, it is clear that questions regarding social integration have increased significance. Immigration and its several elements was the single most important issue for the German population during the election and this could have played a role in the increasing of support for AfD. The German society is familiar with immigration but the sudden, huge number, and the culturally more distinct migrants from previous immigrants created a ground for anxieties. In the past, immigrants were from similar culture, and in the case of Turkish "Gastarbeiter", there were in the country for the purpose of work laid down in bilateral agreements. The welcome culture was strongly affected by the terror attacks, crimes made by immigrants, and the stabile sense of everyday security furthermore weakened with the arson attacks on refugee accommodations and anti-immigrant demonstrations. Most of the violent acts took place in the 'poorer' East Germany and there is a link between these events and the vote shares for extreme right and populist right-wing parties. Questions of national identity and the place of Islam got significance in the public discourse. On the other hand, the state steadily builds up the new direction of its migration policy and the focus is strongly on the liberal approach regarding the necessary migration of missing labour power.

The focus in more on restrictive measures and on the reduction of arrivals, welcoming skilled labour and on the integration of refugees. Germany is developing from a country that accommodated guest workers to a country with regulated immigration.

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# WHAT HAS CHANGED IN EUROPEAN CONCEPT OF UNDERTAKING? FROM "FENIN" TO "EASY PAY" / Katarína Kalesná

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Abstract: *Competition is the main self-regulatory principle of the market in general, internal market included. Competition law has the form of general clauses making its application dependant on the correct interpretation of general concepts. Core competition rules of the Functional Treaty („TFEU") are addressed to undertakings; undertaking thus belongs to key concepts of competition law. Interpretation of this concept is decisive for the scope of competition rules application. So, the article explores different approaches of the case law to the interpretation of the concept of undertaking based on economic activity. It compares the FENIN doctrine and the new functional test of separability developed in EASY PAY. It drives attention to the impact of this new test for the evaluation of procurement activities under competition scrutiny.*

Key words: *Competition; undertaking; economic activity; public procurement*

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## 1. INTRODUCTION

Creation of internal market belongs to main goals of the European Union emphasizing economic fundament of the European integration. Competition is, referring to economic theory, the main self-regulatory principle of the market in general, internal market included. If there is no competition, there is a risk of collapse of the market. Therefore, it is necessary to protect competition as an institution.

Based on OECD data, about 14% of GDP is covered by goods/services obtained by means of public procurement for public sector. As an important part of the internal market, public procurement has to comply with its principles and has to be open to competition. Public procurement law and competition law are therefore understood as two regulatory systems of the internal market.

Competition law (antitrust), as far as legislative technique is concerned, has the form of general clauses, both in EU law and on the national level. This technique is based on the use of general concepts making legal regulation flexible. On the other hand, its application depends on the correct interpretation of general concepts. So, the legal regulation can remain unchanged, but the real contents may be varied.

## 2. CONCEPT OF UNDERTAKING

### *2.1 Functional Approach*

Core competition rules in Art. 101-102 TFEU as regulation of the most important antitrust institutes – agreements restricting competition, abuse of a dominant position – are addressed to undertakings. Undertaking thus belongs to the key concepts of competition law. As a matter of fact, there is no legal definition of this concept in the respective regulation; TFEU leaves its interpretation in these and similar cases to case law. Interpretation of the concept of undertaking in relevant case law thus determines the scope of application of the competition rules, being applied only on subjects fulfilling criteria laid on undertakings.

In the absence of definition in the Treaty or elsewhere in the legal regulation case law has developed a broad and functional definition of undertaking embracing *„any legal or natural person engaged in some form of economic or commercial activity, whether in the provision of goods or services, including cultural or sporting activities...“* (Steiner and Woods, 2009).

With reference to Court´s decision in Shell case (T 11/89) undertaking was understood as *„an economic entity…following an economic aim“*; *„irrespective of its legal status and the way in which it is financed“*,[1] covering also public undertakings. Competition rules do not apply to the exercise of public powers. So, it can be concluded, an undertaking is *„every entity (economic unit) that performs an economic activity.“* (Blažo, 2014).

### *2.2 FENIN doctrine*

Apparently, the concept of undertaking is closely linked to the concept of economic activity. In this respect *„it is not necessary that the activity be pursued with a view to profit.“* (Steiner and Woods, 2009). The notion of undertaking was reconsidered by the Court of First Instance (CFI) under the so-called FENIN doctrine. In this case FENIN, the Spanish association of undertakings providing healthcare goods and medical equipment complained that Spanish National Healthcare System (SNHS) comprising health bodies, hospitals, etc. that purchased their requirements through FENIN abused its dominant position imposing among other business practices a delay on payments. The complaint was rejected by the Court as SNHS is not an undertaking carrying on economic activity *„characterised by the business of offering goods or services in a particular market, rather than the simple fact of making purchases. Provided that the purpose for which goods purchased are subsequently used is a part of an economic activity, then the purchase itself is an economic activity.“* (Steiner and Woods, 2009).That was not the case of SNHS as it purchased goods serving to public end. It was not considered to be an undertaking as it *„operated on the principle of solidarity financed by social security contributions and offered a free service to the general public, which is not an economic activity.“* (Steiner and Woods, 2009). The described FENIN case is considered to be controversial not only because of its definition of undertaking but also due to the impact of public buyer power on competition, especially taking into account economic dependence of FENIN, *„because more than 80 percent of its turnover came from SNHS, and there was no feasible purchasing alternative.“* (Prieto, 2020).

[1] CJEU, judgment of 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH., C-41/90, ECLI:EU:C:1991:161.

*2.3 Impact of the FENIN Case*

Apparently, interpretation of the economic activity in the FENIN case influenced not only case law in the EU[2] but also case law in the Member States. There was a series of decisions/judgments concerning public health insurance e.g. in the Slovak Republic, where the fulfilment of the economic activity criterion decisive for qualification as undertaking led to different conclusions concerning question whether health insurance corporations carrying on public health insurance are/are not subject to competition rules. In this regard L. Lapsanský states that recently was the question whether public health insurance agencies are subject to the Act on Protection of Competition addressed three times with different conclusions in 2008, 2009 and finally 2018. (Lapšanský, 2018).

There are two conflicting opinions in this regard: On the one hand health insurance corporations dispose of the great volume of financial sources what gives them appreciable bargaining power, e.g. in relation to hospitals etc., on the other hand, an opposite opinion derived exactly from the FENIN case: the main criterion for evaluation of economic activity in this case is a determination of solidarity, obligatory participation on system of health insurance and regulation of contributions to this system. So, it is quite evident, that economic activity qualifying undertaking as entity subject to competition rules depends on the interpretation of this concept and selection of different criteria used for this interpretation (Kalesná, 2019).

FENIN judgment was reflected also in legal writing (Patakyová, M. 2020). It was criticised for its controversial character leading e.g. to exclusion of public procurement activities of the contracting authorities from the competition rules (Prieto, 2020).

*2.4 EASY PAY*

CJEU judgment in EASY PAY[3] brings a new test used for exploring economic activities of economic subjects engaged in activities composed of those that have/have not economic character.

*2.4.1 Facts of the Case*

In this case „Easy Pay" AD and „Finance Engineering" AD, undertakings that hold a licence issued by Bulgarian Communications Regulation Commission entitling them to offer postal money order services, complained that the Order on pensions of 10 March 2000 conferring exclusive right on „Balgarski poshti" wholly owned by the Bulgarian State to pay retirement pensions by postal money order, restricts their rights as postal operators and is detrimental to free competition. When the Order on pensions was adopted, „Balgarski poshti" was the only body authorised under Postal Services Act (PSA) to provide the universal postal service which included money orders.[4]

Due to the amendment of PSA „Balgarski poshti" lost its monopoly for postal money orders that were no longer included in the universal postal service.[5] In spite of that Order remained unchanged. The main argument of the Council of ministers was, that granting and payment of pensions cannot be qualified as an economic activity being

[2] CJEU, judgment of 26 March 2009, SELEX Sistemi Integrati SpA v Commission, C-113/07 P, ECLI:EU:C:2009:191; CJEU, judgment of 12 July 2012, Compass-Datenbank GmbH v Republik Österreich, C-138/11, ECLI:EU:C:2012:449.

[3] CJEU, judgment of 22 October 2015, "EasyPay" AD and "Finance Engineering" AD v Ministerski savet na Republika Bulgaria and Natsionalen osiguritelen institut, C-185/14, ECLI:EU:C:2015:716.

[4] *Ibid.*, para. 23.

[5] *Ibid.*, para. 24.

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a part of the state social security functions. As a public service activity, it is not caught by competition law.[6] The Court of the first instance dismissed the action as unfounded based on the argument of discretion flowing from Art. 106 of the Social Security Code as far as selection of a company entrusted with this function is concerned.[7] The Supreme Administrative Court acting on appeal of the parties decided to stay proceedings and addressed a request for a preliminary ruling to CJEU. This request concerned interpretation of Directive 97/67/EC (postal services) and secondly interpretation of Art. 106 and 107 TFEU.[8]

*2.4.2 Findings of the CJEU*

The CJEU concluded that money order service does not fall within the scope of the respective Directive. Concerning the question of state aid provisions of TFEU, the CJEU pointed out that competition law rules are addressed to undertakings. The concept of undertaking covers any entity engaged in an economic activity irrespective of its legal status and the way in which it is financed; economic activity consists in offering goods and services on a given market.[9] According to CJEU the public social security system based on the principle of national solidarity (non-profit –making) fulfils exclusively social function.[10] The CJEU stressed that the activity of „Balgarski poshti" carrying out money order operations could avoid qualification as an economic activity only if it is inseparably connected with the national pensions system.[11]

Having in mind that Order on pensions enables an alternative payment of pensions through banks, the CJEU concluded that money orders of „Balgarski poshti" are not the sole method of payment of the retirement pensions. That indicates, that these operations may be separable from the sole pensions system and may be understood as an economic activity.[12] From fulfilment of the criterion of economic activity flows that articles of the TFEU on state aid addressed to undertakings can be applied on the activity of money order operations of „Balgarski poshti" and consequently granting an exclusive right on operations of this kind to „Balgarski poshti" is to be understood as an advantage under Art. 107 (1) TFEU,[13] but it is not caught by this provision if it constitutes a service of general economic interest.[14]

*2.4.3 Impact of the Case EASY PAY*

Apparently, the key question addressed by this CJEU judgment is linked to the concept of undertaking. Compared to FENIN case where economic activity as a key feature of undertaking depended on subsequent use of goods/services, in EASY PAY the crucial issue to be solved was, *„whether the activity of money order operations for the payment of retirement pensions is separable or inseparable from the provision of pension funds itself."* (Sánchez Graells and Herrera Anchustegui, 2015).

According to the findings of the Court the retirement pensions were paid not only through money order services, but also by bank transfer (53 %). That was quite indicative

[6] *Ibid*., para. 25.
[7] *Ibid*., para. 26.
[8] *Ibid*., para. 27.
[9] *Ibid*., para. 37.
[10] *Ibid*., para. 38.
[11] *Ibid*., para. 40.
[12] *Ibid*., para. 42-43.
[13] *Ibid*., para. 44.
[14] *Ibid*., para. 52.

for the Court that money order services should be understood only as a means/method[15] for payment of retirement pensions that can be separated from the retirement pensions scheme itself. So, *„the test employed by the CJEU appears to rest on a functional distinction."* (Sánchez Graells and Herrera Anchustegui, 2015).

So, although there is undoubtedly a connection between the tool used for payment of retirement pensions and the retirement pensions scheme itself that would be sufficient for the formalistic approach of the previous case law (Sánchez Graells and Herrera Anchustegui, 2015) in EASY PAY the mere connection is no more sufficient; separability of both services is decisive for understanding what has to be considered as an economic activity and what not. Whereas pensions system granted through contributions serves the fulfilment of social function (Sánchez Graells and Herrera Anchustegui, 2015), the way the pensions are paid has the characteristics of an economic activity. Consequently, this activity should be subject to competition rules, provisions concerning state aid included. So, conferring an exclusive right to carry out this service has to be analysed under state aid rules and SGEI requirements (Sánchez Graells and Herrera Anchustegui, 2015).

Carrying on economic activity is, of course, indispensable for subject to be qualified as an undertaking. And only undertaking is an addressee of competition rules. In this regard has a new concept of undertaking derived from a broader interpretation of economic activity significant consequences for the public entities and their activities in sphere of public procurement and elsewhere. As far as public procurement is concerned, under FENIN doctrine pure purchasing activities were excluded from the concept of economic activity; therefore contracting authorities were not subject to competition rules although *„public buyer power is likely to have adverse effect on competition, despite pursuing a public end."* (Prieto, 2020).

Furthermore, Sanchez Graells and Herrera Anschustegui argue that new approach introduced by EASY PAY allows *„for procurement to be carried out as a self-standing (economic) activity with no clear or direct connection to any downstream activity, particularly through the use of central purchasing bodies..."* (Sánchez Graells and Herrera Anchustegui, 2015). Central purchasing bodies can act under Directive 2014/24 as agents or wholesalers. Agent acts by *„awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities"*,[16] whereas a wholesaler resells the acquired goods to a contracting authority. This can even be a profit-making activity (Sánchez Graells and Herrera Anchustegui, 2015). Both agent and wholesalers who cannot influence the further use of the procured goods, should be understood as undertakings based on the argument of separability of their economic activity from the subsequent use of the goods (Sánchez Graells and Herrera Anchustegui, 2015).

## 3. CONCLUSION

Recent case law represented by CJEU judgment in EASY PAY has far-reaching consequences. In comparison with FENIN doctrine and its narrow interpretation of the concept of undertaking as an addressee of competition rules EASY PAY has introduced a new functional analysis based on assessing of separability/inseparability of the

[15] *Ibid.*, para. 42-44.

[16] Recital (69) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024 (accessed on 18.09.2021).

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services concerned. This new test is decisive for understanding what has to be considered as an economic activity, key feature of undertaking. Distinguishing between economic and non-economic activities enables a broader definition of economic activity compared to the FENIN case. That means more cases can be analysed under competition scrutiny as more subjects are qualified as undertakings. This might be significant for strengthening of competition in internal market in general.

Test developed in EASY PAY is particularly important for public procurement. After EASY PAY there is no ground for exclusion of public procurement from the competition scrutiny as it was the case under FENIN doctrine. If there is no inseparable connection between public procurement and subsequent use of the purchased goods/services, public procurement has to be analysed under competition rules.

This is especially significant for central purchasing bodies acting as agents/wholesalers for other subjects in central purchasing systems being a substantial part of the modernization of public procurement in the European Union. Although central purchasing can bring many benefits for public procurement (lowering of prices, reduction of administrative costs, etc.), it can be also harmful for competition, especially when aggregation of demand and improper application of bargaining power (resulting possibly in fall in prices under competitive level) combined with absence of purchasing alternatives leading to economic dependence (as indicated in FENIN case) forces economic operators to leave the procurement market. Afterwards, there is reduction in number of competitors, mainly small and medium enterprises, taking part in future public procurement procedures. Therefore, it is necessary to apply competition principles also in central purchasing schemes to avoid excessive concentration of bargaining power and its detrimental impact on market structure. Getting acquainted with the effects of monopsony and monopsony-like situations in procurement market could be also a good inspiration for further education in process of professionalization of public procurement.

Finally, not to forget is the question of legal certainty. Establishing a new separability test could bring more legal certainty not only for undertakings acting on procurement markets, but it could exclude divergences in the case law in general, e.g. in the health care system.

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