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# PRAVNOG FAKULTETA

# UNIVERSITY OF MONTENEGRO LAW JOURNAL

Collection of papers – Part II
(Jean Monnet Module in Law of the EU Internal Market: Integrating the Western Balkans into the European Union's Internal Market – Challenges and Prospects)

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# ACCESS TO JUSTICE IN CASE OF INFRINGEMENT OF STATES AND EUROPEAN UNION POSITIVE OBLIGATIONS (DUTY OF CARE) IN RELATION TO CLIMATE CHANGE

Summary

*Climate change is undoubtedly one of the biggest global challenges of our time. Although States and the EU are bound by international agreements (the Paris Agreement, adopted under the UN Framework Convention on Climate Change), the EU enactments (among others the 2021 Regulation "European Climate Law"), as well as national laws, access to justice and in particular legal standing of individuals/groups whose rights are violated due to inaction or insufficient activity of States and EU in this area remain the outstanding issues in Europe.*

*The paper pays special attention to the application of procedural mechanisms of the UN Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, as well as to the 2021 amendments to the EC Regulation on the application of the provisions of the Aarhus Convention to Community institutions and bodies, for challenging acts of States and EU in the field of climate change.*

*The link between the positive obligation of States in environmental protection in general and human rights has been confirmed in many ECtHR decisions, but the Court has not yet made reference nor interpreted the States positive obligations under Articles 2 and 8 of the ECHR consistently with provisions of the Paris Agreement in order to protect individuals affected by climate change impacts (through the use of evolutionary or living instrument type interpretation).*

*On the other hand, in recent years, there is a steady increase in number of cases before the national courts of EU Member States adjudicating on violation of the duty to care in the respective field.*

**„Key words"** *„Duty of Care"; „Aarhus Convention"; „Aarhus Regulation"; „Climate litigation"; „ECtHR".*

## I Introduction

The importance of climate matters and the negative impacts on climate change to the physical environment, ecosystems and human societies calls for multidisciplinary approach on a global level. The crucial point in reinforcing the substantive positive obligation of States and the European Union in climate matters was adoption of the Paris Agreement[1] (in force since 2016) which builds upon the United Nation Framework Convention on Climate Change[2] (UNFCCC) so that now, for the first time almost all nations of the world[3] support a common strategy to cut the greenhouse gas emissions which causes a global warming. With the Paris Agreement, all major emitting countries have undertaken an obligation to cut their climate pollution, so that through time global greenhouse gas emissions are reduced and global temperature increase is limited in this century to 2 degrees Celsius above preindustrial levels, while pursuing the means to limit the increase to 1.5 degrees.

And while the substantive matters related to the combating climate change contained in the international agreements and in national and the EU legislation are largely unified, access to justice in this field as the procedural matter still very much differs, but is presently gaining importance. Among the numerous issues, the following stand out: whether and in what way the rights of citizens are protected and the issue of active identification of citizens whose rights have been violated due to inaction or insufficient activity of the States and the EU in this area.

## II The Substantive positive obligation of States and the EU in climate matters

### A. EU Climate law

The environmental issues in general are one of the core concerns of the European Union, and a single most regulated field accounting for more than a third of its acquis. Therefore, it is no surprise that the founding treaties provide the positive obligation of the EU and the Member States in the domain of climate

[1] It was adopted at the 2015 UN Climate Change Conference held in Paris, the text is available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (12.4.2023).

[2] able at:
https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (20.4.2023).

[3] The Paris Agreement now has 195 parties, *see*
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (20.4.2023).

change and even make combating climate change an explicit objective of the EU environmental policy.[4]

As a regional economic integration organization, the EU is a Party to the UNFCCC and the Paris Agreement but with no separate vote from its members. As the world's third-biggest emitter[5] the EU is committed to constantly raise its initial nationally determined contribution (NDC) under the Paris Agreement in order to reduce greenhouse gas emissions.[6] This came as a result of goals set in other legal and policy instruments, primarily the adoption of the European Climate Law[7] and the European Green Deal. The former in addition to climate neutrality[8] and achieving negative emissions after 2050, also sets a binding climate target for the Union to reduce net greenhouse gas emissions by at least 55 % by 2030 compared to 1990 levels, while the latter developed by the European Commission in late 2019 is in fact an action plan containing a set of policy initiatives coordinated across the EU and its Member States to speed up the transition towards net zero greenhouse gas emissions by 2050, and among others to help implement the Paris Agreement.

These ambitious goals should be viewed in light of the EU's previous achievements.[9] Moreover, recently, at the 27th UN Climate Change Conference the

[4] According to the Treaty on the Functioning of the EU one of the objectives of the Union policy on the environment is promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change (Article 191(1)). It also stipulates that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities (Article 11). Furthermore, the Treaty on EU focuses on sustainable development in connection with high level of protection and improvement of the quality of the environment (Article 3(3)). Charter of Fundamental Rights of the EU stipulates that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development (Article 37).

[5] Available at: https://www.reuters.com/markets/europe/eu-plans-upgrade-its-paris-agreement-climate-target-document-2022-09-19/ (10.4.2023).

[6] In 2021 even raised by at least 40% by 2030 compared to 1990 (under its wider 2030 climate and energy framework) to 55%.

[7] Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), entered into force on 29 July 2021. Available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1119 (12.4.2023)

[8] Climate neutrality by 2050 means achieving net zero greenhouse gas emissions for EU countries as a whole, mainly by cutting emissions, investing in green technologies and protecting the natural environment.
In 2020, greenhouse gas emissions have already decreased by 31% from 1990 levels and reached their lowest level in 30 years, which exceeded the EU's target under the Kyoto Protocol of reducing

EU has announced an even more ambitious target to reduce greenhouse gas emissions for at least 57%.[10]

A step forward in reaching not only their particular climate related goals, but also putting a pressure on developing countries to meet the requirements of the Paris Agreement is an instrument in international commerce providing for that as of 2024, the EU will have the power to withdraw preferential trade access for countries that do not meet the climate action standards set by environmental agreements.[11]

However, if governments cannot be challenged in front of the national courts when they do not respect binding targets set at EU level, then the effectiveness of climate action and the European Green Deal may be called into question.

## III Access to justice in environmental matters

### A. The Aarhus Convention and legal standing

The issue of legal protection of the right to a healthy environment and protection from the negative impacts of climate change can be viewed from different angles depending on who is the subject and who is the object of protection. For a long time, the understanding that the decision-making process addressing negative impacts of climate change cannot be called into a question by the public and that arranging those matters are within the sole competence of the State, and in the case of the EU Member States and this regional organization, prevailed, while the right of the individual or the public to actively influence public policies and to challenge them was in the background. Nowadays, the situation is changing significantly, which was largely contributed to by the adoption of the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention),[12] the only

emissions by 20% by 2020. Available at:
https://www.europarl.europa.eu/factsheets/en/indexsearch?query=climate (20.4.2023).

[10] Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/climate-action-and-green-deal/eu-cop27-climate-change-conference_en (21.4.2023).

[11] Available at:
https://www.weforum.org/agenda/2021/11/paris-climate-agreement-legally-binding/ (24.4.2023).

[12] The Aarhus Convention (available at:

procedural international instrument that links environmental and human rights. This is, without a doubt, the most successful international source for legal protection of environmental rights that binds the EU, as well as its Members States and a number of candidates for the accession to the EU, including Montenegro.[13]

Furthermore, the Aarhus Convention indirectly recognizes the substantive right to a healthy environment as a rationale for guaranteeing procedural environmental rights. In Article 1, the Convention sets as its objective that each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention "in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being."

The Aarhus Convention establishes three mechanisms, commonly referred as "pillars": access to information held by public institutions, public participation in decision-making on environmental matters (also addressed in Article 6 of the UNFCCC[14]) and access to justice. The latest pillar provides instruments for the protection of environmental rights of individuals and non-governmental organizations (NGOs) alike is presently the main subject of our interest.

The right to legal protection guaranteed by Article 9 of the Aarhus Convention encompasses legal tools for enforcing the rights for access to information and participation, challenging the environmental legality of public decisions, as well as general infringements of national environmental law before courts and non-judicial instances. In the context of this paper it is important to point out that the core of the procedural participatory democracy within the Aarhus Convention is the possibility that non-governmental organizations and members of the public – deemed as "public concerned" according to their national legislation may have a legal standing to challenge the substantive and procedural legality of any decision, act or omission of public authorities under condition that they have a sufficient

https://unece.org/environment-policy/public-participation/aarhus-convention/text) entered into force on October 30, 2001 and as of 24 October 2022 has 47 Member States, *see* https://unece.org/environment-policy/public-participation/aarhus-convention/status-ratification. (12.4.2023).

[13] From February 2, 2010.

[14] UNFCCC Article 6 requires Parties to "Promote and facilitate ... in accordance with national laws and regulations, within their respective capacities" (ii) public access to information on climate change and its effects and (iii) public participation in addressing climate change and its effects and developing adequate responses...

interest or, alternatively, are maintaining impairment of a right. Moreover, members of the public have access to administrative or judicial procedures to challenge acts and omissions by public authorities which contravene provisions of its national law relating to the environment. The timely rendered decisions shall be in writing and the court decisions shall be publicly accessible.[15]

However, Article 9(3) of the Aarhus Convention, which guarantees access to justice is not directly justiciable as its provisions are rather general and instructive, so it is up to the national judiciaries to implement them according to their respective legislation, practically the sole scrutiny procedure of their compliance with the provisions of the Convention being the procedure before the Compliance Committee.[16] Therefore, there are no compact and uniform standards in Party Members on many legal issues, the most prominent being a right to legal standing, especially of the NGOs. The Compliance Committee found that Germany, Austria and Bulgaria did not ensure standing for environmental NGOs in many sectoral laws, while in some States the remedies in judicial procedures are ineffective (Bulgaria, Romania), and in some other States the procedures are too costly to comply with the Convention (UK, Spain).[17]

Those differences are particularly visible regarding climate related litigation where legal standing and admissibility of a claim vary depending on the country at stake. In line with the scope of the Article 9 of the Aarhus Convention, climate related matters that could be legally challengeable on the national level may encompass permits and licenses for certain specific projects involving greenhouse gas emissions, as well as national or local plans, programs and policies on climate change and in other sectors which highly distribute to the climate change, such as energy, transport, agriculture, industry etc.

[15] *See* Art. 9 (2), (3), (4) respectively.
[16] Available at: https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee__second_edition__2019_/English/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf (20.3.2023)
[17] Available at: https://www.movimentoeuropeo.it/images/IPOL_BRI2016571357_EN.pdf, pp. 7-8. (18.3.2023).

B. Access to justice on the EU level

*a) Deficiencies regarding the scope and the legal standing prior to 2021*

The European Union is a Party to the Aarhus Convention since 2005, and so are the Member States. In 2006 the EU adopted the Aarhus Regulation[18] providing for the framework for implementing the Convention at the EU level which, among other, provides for access to justice to the NGOs which comply with the conditions set in its Article 11. It included the administrative review procedure ("a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act")[19] and in the second instance instituted direct proceedings before the Court of Justice[20] (under the Article 263 para 4 of the TFEU).[21] Moreover, as the requests for a preliminary ruling made by national courts form an integral part of the Union system under the Treaties (in accordance with Article 267 TFEU) indirectly this recourse can benefit the interested party.[22]

Although the 2006 Aarhus Regulation allowed NGOs to start proceedings before the European Courts against the decisions of EU institutions and bodies, its application showed some deficiencies and inconsistence with the Aarhus Convention (which as an international treaty should prevail over EU secondary legislation), the main issues being admissibility of non-legislative regulatory acts of a general nature and legal standing of the members of the public beyond NGOs. This became visible in the EU case law that is even related to the climate change matters. Thus, in *case Stichting Natuur,*[23] the outstanding question was whether the EU Commission decision on exempting a State from complying with its obligations

[18] Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the Aarhus Regulation), available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32006R1367 (18.3.2023).

[19] Article 10(1) of the Aarhus Regulation.

[20] Article 12 of the Aarhus Regulation addressing proceedings before the Court of Justice directs to application of the TFEU.

[21] However, the decision from the internal review may be challenged before the EU Courts with a limited scope of judicial review as it does not directly cover the substantive grounds stated in the initial request for internal review nor can lead to assessing the legality of the underlying administrative act or omission.

[22] Article 12(1) of the Aarhus Regulation.

[23] Joined Cases C 404/12 P and C 405/12 P, Stichting Natuur en Milieu (13 January 2015) ECLI:EU:C:2015:5

under a directive[24] should be construed as a measure of individual scope - an "administrative act" within the meaning of Article 2(1)(g)[25] of the Aarhus Regulation and therefore challengeable or as a measure of general scope. First, the Commission rejected their request for an internal review of this decision as inadmissible, and later the Court of Justice of the EU (CJEU) refused to review the legality of Article 10 and Article 2(1)(g) of the Aarhus Regulation with regards to Article 9(3) of the Aarhus Convention as the decision was not a measure of individual scope and that it could not therefore be considered an "administrative act" within the meaning of Article 2(1)(g) of the Aarhus Regulation. Instead, the Court held that applicants may be able to request the national court to assess whether the body of policies and measures adopted or envisaged by the national program is appropriate to the objective of keeping emissions of pollutants below the ceilings laid down for each Member State within the time limit set by the Directive.[26]

The similar outcome was in another case, in *Vereniging Milieudefensie*,[27] where the NGO applicants challenged the Commission's decision to reject their request for internal review of Regulation 149/2008 setting maximum pesticides residue levels for certain products. Here Commission made distinction between decisions granting one company the authorization to use a substance, considered as being of individual scope and the regulations addressed to all operators (encompassing "the approval of the substance is valid for any operator intending to apply for authorization for the placing on the market of plant protection products containing the active substance," as well as the authorization to place on the market biocidal products). According to the Commission those acts of general application addressed to all operators cannot be considered an administrative act within the meaning of Article 2(1)(g) of the Aarhus Regulation.[28] Based on this case law the conclusion was

[24] The decision authorizes a postponement of the deadline by which the Netherlands would have to reach some of the air quality objectives of Directive 2008/50.

[25] Article 2(1)(g) of the Aarhus Regulation stipulates: "'administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects."

[26] Joined Cases C-165 to C-167/09 Stichting Natuur en Milieu, para. 103.

[27] Joined Cases C-401/12 P to C-403/12 P, Vereniging Milieudefensie et Stichting Stop Luchtverontreiniging Utrecht (13 January 2015) ECLI:EU:C:2015:4.

[28] Access to Justice in European Union Law - A Legal guide on Access to Justice in environmental matters, ClientEarth, p. 59, https://www.clientearth.org/media/xlff3sur/2019-02-26-access-to-justice-in-european-union-law-a-legal-guide-on-access-to-justice-in-environmental-matters-ce-en.pdf

that only EU decisions addressed specifically to companies can qualify as administrative acts and that the decisions addressing States are inadmissible. Therefore, Article 10(1) of the 2006 Aarhus Regulation, in so far as it provides for an internal review procedure only in respect of acts defined as "measures of individual scope", is incompatible with Article 9(3) of the Aarhus Convention.

What was clear and visible to many, found its stronghold in the findings of the Aarhus Convention Compliance Committee. In a follow-up to a complaint of the NGO Client Earth in 2008, alleging a failure of the EU to comply with the Aarhus Convention provisions on access to justice regarding the standing criterion for individuals and NGOs to challenge decisions before the Court of Justice of the EU and the General Court[29] the Compliance Committee in case C-32 of 2017[30] concluded that the EU was in non-compliance with Article 9, paragraphs 3 and 4 of the Convention concerning access to justice by members of the public. Furthermore, the Compliance Committee held that the TFEU rules on access to justice before the EU Courts, as interpreted by them, and the criteria for access to administrative review under the 2006 Aarhus Regulation are in breach of the Convention. According to the Compliance Committee "the term "members of the public" in the Convention includes NGOs, but is not limited to NGOs. It follows that, by barring all members of the public except NGOs meeting the criteria of its Article 11, the Aarhus Regulation fails to correctly implement article 9, paragraph 3" of the Aarhus Convention.

*b) Carvalho case (People's Climate Case)*

In one of the first genuinely climate cases against EU legal acts, Carvalho and others v European Parliament and Council of the European Union (also known as "People's Climate Case)"[31] where applicant alleged that their fundamental rights are

[29] For all relevant information *see* https://unece.org/env/pp/cc/accc.c.2008.32_european-union
[30] ACCC/C/2008/32.
[31] Case C-565/19 P Carvalho and others v European Parliament and Council of the European Union (25 March 2021) ECLI:EU:C:2021:252. The applicants, families from several European countries, as well as outside the EU, and the Swedish Saami Youth Association, operating in agricultural sector and tourism in the regions already seriously affected by climate change challenged parts of the 2018 legislative package regulating greenhouse gas emissions (GHG) for the years 2021 to 2030 to comply with the nationally determined contributions under the Paris Agreement. They claimed that setting the target to reduce GHG emissions by only at least 40% by 2030 as compared to 1990 levels was too low to prevent the climate crisis and, therefore, breached their fundamental rights to life, health,

affected by the climate, CJEU in 2021 dismissed the case on procedural grounds. The Court applied the "Plaumann"[32] test, and held that the applicants were not individually concerned for the purpose of Article 263(4) TFEU, which sets standing requirements before the Court. Previously, in Plaumann the Court ruled that the right of natural or legal persons to institute proceedings before the CJEU according to art. 263.4 TFEU, against an act that concerns them "individually" is granted only if "that decision affects them … by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." It also corroborates the findings of the General Court by stating "the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application."[33] Therefore, the applicants could not rely on a potential fundamental rights infringement to satisfy the Plaumann criteria. The limits of this criteria in relation to the Aarhus Convention (Article 9(3)) are addressed in reports of the Aarhus Convention Compliance Committee which finds it "too restrictive and barring all access to justice".[34]

occupation and property. Therefore, they filed an action for annulment against several EU acts relating to GHG emissions and claimed an order directed at the Council and the Parliament to adopt stricter GHG emission targets of 50% to 60%.

[32] Case 25-62, Plaumann & Co. v Commission of the European Economic Community (15 July 1963) ECLI:EU:C:1963:17, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0025.

[33] ECJ, paragraph 40, referring to paragraph 50 of the T-330/18, Order of the General Court, *See* https://curia.europa.eu/juris/document/document.jsf?text=&docid=239294&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=504038 and https://curia.europa.eu/juris/document/document.jsf?text=&docid=214164&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=3679611.

[34] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, Economic Commission for Europe, adopted by the Compliance Committee on 17 March 2017, p. 5, https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7_for_web.pdf

*c) The New opportunities regarding admissibility of non-legislative regulatory acts of a general nature and legal standing*

In order to ensure the full compliance of the Aarhus Regulation with the Aarhus Convention, it has been revised by adopting 2021 amendment[35] which significantly broadens the definition of administrative acts that can be challenged in internal and judicial review procedure. Now, it encompasses not only administrative acts of an individual nature but also non-legislative acts[36] adopted by an EU institution or body if these acts have legal and external effects (condition in accordance with the CJEU case-law). Moreover, this encompasses administrative acts requiring implementing measures at national level or at Union level, and contain provisions that may contravene environmental law[37] (and not only those "adopted under environmental law"). Furthermore, the amendments introduce obligation for the EU institutions and bodies to publish review requests and decisions on them (as prescribed by the Article 9(4) of the Aarhus Convention).

As stated in the judgment of the General Court in *Stichting Natuur en Milieu*: "It must be held that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified" (point 76).

The amendments to the Article 10 of the 2006 Aarhus Regulation now enable other members of the public, beyond NGOs to request internal reviews of administrative acts if they meet prescribed conditions. Here we have two different situations depending on individual or public interest at stake. In a first case scenario the legal standing of private parties is conditioned by meeting two cumulative

35 Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R1767. The amendment entered into force on 28 October 2021, with the exception of Article 1, point (3)(a), which shall apply from 29 April 2023.

36 Non-legislative acts include decisions adopted under Article 290 TFEU (delegated acts) and Article 291(2) TFEU (implementing acts) as well as other acts of general application adopted by the Commission and other agencies and bodies which does not entail implementing measures.

37 *See* new Article 2(1), point (g) of the Aarhus Regulation and point (h) which also addresses administrative omissions as: "any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene environmental law".

requirements: that the members of the public demonstrate an impairment of their rights caused by the alleged contravention of environmental law and that they are directly affected by such impairment in comparison with the public at large. With this wording the 2021 Aarhus Regulation "without establishing an actio popularis, bypasses the severe (in)admissibility criterion of the Plaumann case."[38]

The second case scenario provides that members of the public demonstrate a sufficient public interest and that the request is supported by at least 4000 members of the public residing or established in at least five Member States, with at least 250 members of the public residing or established in each of those Member States. In both cases, the members of the public shall be represented by an NGO or a lawyer.

These new tools were not originally entailed in the Commission's proposal of the Regulation but were result of the intervention of the European Parliament. However, democratic procedures do not work in synergy all the time, as due to the fear of the increase in number of climate related cases before the CJEU all previous attempts to create uniform legal framework at the EU level regarding access to justice in all Member States have not been successful. This include the 2003 Commission's proposal of a directive on access to justice in environmental matters, designed to implement Aarhus requirements at the level of Member States, as well as the 2022 attempt of the European Parliament to introduce into the two prominent regulations of the "Fit For 55" under the European Green Deal climate package provisions allowing access to justice at national level.[39]

### C. Climate litigation on the national level

The idea of climate litigation is relatively new in Europe and comes with the rising of the public awareness on the negative impact of the climate change on the wellbeing of humans and the nature. Those disputes may be "strategic", where the

[38] Georges Dellis, *Greening Luxembourg? Environmental rights after the 2021 amendments of EU Aarhus Regulation*, available at: https://www.chemins-publics.org/articles/greening-luxembourg-environmental-rights-after-the-2021-amendments-of-eu-aarhus-regulation (21.4.2023).

[39] The regulations set climate targets for Member States in various sectors, including greenhouse-gas emissions from road transport, buildings, agriculture, small industry, waste management and land use, and they require national governments to take appropriate measures to achieve these objectives which generate more than 60 per cent of EU emissions. Frederik Hafen, Roman Didi, *Legal challenges by NGOs, citizens key to climate battle*, Social Europe, 22nd December 2022, https://www.socialeurope.eu/legal-challenges-by-ngos-citizens-key-to-climate-battle (21.4.2023).

claimant's motive is to bring about an improvement of policies in the area of climate change, while the other disputes concern mainly only the parties involved in the case, e.g. disputes regarding building permits in areas at risk of flooding or sea level rise. We are witnessing a steady increase in the number of all climate change related cases globally. Actually, the number of cases has more than doubled since 2015, bringing the total number of cases to over 2,000. Around one-quarter of these were filed between 2020 and 2022. So far there are no climate cases neither in Montenegro nor in Balkans.[40] The cases can be classified on different grounds, for this paper the most important being claims against the State for actions or omissions that allegedly led to an increase in greenhouse gas emissions, insufficient decrease in greenhouse gas emissions, or a failure to adapt to climate change, either in contradiction to or absence of climate commitments,[41] as some of those cases were groundbreaking (Urgenda Foundation v. the Netherlands,[42] Neubauer et al. v. Germany,[43] Notre Affaire à Tous et al v. France[44] etc.). The common for those three cases is that they

[40] As of 31 May 2022, 2,002 cases of climate change litigation from around the world had been identified and included in the Sabin Center's Climate Change Litigation databases and the CCLW database. Of these, 1,426 have been filed before courts in the United States, while the remaining 576 have been filed in 43 other countries or before 15 international or regional courts and tribunals. Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy*, London School of Economics and Political Science, London, 2022, pp. 9-10. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf (20.4.2023).

[41] Ibid, p. 45.

[42] Hague District Court, Judgment of 24 June 2015,
Available at:
https://onlineacademiccommunity.uvic.ca/climatechangelitigation/2021/02/20/urgenda-foundation-v-state-of-the-netherlands-ministry-of-infrastructure-and-the-environment/
Hague Court of Appeal, Judgment of 9 Oct 2018, Case no.: 200.178.245/01
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Available at:
http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (20.4.2023).

[43] *Neubauer, et al. v. Germany* (2021), Federal Constitutional Court - 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 - - 1 BvR 288/20 – available at:
http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf

[44] *Notre Affaire à Tous and Others v. France*, No. 1904967, 1904968, 1904972, 1904976/4-1, Paris Administrative Court (3 February 2021), available at:

were successful, among others, due to the fact that in the respective countries the claimants had legal standing and the case passed the admissibility test as the national laws of these three countries do not require that the plaintiffs must be affected in a way which distinguishes them from the public at large. Furthermore, international commitments and fundamental rights were also at stake especially in the Urgenda case. Moreover, the German Constitutional Court held that the provisions of the Federal Climate Change Act governing national climate targets and the annual emission amounts allowed until 2030 are incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards, while the Paris Administrative Court issued a landmark decision ordering the government to increase climate action in order to implement its international commitments).

*a) The goal has been reached – the Urgenda case*

The far most important climate case so far was the Urgenda case against the Dutch government as the first in the world where a court, based on a citizen's lawsuit, determined that their government had a legal obligation to prevent dangerous climate change. Having in mind the importance and impact of this decision, below we will refer briefly to the findings of the Dutch courts.

The central issue of the case was whether the State has an obligation to impose further reductions in greenhouse gas emissions beyond the limits already set by Dutch climate policy. Representatives of the NGO Urgenda pointed to three sources of law that support this duty of the State: Articles 2 and 8 of the European Convention on Human Rights; Article 21 of the Dutch Constitution;[45] and the general duty of care in the Dutch Civil Code.[46]

https://elaw.org/system/files/attachments/publicresource/190496719049681904972190497 6.pdf (10.4.2023).

[45] Art. 21 reads: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment," available at: https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands (20.3.2023).

[46] The violation of duty of care under Book 6, Section 162(1) of the Code which stipulates "A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof." Available at: http://dutchcivillaw.com/legislation/dcctitle6633.htm (10.3.2023).

The first instance Court - the Hague District Court found that Urgenda has legal standing[47] in so far as Urgenda acts on behalf of current generations of Dutch citizens. Also, Urgenda has standing to represent persons outside the Dutch national borders, as well as future generations.[48] However, this Court held that Urgenda, as a legal person, could not rely on the rights conferred by Art. 2 and 8 of the ECHR, but the practice of the ECtHR in the environmental field can serve as a source of interpretation for national laws regarding degree of discretionary power of the State in exercising its power, on the one hand, and its minimum degree of the duty of care, on the other hand.[49] Therefore the Court based its decision on a violation of the duty of care which requires, that the State has committed an unlawful hazardous negligence, and that the State action was below standard and thus beyond the State's discretionary powers.[50] In determining the scope of hazardous negligence, the Court took into account the Netherlands' international obligations and particularly the principle of fairness, the precautionary principle and the sustainability principle, as formulated in Article 3 of the UN Framework Convention on Climate Change. Moreover, the District Court considered the climate agreements of the United Nations and the European Union, together with the principles of international law and scientific views on climate, to define the scope of the duty of the State to act actively in order to reduce the harm caused by climate change. The Court indicated that courts may take into account obligations and principles of international law when interpreting open standards in national laws.

The Court of Appeal added to the findings on the legal standing of the first instance court by referring to the national law. This Court held that the NGO Urgenda can rely on Article 2 and Article 8 of the ECHR, no matter the ECtHR has decided that it will not hear public interest actions, but only those by claimants whose interests are directly affected, as this cannot serve as a basis for restricting access to Dutch courts, as Dutch law[51] provides for class actions by interest groups.

This provision has been interpreted by Dutch courts to establish an unwritten duty of care of the State.

[47] Book 3, Section 303a of the Dutch Civil Code.

[48] Hague District Court Judgment at paras. 4.7-8.

[49] Hague District Court Judgment at para. 4.46 and 4.52.

[50] Hague District Court Judgment at para. 4.53.

[51] Book 3 Section 305a of the Dutch Civil Code.

Since individuals who fall under the Dutch State's jurisdiction may invoke Article 2 and Article 8 of the ECHR, Urgenda is also entitled to do so on their behalf.[52]

On December 20, 2019, the Dutch Supreme Court, the highest court in the Netherlands, upheld previous decisions in the Urgenda case, finding that the Dutch government has an obligation to urgently and significantly reduce emissions in line with its human rights obligations.

The Supreme Court even reinforced the arguments regarding the legal standing of the NGO Urgenda by referring to the Aarhus Convention[53] and the ECHR as its Article 13 obliges States to offer "everyone whose rights and freedoms as set forth in this Convention are violated […] an effective remedy before a national authority."

Another important point of the Supreme Court's Judgment is its deliberation on question of separation of powers. The Court held that although the judiciary cannot order the legislator to create legislation with a particular content, this does not, prevent the courts from issuing a declaratory decision to the effect that omission of legislation is unlawful, nor from ordering a public body to take measures to achieve a certain goal. Such an order leaves the State free to choose which exact measures should be taken.[54]

The Urgenda case is the groundbreaking success in climate litigation as for the first time the State was found accountable for human rights violations while implementing its climate policy.

### D. Climate protection and human rights

Although the European Convention on Human Rights (ECHR), does not provide for a specific right to a healthy environment, the impact of climate change to the humans' wellbeing and their human rights is undisputable. The Court has long and steady tradition of adjudicating environmental related cases under the human rights that the Convention protects. This is evidenced by the fact that so far the

[52] Hague Court of Appeal Judgment at paras. 35-6.
[53] For the Art. 9(3) *see infra* while Art. 2(5) of the Aarhus Convention stipulates that "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest [in environmental decision-making]".
[54] Supreme Court Judgment at paras. 8.2.4-7.

European Court of Human Rights (ECtHR) rendered judgments and decisions in more than 300 environment related cases.[55]

It is reasonable to assume that the Court shall protect individuals against the negative impacts of climate change, as it falls within the scope of protection under the ECHR. Thus, by the way of analogy with the previously adjudicated environmental cases, claims may be invoked primarily under the articles 2 (the right to life) and 8 (the right to respect for private and family life), though the climate cases can also fall within the prohibition of discrimination (Article 14 ECHR), and the rights to a fair trial and to an effective remedy (Articles 6 and 13 ECHR).[56] Some authors even make a list of procedural and substantive positive obligations of the States in accordance with the ECtHR jurisprudence which may also be applied in climate cases.[57]

However, there may be some specific hurdles that may arise in climate related issues bearing in mind the applications concerning the impact of climate change to human rights before the ECtHR.[58] One of those issues is active identification of citizens whose rights have been violated due to inaction or insufficient activity of the States in this area and their status as victims. The right of individual application stands with any person, NGO or group of individuals alike claiming to be the victim of a violation by one of the Contracting Parties. Although the circle of persons who have legal standing is wide, ascertaining victim status presuppose that the applicant

[55] *See* the Court's case-law database, HUDOC, and also Guide to the case-law of the European Court of Human Rights, Environment, ECHR, 2022, available at: https://www.echr.coe.int/Documents/Guide_Environment_ENG.pdf. (21.4.2023).

[56] Ibid.

[57] Obligations relating to the public participation in a general sense, an obligation to enact environmental legislation; a duty to conduct studies, research, and environmental impact assessments to ensure compliance with the precautionary principle; an obligation to meet adequate safety precautions; an obligation to prosecute and punish polluters causing environmental damage; and an obligation to deal with omissions by the States and inefficient measures. Katharina Franziska Braig, Stoyan Panov, *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?* Journal of Environmental Law & Litigation No 35, 2020, available at: https://core.ac.uk/reader/359918610.

[58] *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20), *Carême v. France* (application no. 7189/21) and *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20)). Cases adjourned: *Uricchio v. Italy and 31 other States* (application no. 14615/21) and *De Conto v. Italy and 32 other States* (no. 14620/21), *Müllner v. Austria* (no. 18859/21), *Greenpeace Nordic and Others v. Norway* (no. 34068/21), *The Norwegian Grandparents' Climate Campaign and Others v. Norway* (no. 19026/21), *Soubeste and 4 other applications v. Austria and 11 other States* (nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22), *Engels v. Germany* (no. 46906/22), available at: https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng (21.4.2023)

"suffered a significant disadvantage" and if that is not a case that "respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits" (Article 35.3(b)) and the latter may include a need to clarify the States' obligations under the Convention.[59] The Court interprets the notion of "victim" autonomously and therefore it "evolves in the light of conditions in contemporary society and it must be applied without excessive formalism."[60] The ECtHR has already adhered to the interpretation of victim status in environmental cases. In 2019 Cordella v Italy case,[61] the Court recognized legal standing only to applicants claiming to be victims due to environmental damage who were personally affected and that damage has violated their own rights (the Court considered that 19 applicants did not have victim status, since they did not live in one of the towns classified as being at high environmental risk).[62] However, as climate cases are very complex the Court may opt to examine victim status together with the merits and thus enable the flexibility in application of the Convention through living instrument interpretation.[63]

In climate cases, the issue of potential victim pro futuro will gain particular importance, as indicated by pending applications before the Court and in some cases the applicants relied on their age.[64]

It is undeniable that the right of individual application from Article 34 of the Convention does not allow complaints in abstracto alleging a violation of the

[59] Practical Guide on Admissibility Criteria, updated 30 April 2022, Council of Europe, paras. 18-19, available at: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (21.4.2023).
[60] Ibid.
[61] *Cordella and Others v. Italy*, applications nos. 54414/13 and 54264/15, Judgement 24.01.2019, ECtHR.
[62] In this case, there were 180 applicants who lived or had lived in the municipality of Taranto or in neighbouring areas and complained about the effects of toxic emissions from the Ilva steelworks in Taranto on the environment and on their health. They submitted in particular that the State had not adopted legal and statutory measures to protect their health and the environment, and that it had failed to provide them with information concerning the pollution and the attendant risks for their health. They also complained about the ineffectiveness of the domestic remedies
[63] Helen Keller, Corina Heri, *The Future is Now: Climate Cases Before the ECtHR*, Nordic Journal of Human Rights, No 40, 2022, available at: https://doi.org/10.1080/18918131.2022.2064074 (21.4.2023).
[64] In *Duarte Agostinho v Portugal and 32 Other Member States* and in *Greenpeace Nordic* young environmental activists alleged past and future harms caused by climate change deprive young people of their future, while in *Verein Klimaseniorinnen and Others v Switzerland* the applicants have alleged that the "respondent State's climate policy is putting them, as elderly women, at risk of health impacts, including death, due to future heat waves caused or exacerbated by climate change."

Convention. However, in some specific situations, the Court has accepted that an applicant may be a potential victim[65] under condition that applicant produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is not sufficient.

Grounds for inadmissibility relating to the Court's jurisdiction (incompatibility ratione personae, ratione loci, ratione temporis and ratione materiae) should not pose particular difficulties in climate cases. The same stands for procedural grounds for inadmissibility, though non-exhaustion of domestic remedies should raise some important issues in Duarte Agostinho case, as the applicants directly addressed the ECtHR. In this case the applicants asked for the exceptional absolution from the admissibility requirement because according to them, as children, it would represent a disproportionate financial burden and lead to the prolongation of the procedure, as they come from 33 countries.

The question arises in which direction the further development of the Convention will move. One possibility is that ECtHR as it used to do, applies sources of international law to fill gaps in the text of the Convention and to develop the Convention „progressively and contextually."[66] If that is a case, the ECtHR could also apply the Paris Agreement and by doing so order, States to adhere to the targets set out in this Agreement. However, the latest developments may point to other scenarios in the near future.[67]

[65] Helen Keller, Corina Heri, *The Future is Now: Climate Cases Before the ECtHR*, Nordic Journal of Human Rights, No 40, 2022, p. 36.

[66] Ibid*,* p. 19.

[67] Recommendation 2211 (2021) of the Parliamentary Assembly of the Council of Europe of 29 September 2021 to draw up an additional protocol to the European Convention on Human Rights on the right to a safe, clean, healthy and sustainable environment (with the proposed text of the protocol); Recommendation CM/Rec(2022)20 of the Committee of Ministers of 27 September 2022 to member States on human rights and the protection of the environment; United Nations Human Rights Council Resolution 48/13 of 8 October 2021 and United Nations General Assembly Resolution 76/300 of 28 July 2022 which recognised the right to a clean, healthy and sustainable environment as a human right.

## IV Concluding remarks

Positive obligations, firmly enshrined both in international conventions and the EU legislation place a duty on State, as well as on the EU authorities, to take active steps in order to safeguard from negative impacts of the climate change. Access to justice in environmental matters, as the core of procedural democracy, is still growing and evolving, both on the EU and national level. The Aarhus Convention on the national level and the 2021 amendments to the Aarhus Regulation on the level of the EU already provide for a frame for climate litigation.

Furthermore, recently we also witnessed important developments on the national level. The Urgenda case was the first success in establishing that the State can be held accountable for human rights violations while implementing its climate policy.

Another window which is presently opening for access to justice in climate related matters is the prospective practice of the European Court of Human Rights. To this should be added the trend of "greening" of traditional human rights that has been present for decades in a series of decisions of this court which even resulted in an idea of introducing a new human right to a healthy environment.

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# PRINCIPLES OF EUROPEAN ADMINISTRATIVESPACE AND THE WESTERN BALKANS EU INTEGRATION PROCESS (CASE OF MONTENEGRO)

Summary

*Fulfillment of conditions for the accession to the European Union related to public administrations largely depends on the scope which the respective country adheres to the basic principles of the European administrative space. Despite difficulties in the process of joining the European Union, the Western Balkan candidate countries which have not achieved the status of EU member-states should take advantage of the principles and standards of European administrative space defined by the SIGMA expert analysis regarding European principles for public administration and their countries respective administrative capacities for EU integration. By adhering and applying principles and standards of the European administrative space after the ratification of respective stabilization and accession agreements, national governments of the Western Balkan countries need to incorporate these principles and standards into their national public administrative legislation and provide effective supervision and control mechanisms, inter alia in order to integrate Western Balkan countries into EU internal markets. In the context of implementing these principles and standards in a particular Western Balkan country, the case of Montenegro is summarily presented through the newest „progress report", emphasizing the political commitment of the Montenegrin authorities to the strategic goal of European integration.*

„**Key Words"** "*European administrative space", "Administrative capacities for EU integration", " Western Balkans", "Montenegro".*

## I European Union aministrative law framework

### A. Introduction

The European Union represents a specific form of regional integration and differs in many ways from other forms of regional cooperation existing in the world today. One of the key features of the European Union, and at the same time the key difference in regard to other regional and/or international socio-political and

economic systems, is its specific supranational character.[1] With the entry into force of the Treaty of Lisbon in December 2009,[2] two until then basic treaties were amended. The Treaty on the European Union (Maastricht 1992) and the Treaty Establishing the European Community (Rome, 1957) were integrated and renamed as the Treaty on the Functioning of the European Union (TFEU). The process of gradually strengthening the „legal personality" of the Union was completed, as the Treaty of Lisbon explicitly stipulates that the European Union „replaces and inherits the European Community" and enjoys legal subjectivity.[3] With the Treaty of Lisbon, the European Community is replaced by the European Union constituted as a single entity that has the status of a legal entity and has international legal personality.

B. EU Administrative Law

Over the years, European Union law has influenced the content of member states' national legal frameworks, even in areas where European Union standards do not apply. This phenomenon is due to the fact that it is very difficult to draw on, within a given country, different standards and practices for the application of original national law and European Union law. Over time, member states have begun to use the same or similar standards when applying national and European Union law. [4]

Regarding European Union law, the Court of Justice of the European Union (CJEU) continuously defines a large number of principles of law by referring to general legal principles of law common to the member states. In the field of administrative law, particularly important principles are set out in the case law of the Court. Member states need to adhere to these administrative law principles when applying European Union law, which, *inter alia*, include: the principle of legality of administrative action; the principle of proportionality and legal certainty; the

1 Lučić Sonja, „Konstitucionalizacija pravnog sistema Evropske unije – Uloga evropskog Suda pravde", Pravni život, 53(7–8), 2004, pp. 207-218, p. 211.
2 Knežević-Predić Vesna, Radivojević Zoran, „Pravna priroda Evropske unije prema Lisabonskom ugovoru", Harmonizacija zakonodavstva sa pravom Evropske unije (eds. Dimitrijević D., Miljuš, B.), Institut za međunarodnu politiku i privredu, Beograd, 2010, pp. 111-131.
3 Consolidated Version of the Treaty on European Union, Official Journal of the European Union, C 326/13 (26.10.2012), Art. 1 and Art. 47.
4 Von Bogdandy Armin, „Founding Principles of EU Law: A Theoretical and Doctrinal Sketch", European Law Journal, 16 (2), 2010, pp. 95-111.

principle of protecting legitimate expectations; the principle of non-discrimination and right to be heard in the administrative decision-making process; the principle of access to administrative courts under equal conditions, etc.[5]

General difficulties in defining the principles are the reason why the Court often uses doctrinal constructions (e.g. so-called blank concepts) in the reasoning of its decisions and in defining the principles of administrative law. As it is pointed out: „This elusive nature of administrative law principles is one of the reasons why „blank concepts" are so common in administrative law and civil service regulations. This is also one of the reasons why national courts and the European Court of Justice as well, are so often invoked to solve conflicts and to continually refine these definitions in a doctrinal construction, adapted over time. (...) From the perspective of law-making it is probably wise to resort to „blank concepts" because of their flexibility to fit in disparate situations. From the standpoint of civil servants' and public authorities' behavior, relying on common sense and seeking inspiration from consolidated case law doctrine would be advisable."[6]

For these reasons, it is not possible to list all the principles of European Union administrative law that have so far been confirmed by the Court. However, two classifications dominate. One classification rests on the theoretical division of principles into substantial (material) principles, on one hand, and procedural (formal) principles, on the other. The other classification is based on the grouping of numerous, for the purposes of the SIGMA program, identified principles.

The Court of Justice has given different strengths to the principles depending on which of these two groups they belong to. Thus, the established violation of substantial (material) administrative principles, as a rule, is the reason for annulment of EU decision which is subject to review before the Court, while violation of procedural (formal) administrative principles usually leads to annulment of the decision only if it represents a so-called significant violation of the procedure, i.e. if the violation is such that it could have affected the resolution of the administrative subject matter.[7]

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**5** Schwarze Jürgen, (ed.), *Administrative Law under European Influence: On the Convergence of the Administrative Laws of the EU Member States*, Nomos, Baden-Baden, and Sweet and Maxwell, London, 1996.

**6** *European Principles for Public Administration*, SIGMA Papers No. 27, OECD, Paris, 1999, p. 9.

**7** Rabrenović Aleksandra, „Načela 'kvalitetne uprave' u pravu Evropske unije", Javna uprava 1, 2002, Savet za državnu upravu, Beograd 2002, pp. 155-175; Nehl H.P., *Principles of Administrative Procedure*

The substantial principles of EU administrative law are in most cases the general legal principles of EU law, which, in case of violation, are subject to legal challenge both as individual decisions or general decisions of EU bodies. In this context, there is a dilemma whether substantial principles are special principles of administrative law or are they general principles of (e.g. constitutional) law. At this stage of development, European Union law does not provide a sufficient basis for distinguishing between constitutional principles and principles of administrative law.[8] For example, the Court introduced the principle of proportionality into European Union law adopting a noted decision in the case of Liselotte Hauer v. The Land of Rhineland-Palatinate (1979), in which the Court defined the principle of proportionality by stating that restrictive measures taken by the European Community must be in proportion with the general interest of the Community.[9]

Procedural principles are also important, because they represent the way in which a person can „access" the legal system. In any system of administrative law, there are access points (the way the legal system determines who can procedurally enter the system) and each administrative law regime will usually have two key access points: a procedural rule that determines who has the right to be heard or intervene before than the initial decision is made, as well as who has the right to take part in the process of formulating regulations. Also, there are rules that determine who has the prospect of submitting an appeal to court because the decision-maker has exceeded the prescribed authority.[10]

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**8** Schwarze Jürgen, *European Administrative Law*, Sweet and Maxwell, London, 1992, p. 145; Mattarella Bernardo Giorgio, „The Influence of European and Global Administrative Law on National Administrative Acts", Global Administrative Law and EU Administrative Law – Relationships, Legal Issues and Comparison Chiti Edoardo, Mattarella Bernardo Giorgio (eds.), Springer 2011, pp. 61-85.

**9** C-44/79, *Liselotte Hauer v. Rhineland-Palatinate* (13 December 1979), ECR p. 3728. „30. Therefore it is necessary to conclude that the restriction imposed upon the use of property by the prohibition on the new planting of vines introduced for a limited period by Regulation No 1162/76 is justified by the objectives of general interest pursued by the community and does not infringe the substance of the right to property in the form in which it is recognized and protected in the community legal order".

**10** Craig Paul, „Process Rights in Adjudication and Rulemaking: Legal and Political Perspectives", What's New in European Administrative Law (ed. Ziller J.), European University Institute, Florence, 2005, pp. 25-29.

## II European administrative space

### A. The Concept of European Administrative Space

The concept of the European administrative space is a result of the practical needs of future members of the European Union and represents a framework of defined guidelines that their administrations should follow in order to become capable of future coherent work with both individual member states, as well as the European Union itself. The very term „European administrative space" was originally mentioned in publications published by SIGMA,[11] which is a joint initiative of the Center for Cooperation with Non-Community Members of the OECD and the European Union with the aim to (previously) improve government and administration in Central and Eastern European countries in transition, and (presently) support administrative reform of Western Balkans EU candidate countries.

In this context, the term „European administrative space" refers to a set of administrative principles, values and standards that form the contours of European administrative law. The conceptualization of the European administrative space determines the organization, activity and functioning of state administration bodies on the basis of the *acquis communautaire* and thus the framework for laying the foundations for building a modern European public administration system.

The concept and notion of a European administrative space was designed and defined in the analytical papers presented by SIGMA. The European administrative space concept was first presented in Paper No. 23 suitably titled *Preparing Public Administrations for the European Administrative Space*: „What may be called a 'European administrative space' is gradually taking shape. In order to implement Community decisions, the public servants of member states meet frequently. They get to know each other and trade views and experiences. Patterns of communication develop which have an impact on decision-making, so that common solutions are often found. Officials and experts from European states are becoming used to examining issues jointly, including those having to do with public administration. A European

11 SIGMA - Support for Improvement in Governance and Management in Central and Eastern European Countries is a joint initiative of the OECD Centre for Co-operation with Non-Member Economies and the European Union's Phare Programme. The initiative supports public administration reform efforts in countries in transition (www.sigmaweb.org).

administrative space is emerging with its own traditions which build on, but surpass the distinctive administrative traditions of the Union. Administrative reliability, which is necessary for the rule of law, effective implementation of policy and economic development, is one of the key characteristics of this space".[12]

The notion of European administrative space concept was presented in SIGMA Paper No. 27 titled *European Principles for Public Administration*: „The notion of a European administrative space is taken from the more common notions of European economic and social spaces, widely debated upon in EU constitutional negotiations. It also relates to an EU-wide system of judicial co-operation, which includes mutual assistance in law enforcement and some approximation in the relevant field of law. A common administrative space, properly speaking, is possible when a set of administrative principles, rules, and regulations are uniformly enforced in a given territory covered by a national constitution. Traditionally, the territory where administrative law has been applicable has been that of the sovereign states. The issue of a common administrative law for all the sovereign states integrated into the European Union is now a matter of debate."[13]

The concept of the European administrative space arises in response to the question on what an administrative system should have in organizational and functional terms in order to be able to effectively fulfill the tasks imposed by European standards in the field of economy, social justice, security, etc., which was achieved through long-term integration processes in the developed Western European countries.[14]

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**12** Preparing Public *Administrations for the European Administrative Space*, SIGMA Papers No. 23, OECD, Paris, 1998, p. 122.

**13** *European Principles for Public Administration,* SIGMA Papers No. 27, OECD, Paris, 1999, p. 16.

**14** Kavran Dragoljub*,* „Evropski upravni prostor, reforma i obrazovanje državne uprave", Pravni život, 53(9), 2004, pp. 1059-1075, p. 1063; *Dimitrijević Marina*, „Evropski upravni prostor", Pravni život, 56(10), 2007, pp. 915-928; *Lilić Stevan, „*Evropska unija i evropski upravni prostor", Zbornik škole prava Evropske Unije, II sesija, Univerzitet Donja Gorica, Podgorica, 2011, pp. 83-99; *Šimac Neven*, „Europski upravni prostor i europska načela javne uprave", Zbornik radova Pravnog fakulteta u Splitu, 49 (2), 2012, pp. 351.-368; Lilić Stevan, Cerović Dražen, *Upravno pravo*, JU Službeni list Crne Gore, Podgorica, 2019, p. 77; Andonović Stefan, „Evropski upravni prostor – zlatna tačka evropskih integracija", Društvene nauke - Evropske (dez)integracije (eds. Vučković A., Savić A.), Banja Luka, 2018, pp. 18-35.

B. SIGMA Administrative Law Principles

The classification of administrative principles was done within the SIGMA program, primarily by SIGMA program experts to help candidate countries join the European Union. Thus, the basic (most general) principles are given as guidelines for reforms that should enable candidate countries entry into the European administrative space.

SIGMA systematizes a large number of different, but related general and special, legal and administrative principles into the main principles of administrative law common to Western European countries, and divides them into four groups: 1) reliability and predictability (legal certainty); 2) openness and transparency; 3) responsibility and 4) efficiency and effectiveness.[15] In formulating the principles, SIGMA started from the assumption that they must be derived from the principles of administrative law which are the backbone of everyday activities of public servants, and that the case law of the Court of Justice confirms the formulated principles as applicable in the wider European Union context.

## III Administrative law priniples and European administrative space

A. The Principle of Reliability and Predictability (Legality)

A number of principles and mechanisms of administrative law are classified under the general principle of „reliability and predictability", also called „legal security" of public administration procedures and decisions. These principles seek to eliminate arbitrariness in the conduct of public affairs. One of the most important is the principle of legality.

The rule of law (*Rechtsstaat, état de droit*) is a multilateral mechanism for reliability and predictability. Above all, this means the presence of the principle of „legality in the work of the administration". In this sense, the principle of legality is defined as the obligation of the state to act in accordance with the law. Its importance for the functioning of the European Union stems from the legal nature of the European Union, which, despite the constant expansion of its competencies, does not possess

**15** These principles were set out and elaborated in SIGMA Paper No. 27, *European Principles for Public Administration*, OECD, Paris, 1999, pp. 8-18.

the essential feature of sovereignty. Therefore, any activity of the bodies of the European Union must be based on the regulations of the European Union. Thus, Article 5 of the Treaty on European Union stipulates that the Union must act „within the limits to which it is authorized by this Treaty". Also, the Council and the Commission are obliged to act in accordance with the provisions of the Treaty. If the institutions of the European Union violate the principle of legality in their work, the Court of Justice will annul such acts: „We now consider the position where the initial decision is unlawful. This is an endemic problem faced by all legal systems."[16]

The Treaty of Lisbon adds bodies, offices and agencies of the Union whose acts are subject to control of legality. The idea of adding these organs arose as a consequence of the „hyper-production" of organs entrusted with significant competencies.[17] Public authorities may decide only on matters within their competence based on law. Jurisdiction in this context means an explicit and statutory authority to decide on a particular legal matter or issue of public interest, which legally allows a public authority not only to make decisions on that issue, but also obliges it to take responsibility. The competent public authority cannot deny this responsibility. In that sense, authority is in correlation with responsibility. The existence of authorization is strictly taken into account, so that the decision, which was made by the body without legal authorization, is invalid and will be declared as such by the Court.

However, the principle of legality and the principle of reliability and predictability of public administration are not in conflict with the discretionary powers of the administration (*freies Ermessen, pouvoir discrétionnaire*). Discretion and arbitrariness are not the same. Discretionary decisions are cases where, within the legal framework, some degree of choice is left to the decision maker. Discretionary powers are entrusted to public authorities for several reasons. First of all, discretionary decisions are necessary, because the law cannot foresee every circumstance that may arise from future situations. The courts have developed a legal doctrine of administrative discretion that contains various principles that guide and limit the use of discretion. Among these principles are those who instruct the administration to act in „good faith", to „reasonably follow the public interest", to

**16** Craig Paul, *EU Administrative Law,* Second edition, Oxford University Press, 2012, p. 562.
**17** Čavoški Aleksandra, „Pravosudni sistem Evropske unije u svetlosti reformskog ugovora", Strani pravni život, 1, 2009, Institut za uporedno pravo, Beograd, pp. 73-85.

respect the prescribed procedures, to respect the requirement of equal treatment, as well as to respect the principle of proportionality. In other words, legal discretion cannot function without the general principles of administrative law, because they constitute a counterbalance mechanism to the discretionary powers of the administration.

### B. The Principle of Openness and Transparency

Openness and transparency are the principles on which public administration must be built in order to enable citizens a certain degree of participation and control in the performance of public services. Also, administrative transparency guarantees the legitimacy of public administration. Administrative transparency can be viewed in a narrower and broader sense. The principle of administrative transparency, understood in a narrower sense, is contained in regulations governing administrative procedure and aims to ensure *ex aequo et bono* decision-making. The realization of this principle in administrative procedure is necessary for the protection of the rights of the individual. In a narrower sense, administrative transparency means the right of an interested party in the administrative procedure to access documents in the possession of the administrative body, which may affect the course and outcome of the procedure. This principle also implies an explanation of the reasons for the adoption of the administrative act and thus helps the interested party to exercise the right to appeal.

The administrative act and the decision should be accompanied by an explanation and reasoning. With it, the administrative authority shows the justification of its decision and especially shows the consistency between the factual situation and the existing legal framework. Therefore, reasoning should include facts and evidence about them, as well as legal norms that apply to the given case. The explanation (narrative) is of the utmost importance when the request of the interested party is rejected. In that case, the explanation should be carefully presented and explain why the argument or evidence submitted by that party is not accepted.

In a broader sense, administrative transparency means the right of the public to access information of public importance (official documents). i.e. „the right of the public to know." Unlike administrative transparency in the narrow sense, administrative transparency in the broad sense implies access of every person to

every document held by every public authority. The principle of administrative transparency understood in a broader sense means that its realization is usually regulated by a special law (*lex specialis*) regarding free access to public information as a specific human right.

C. The Principle of Accountability

Accountability is understood as a situation where a person or authority has to explain and justify its actions to another entity that was supervisory powers. Accountability in administrative matters means that any administrative authority should be answerable for its actions to other administrative, legislative or judicial authorities, and that no authority should be exempt from supervision, scrutiny or review by others. A special feature of administrative accountability is that it is ensured through a rather complex set of formal procedures. The other side of administrative accountability is a supervision mechanism which is needed to ensure that administrative bodies use their powers properly according to law and follow established procedures. The purposes of supervision are to evaluate whether public bodies are performing their functions effectively, efficiently and on time, and that the principles and procedures laid down, by either specific or general regulations, are upheld. In a wider context, supervision aims to ensure the principle of legality is respected in administrative action and decisions.

D. The Principles of Efficiency and Effectiveness

A special dimension of responsibility is efficiency in the work of the administration. It is relatively recent that efficiency has been recognized as an important value in public administration and civil service. As the state becomes a „provider of public services", the notion of productivity entered the realm of public administration. Today, due to fiscal constraints, the efficiency and effectiveness of public administration in providing public services is increasingly being studied in many countries. Efficiency is a typical management principle that essentially consists of maintaining a good relationship between the resources used and the results achieved. Presently, the strongest tool in achieving administrative efficiency is electronic government (e-government).

In relation to the principle of efficiency stands the principle of effectiveness, which basically consists of ensuring the success of the public administration in achieving its goals and solving public problems set by law and the government. It primarily calls for the analysis and evaluation of existing public policies, as well as for the evaluation of their implementation by the state administration and civil servants. In more recent Western European constitutions, such as the Spanish (1978), the principles of efficiency and effectiveness of public administration have been established as constitutional principles. New orientations in managing public administration refer to the 3-E concept (i.e. economy, efficiency and effectiveness.

Sometimes, the principles of efficiency and effectiveness as management values may seem to be in conflict with the rule of law and legally prescribed procedure. Public managers often see legal procedures as constraints that damage efficiency. Adherence to established procedures can be unfavorable to the economical use of funds and can negatively affect the relationship between costs and results of administrative actions. This contradiction raises a number of questions and various institutional and legal solutions are looking for acceptable solutions like transferring public administrative activities to the private sector (e.g. outsourcing; public-private partnership).

## E. The Right to Good Administration

Administrative functions in the European Union can be performed by the administration of the member state, by the EU Commission, and jointly by the EU Commission and administration of the member state(s) in what is called „shared performance" of administrative functions. Each of these levels of government is neither purely national nor supranational. On the one hand, the administrative functions of the member states are not only regulated by national regulations, while on the other hand, the administrative activity of the Commission involves the involvement of national bodies in formulating administrative regulations (e.g. comitology consultation procedure).

The application of EU law in individual and specific situations is primarily performed by the administrations of the EU member states. In performing administrative functions, the public administration of the member states is primarily guided by national regulations governing administrative procedure with the obligation to respect the principles of administrative procedure that have developed

at the level of the European Union, primarily within the concept of the European administrative apace. For this reason, one of the preconditions for membership in the European Union is achieving a certain level of „administrative capacity" of candidate countries in the sense that its administration can effectively implement the *acquis communautaire*.

The impact of the principles of the European administrative space on the administrative law of the member states is reflected in the established „right to good administration" formulated in Article 41 of the Charter of Fundamental Rights of the European Union[18] (which became a binding document with the 2009 Treaty of Lisbon), meaning that every person has the right to impartial, fair and timely treatment of his or her cases in the institutions and bodies of the Union. This right to good administration includes: the right of every person to be heard before any individual action is taken against him or her; the right of every person to inspect his or her file, while respecting legitimate interests regarding the confidentiality of professional and business secrets; the obligation of the administration to justify its decisions. This right also implies that every person has the right to compensation for damage caused by the institutions of the Union, or its civil servants in the performance of their duties, in accordance with general principles common to the laws of the member states. Any person may address the institutions of the Union in writing in one of the contracting languages and must be answered in the same language.

## IV Administrative capacity of EU candidate countries

### A. The Copenhagen Criteria and Administrative Capacity

The administrative capacity of a candidate country is one of the most important factors in assessing its readiness to become a member of the European Union. „Administrative capacity refers to the ability to effectively manage the human and physical resources necessary to accomplish the tasks assigned to the Government."[19] There are several independent factors that determine the

**18** Charter of Fundamental Rights of the European Union, (2007/C 303/01).

**19** Painter Martin, Pierre John, „Unpacking Policy Capacity: Issues and Themes", Challenges to State Policy Capacity - Global Trends and Comparative Perspectives (eds. Painter, M., Pierre, J.), Palgrave Macmillian, London, 2005, pp. 1-18, p. 2.

administrative capacity of a state: the system of public administration, territorial organization, management of public expenditures, the system of audit and control etc.

The administrative capacity of a candidate country to implement the obligations is assessed by the method of comparison with the already existing administrative capacities of the member states of the European Union. The quality of administration necessary for the implementation of obligations arising from membership is not defined in advance by the written *acquis communautaire*, but through „quality control of administration" in individual cases which gradually define certain values, standards and principles of the European administrative space. The very „control of the quality of administration" (and at the same time the creation of the European administrative space) at the level of the European Union is in practice carried out by the European Court of Justice and the European Ombudsman.

In order for the administration to be reorganized and able to implement EU rules and policies, it is necessary to have the political will and to define a comprehensive reform strategy that includes not only administrative reform, but also the modernization and of the society of candidate countries as a whole. In previous enlargements, administrative capacity was not a condition that candidate countries needed to meet in order to become members of the EU. However, until the fifth (also known as the „big") enlargement that ended in May 2004, when ten Central and Eastern European countries joined the EU, the issue of administrative capacities was not in the general public focus. This was considered more of a technical issue, as in previous enlargements the number of EU regulations to be applied was modest and, in particular, the acceding states were not former communist countries (in the 2004 enlargement eight of the ten states were). Presently, particularly in regard to Western Balkans candidate countries, the process of European integration is long and gradual, primarily due to the need to build completely new institutions compared to those of the previous period. All this has led to the issue of administrative capacity becoming one of the most important factors in the European integration process.[20]

**20** Todorović Jelena, „Jačanje administrativnih kapaciteta kao uslov članstva u EU", Politička revija 2, Institut za političke studije, Beograd, 2009, pp. 27-39.

In consequence, the European Council defined five so-called Copenhagen criteria for joining the EU (1993).[21] In addition to the fundamental criteria for membership set out in Article 6 (1) of the Treaty on European Union, the Commission should consider the following requests (criteria) when formulating its opinion in the form of a draft accession of a candidate country in accordance with procedural requirements: a) the stability of the institutional guarantee of democracy, the rule of law, respect for human rights and the protection of minorities; b) a functioning market economy, as well as the capacity to cope with competitive pressures and market forces in the Union's single market; c) the ability to accept the rights and obligations arising from Union law; d) commitment to the political, economic and monetary objectives of the Union; e) the capacity of the Union to absorb new members without losing quality in European integration. As a result, four of the Copenhagen criteria apply to the applicant countries, while the fifth concerns the EU itself.

Later, the European Council added the so-called Madrid Criterion (1995)[22] on the basis of which candidate countries should „strengthen their administrative capacity", which has now become a prerequisite for membership. Since then, this condition has been repeated several times in various forms, and in official EU documents it has been increasingly elaborated as an issue important for the further enlargement of the Union.

The existence of professional and neutral public services is a precondition for the successful establishment administrative capacities within the framework of the „European administrative space". In addition to this, public services have been identified as one of the key areas requiring special attention. Civil servants must be subject to legal principles that ensure professional stability and impartiality. Adequate wages, a public and well-regulated income scheme and anti-bribery disciplinary measures help strengthen a regime that discourages corruption. Legality in the work of public services requires proper statutory definition of the legal status, rights and obligations of public servants. They should be guided by the principle of legality in work, responsibility to superiors and reliability. The impartiality and integrity of public servants should be ensured by disciplinary measures for

[21] These membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name. Excerpt from the Copenhagen Presidency conclusions.
[22] Miščević Tanja, „Madridski kriterijum: administrativni kapsciteti kao uslov članstva u EU", Izazovi evropskih integracija (časopis za pravo i ekonomiju evropskih integracija) 1, Beograd, 2008, pp. 98-123.

corruption and legally defined salary structures. These criteria highlighted the creation of a professional and depoliticized state administration. SIGMA also prepares public administration assessment reports that supplement the annual „progress report" that is prepared and presented by the European Commission for each country.[23]

B. Western Balkans EU Integration Process

As its political strategy, in 2000 the European Union included the countries of the Western Balkans as potential candidates for EU membership. The European perspective of the Western Balkans was formally confirmed in Thessaloniki in June 2003 with the so-called „Thessaloniki Agenda" as the basis of EU policy towards this region. This EU regional policy is implemented through the process of stabilization and accession agreements (SAA).

As part of the accession process of the Western Balkan countries, the European Commission has been submitting regular „progress reports" (for each country separately) to the European Parliament and the European Council since 2002. In terms of content, the progress report is a specific instrument for assessing the fulfillment of conditions and analysis of the administrative capacities of the Western Balkan countries on their path to European integration and EU membership. Progress is measured on the basis of decisions made, legislation adopted and measures implemented, and is based on information collected and analyzed by the European Commission.

C. The Case of Montenegro

Montenegro declared independence in June, following a referendum in May 2006. As a result, the EU has decided to establish relations with Montenegro as a sovereign state, and all EU member states have recognized Montenegro's independence. The Stabilization and Association Agreement between the European Communities and its Member States and Montenegro was signed in October 2007 and entered into force in May 2010, following ratification by the Contracting Parties.

[23] Trbović Ana S., Đukanović Dragan, Knežević Borisav, *Javna uprava i evropske integracije Srbije*, Fakultet za ekonomiju, finansije i administraciju, Beograd, 2010, pp. 75.

According to European organizational and functional standards, the Montenegrin public administration is one of the key factors in achieving the strategic political interest of Montenegro through active involvement in European integration processes, and finally with full membership in the European Union. However, the inclusion of the Montenegrin public administration in the European administrative space does not mean that the reform of the state administration of Montenegro should be carried out according to some „imported" model. Uncritical acceptance („copying") of an existing foreign model of administrative reform can lead to the creation on paper of an ideal but in practice inapplicable administrative system.

Therefore, administrative reform in Montenegro should be adjusted to the existing legal order, financial possibilities, and even certain traditional values, resulting in a „modern" public administration, which as an „integrated system of administrative structures and procedures" can establish organizational, functional and value communication with the European administrative space on a partnership basis.

A study on administrative capacities in Montenegro, *inter alia*, states: „Establishing an adequate legal and institutional structure for strengthening and building administrative capacity is something that Montenegro can show as one of the relatively successful tasks in the process of joining the European Union." (...) An important dimension is the need and opportunity for the overall public administration to have the ability to transform and, following the social, economic, economic and cultural development of the state, to respond to the challenges it poses, as a highly professional, competent and flexible public administration. In this regard, it is necessary to keep in mind that the right of citizens of the European Union to good administration is prescribed in Article 41 of the Charter of Fundamental Rights of the European Union. The Council of Europe, in its Resolution 77 (31), also recognizes the right of citizens to good governance ensures the protection of the fundamental rights and freedoms of individuals and promotes fairness in relations between citizens and government. In addition, the Court of Justice has established general administrative principles on the basis of which the practice of national administrative courts of the member states of the European Union has been established, thus forming common European values in this area. Montenegro, as a member of the Council of Europe and a country that is on a stable pre-accession path to membership in the European Union, is obliged to provide its citizens, tomorrow the citizens of the European Union, with good governance: not

only as a state that builds and confirms its international credibility, but also as a stable democracy in which, before the law and the institutions that implement it, all citizens are equal."[24]

European Commission reports for Montenegro as an independent state are published since 2006. The Report on the Progress of Montenegro for 2021 states that: „Accession negotiations with Montenegro were opened in June 2012. To date 33, negotiating chapters have been opened, of which three have been provisionally closed. (...) Overall progress in the accession negotiations depends on progress in the area of rule of law, as per the requirements set out in the Negotiating Framework as well as the revised methodology formally accepted by Montenegro in the Intergovernmental Conference held on 22 June 2021."[25]

The Report also states (page 6) that in relation to public administration reform Montenegro is moderately prepared on this issue: „Overall, limited progress was made in the reporting period. Some progress has been made in areas such as medium-term policy planning, electronic government and public finance management as well as budget transparency. Public consultations were held on draft amendments to the Law on Access to Information, which, together with the new Public Administration Reform and Public Financial Management strategies, remain to be adopted. (...) Reorganization of public administration led to substantial staff changes, losing experienced staff in EU accession process related matters. Strong political will need to effectively address the depoliticization of public service, optimization of state administration and effective implementation of managerial accountability."

In November 2021, the Ministry of Public Administration, Digital Society and Media of Montenegro presented the Draft Strategy of Public Administrative Reform for 2022-2026 Period, stating, *inter alia*: „In March 2011, the Government of Montenegro adopted the Strategy of Public Administration Reforms for the Period 2011-2016 (AURUM), with the Framework Action Plan for its implementation. AURUM covered two sub-areas of public administration: state administration and local self-government. The main goal of AURUM was focused on efficient, professional and service-oriented public administration in the function of citizens and other social and economic entities. The implementation of AURUM was,

[24] *Administrativni kapaciteti u Crnoj Gori*, Evropski pokret u Crnoj Gori, Podgorica, 2012, p. 7.
[25] European Commission, *Montenegro 2021 Report,* SWD(2021) 293 final/2, Strasbourg, 19.10.2021, p. 4.

among other things, aimed at building a legislative framework for public administration in Montenegro and this goal has been largely met. In July 2016, the new Public Administration Reform Strategy of Montenegro for 2016-2020 was adopted. The structure of this Strategy followed the logic of reform areas as set out in the document „Principles of Public Administration", developed by SIGMA. The reform areas of the 2016-2020 Strategy referred to all segments of public administration (state administration, local self-government, organizations with public authority), while the specifics of local self-government, concerning its territorial, functional and financial position, and were further elaborated in a special chapter. The general goal of the reform activities up to 2020 was aimed at creating an efficient and service-oriented public administration, which is characterized by the growth of citizens' trust in its work. In order to continue the public administration reform, the Public Administration Reform Strategy 2022-2026 has been prepared."[26]

Concluding, it is fair to say that principles of European administrative space in context of European administrative law have played, and will play a significant role in strengthening administrative capacities of the public administrations of Western Balkan candidate countries on the road to their full European Union membership status (the case of Montenegro being a tangible model), as the principles of European administrative space have played in the previous 2004 enlargement sequence.

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**26** Ministry of Public Administration, Digital Society and Media (Montenegro), *Draft Strategy of Public Administrative Reform for the 2022-2026 Period (https://www.gov.me/clanak/javna-rasprava-o-nacrtu-strategija-reforme-javne-uprave-2022-2026), p. 5.*

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# THE PRINCIPLE OF INDIRECT EFFECT OF EU LAW AND BEYOND: SOLVING "THE PROBLEM" OF LACK OF HORIZONTAL DIRECT EFFECT OF EU DIRECTIVES

Summary

*This conference paper represents an overview of one of the mechanisms devised by the CJEU in an effort to essentially mitigate the repercussions of its own longstanding position that provisions of EU directives may not be invoked directly before the Member States courts in disputes between (strictly) private parties. Hence, the paper briefly deals with the history of direct effect of EU directives, CJEU's ratio decidendi for maintaining the position that directives should not have horizontal direct effect and summarizes key mechanisms devised with the view to compensating the lack of horizontal direct effect. Thereinafter, it focuses on the principle of indirect effect of EU law, its origin in the CJEU case law, as well as its key features and application criteria. Finally, the focus shifts on the principle of incidental effect of EU law, which is seen by many, including this author, as further development/upgrade of the principle of indirect effect of EU law.*

**„Key words"** *"Directives"; "Vertical direct effect"; "Horizontal direct effect"; "Indirect effect"; "Incidental effect"; "Disputes between private parties".*

## I Introduction: From *Van Gend en Loos* to *Marshall* and beyond

"The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.

Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."

By pointing out the above in the famous *Van Gend en Loos* judgment,[1] Court of Justice of the European Union (CJEU),[2] still in the early stages of the post-war European integrations, had essentially put forward its rather historical standpoint that the legal order of the European Union (European Economic Community, at the time) is not to be understood as traditional (public) international law, which predominantly remains within "the boundaries" set by its purpose to regulate legal relations between the states and other subjects possessing international legal personality (such as international organizations). Put differently, CJEU had therewith set the stage for future development of EU law as *sui generis* legal system penetrating in the legal systems of the Member States far deeper than, at least seemingly, envisaged initially.

Hence, *Van Gend en Loos* judgment led to establishment of the principle of direct effect of EU law, which, along with the principle of supremacy of EU law established in Costa v E.N.E.L,[3] gradually led to EU law becoming the most important source of law in the years to come for numerous categories of legal relations regulated in the past exclusively by national legislators. To that end, the well-known *Van Gend en Loos* test was established and perfected over time, allowing for direct effect of those provisions of EU law that are clear, precise and unconditional.[4]

When it comes to directives as a type of indirect EU regulatory instruments,[5] CJEU has taken a specific approach. Namely, in *Van Duyn v Home Office*,[6] it first held that directives can have direct effect, by essentially confirming that natural or legal persons can protect before national courts their rights enshrined in EU directives against the Member States as obligors. It also added another condition, in addition to provision of directive having to pass the Van Gend *en Loos* test. It was the requirement that the deadline for implementing directive through implementing

[1] C-26/62 NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (5 Februar 1963) EU:C:1963:1, par. 3.
[2] At the time, the Court of Justice of the European Communities (CJEC).
[3] C- 6/64 Flaminio Costa v E.N.E.L. (15 July 1964) EU:C:1964:66
[4] For more on Van Gend en Loos test, for instance, see: Storey Tony, Turner Chris, *Unlocking EU Law* (4th ed.), Routledge, 2014, p. 153;
[5] It need not be reiterated that directives require implementing legislation on the national level, since these instruments „only" set the objectives that must be met by the Member States.
[6] C-41/74 Van Duyn v Home Office (4 December 1974) EU: C: 1974:133.

legislation had already elapsed. However, in *Marshall*,[7] CJEU held that provisions directives have only partial direct effect. Put differently, it established that the provisions of directives may have only vertical direct effect and therefore have the potential of being invoked in disputes before national courts only if they are invoked against the state.

In the following decades, CJEU demonstrated firm resolve in denying horizontal direct effect to provisions of directives aiming at regulating (through implementing legislation) legal relations between private parties. The analyses of the reasons put forward by the tribunal and other proponents of the approach are not primary concern of this paper but the most prominent one seems to be the standpoint expressed by the CJEU in *Marshall*:

"With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to article 189 of the EEC treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to' each member state to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person."[8]

As further elaborated in the relevant academic literature, other leading arguments offered by the CJEU for not according direct horizontal effect of directives would include: the need to avoid making individuals responsible for something that is not their fault (non-implementation of directives), preserving the difference between directive and regulations that are horizontally directly effective and protecting the principle of legal certainty by preventing directives from creating direct obligations for individuals (since implementing legislation is needed for that).[9]

On the other side, the most prominent argument for according horizontal direct effect to directives essentially comes down to the standpoint that that such approach would be in line with the *effet utile* principle of interpretation, which is considered by many as "the supreme tool" often utilized by the CJEU in order to secure somewhat extensive interpretation but, at the same time, intended and

[7] C-152/84 M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (26 February 1986) EU:C:1986:84.

[8] *Ibid*, par. 48 (of the judgment).

[9] For more on the issue, *see* Schutze Robert, *European Union Law,* Oxford University Press, 2018, p. 99 – 100; Bobek Michal, "The Effects of EU Law in the National Legal Systems", European Union Law, (eds. Barnard Catherine and Peers Steve), Oxford University Press, 2017, p. 154.

presumably best possible effect of EU rules.[10] Put differently, the non-accordance of the horizontal effect to directives is considered by the proponents of the horizontal direct effect (of directives) to impede the effectiveness of the provisions of EU law enshrined in these instruments and thereby of the EU law in general.[11]

## II Solving "the Problem"

### A. In General

Before focusing on the concept of indirect effect, it should be reiterated herein that this is not the only mechanism envisaged and/or utilized by the CJEU to secure the effectiveness of EU law adopted in the form of directives. For instance, the very notion of state has been gradually broadened over time by the tribunal, essentially, in order to help satisfy justice and (thus) secure the effectiveness of EU law, which led to emergence of the term "emanation of the state".[12] This tendency, which is sometimes termed as "expanded vertical direct effect", has its roots in the case law preceding the famous *Foster* case, which is considered to be the one offering the initial definition of the term "emanation of the state".[13] The notion itself served

[10] For more on the *effet utile* principle of interpretation of EU law, for instance, see *Sadl Urska*, "The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence From the Citation Web Of The Pre-Accession Case Law of The Court of Justice of the EU", 8(1) European journal of legal studies (2015), p. 18 - 45; *Skouris Vassilios*, "Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives", 17(2) European Business Law Review (2006), p. 241– 255; *Fennelly Nial*, "Legal Interpretation at the European Court of Justice", 20(3) Fordham International Law Journal (1996), p. 656 – 679.

[11] For instance, see Reich Norbert Reich Norbert, Goddard Christopher, Vasiljeva Ksenija, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (2nd ed.), Intersentia, 2015, p. 33 – 34.

[12] The notion of "emanation of the state", which is considered initially defined in *Foster* case (C-188/89 Foster and others v British Gas plc (12 July 1990) EU:C:1990:313, par. 20) as "*a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals*." This notion has been additionally elaborated and defined by the CJEU in judgments subsequent to *Foster* (see Wiberg Maria, *The EU Services Directive: Law or Simply Policy?* T.M.C. Asser Press, 2014, p. 141 – 147; *Kvjatkovski Vanda*, "What is an 'Emanation of the State'? An Educated Guess", 3(3) Public Law Review (1997), p. 329 – 328).

[13] For instance, such developments can be noticed in the case law relating to the so-called "expanded vertical direct effect" of the TFEU provisions on free movement of goods, which the CJEU also finds not to have horizontal direct effect. More on the expanded vertical direct effect of the TFEU provisions on free movement of goods: *Savkovic Vladimir*, "Do TFEU Provisions on Free Movement

throughout the decades to allow the CJEU to significantly broaden the scope of legal persons and other bodies that may be subsumed under the general notion of the state and thus considered (directly) obliged by directives and other provisions of EU law lacking horizontal direct effect.

The potential of the concept/notion of emanation of the state; however, was not enough to secure the adequate level of effectiveness of the EU law, more precisely, the segment of this body of law that was denied horizontal direct effect. Put simply, there were instances, *i.e.* cases in which the necessity to take into account the rules embedded in a directive existed although none of the parties in the case was or could have been considered emanation of the state. Therefore, legal concepts, such as the principle of indirect effect of directives, as well as the principle of incidental effect of directives have emerged as potential solutions. Furthermore, to a significant extent, although primarily in terms of the remediation mechanism for the negative consequences of inadequate or lack of timely implementation of directives, the principle of responsibility of the Member States for non-transposition of EU directives could even be regarded as belonging to this set of EU legal concepts/principles.[14]

The following analyses focus primarily on indirect and, consequentially, on the incidental effect of directives. This is so in light of the fact that the latter is rightfully seen by many as further development, i.e. upgrade of the former, although still considered by some as simple (and direct) exception to the rule established in *Marshall* that directives may not have horizontal direct effect, meaning that they can actually have such effect occasionally and under certain preconditions.[15]

of Goods Apply to Private Parties: Expanded Vertical or Horizontal Direct Effect?" , 66(4) Annals of the Faculty of Law in Belgrade, 2018.

[14] For more on this concept, see Homewood Matthew J., *EU Law Concentrat* (4th ed.), Oxford University Press, 2014, str. 34; *Pavlovic Vladimir*, "Some Observations on the European Court of Justice's Post-Francovich Jurisprudence" 2007(4) Croatian Yearbook of European Law and Policy, p. 179 – 193. Hanft James E., "Francovich and Bonifaci v Italy: EEC Member State Liability for Failure to Implement Community Directives", 15(4) Fordham International Law Journal (1991), str. 1237 – 1274.

[15] For instance, *see* Schütze Robert, European Constitutional Law, Cambridge University Press, 2012, p. 101, stating that in the CJEU cases in which the principle of incidental effect was applied the rule in Marshall that directives may not negatively affect private parties was in fact violated.

B. Indirect Effect of EU Directives

The principle of indirect effect of EU law is considered conceptualized as such in *Van Colson* case,[16] interestingly, a case not involving exclusively private parties, but an emanation of the state.[17] It was the case in which the CJEU had established that, in applying the national law and in particular the provisions of a national law specifically introduced in order to adequately implement a directive, *i.e.* achieve the results aimed for by it, Member States courts are required to interpret and consequentially apply their national law in light of the wording and the purpose of such directive (in this particular case, the initial version of the "Equal Treatment Directive" - Directive 76/207/EEC).[18] However, while establishing this principle in an attempt to provide the mechanism for remediation of the fact that the FR Germany failed to secure "effective transposition" of Directive 76/207/EEC regarding the nature of the sanctions against discrimination,[19] the CJEU also established that such interpretation and corresponding implementation of the national law should be exercised by a national court to the extent, i.e. "in so far as it is given discretion to do so under national law".[20]

The above cited formulation in *Van Colson* could seem to be a little unfinished, or even a little imprecise criterion/guideline, although admittedly prudent and quite understandable from the standpoint of CJEU, which has been criticized occasionally for "pursuing federal agenda" with its activism in creating EU law.[21] Namely, it must be far from easy for the national courts to establish time and again (i.e. on the case by case basis) the "measure of elasticity" of national law in the context of meeting the objectives set by provision of a specific directive or another provision

[16] C-14/83 Sabine von Colson and Elisabeth Kamann v Land NordrheinWestfalen (10 April 1984) EU:C:1984:153

[17] Seemingly, the relevant provisions of the "Equal Treatment Directive" were not considered by the CJEU as unconditional and sufficiently precise, meaning that they were considered not to satisfy the "Van Gend en Loos test" for establishing that a provision of EU law can have direct effect. For more on Van Gend en Loos test, see Van Leuken Roel, Private Law and the Internal Market, Intersentia, 2017, p. 16; Craig Paul, De Burca Grainne, EU Law – Text, Cases and Materials (6th ed.), Oxford University Press, 2015, p. 184;

[18] *Ibid*, par. 26.

[19] *Ibid*, par. 24.

[20] *Ibid.* par. 24.

[21] *See* Neill Patrick, The European Court of Justice: a case study in judicial activism, European Policy Forum, 1995.

of EU law not capable of having direct effect.[22] Moreover, in light of the inherent differences between national laws of myriad Member States, it would seem that the implementation of the concept of indirect effect of EU law, in spite of exactly the opposite motive behind it, could have the potential to result in erosion of legal certainty in the EU legal space. Put differently, although this author is not aware of any such specific tendencies currently taking place, given the instructive, sometimes even imprecise nature of provisions of EU directives, the objectives of which are to be met by the appropriate interpretation and implementation of the national law, particularly in cases in which CJEU is not involved, differentiating or even opposite judicial decisions are conceivable in similar cases.[23] Objectively; however, given the above described features of the large number of provisions of EU directives, it seems that the right question would be if CJEU has had any superior solution, i.e. better alternative to principle of indirect effect of the provisions belonging to this *sui generis* type of regulatory instruments?

Be the above as it may, while regularly adhering to the same or phrases similar to the phrase: "in so far as it is given discretion to do so under national law",[24] in the subsequent case law relating to implementation of the principle of indirect effect of EU law CJEU has provided some additional clarifications, i.e. "guidelines" on other important issues arising out of this segment of its case law.

In *Marleasing*,[25] CJEU has put forward the following conclusion:

"It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."[26]

Hence, in *Marleasing*, CJEU has established that national court have the duty of harmonized interpretation (and corresponding implementation) of national law

[22] Some additional instructions provided by the CJEU in the relevant case law would include the suggestion that national court is not obliged to utilize this principle to the extent of producing *contra legem* interpretation of relevant national provisions.

[23] Especially so when those are trialled and adjudicated by the courts from different Member States.

[24] For instance, see: Case 79/83 Dorit Harz v Deutsche Tradax GmbH (10 April 1984) EU:C:1984:155, par. 28; C-397/01 do C-403/01 Bernhard Pfeiffer and Other v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (5 October 2004) EU:C: 2004:584, par. 113.

[25] C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA (13 November 1990) EU:C:1990:395.

[26] *Ibid*, par. 8.

independently of whether the Member state in case has enacted particular (legislative) instrument of implementation or not. More specifically, notwithstanding the fact that Spain has failed to enact implementing legislation for the so-called "First Company Law Directive",[27] it was deemed obliged to interpret and correspondingly apply previously existing national (company) law "as far as possible" in line with this directive, so as to achieve the results pursued with it. It is, therefore, not necessary that the specific, i.e. direct connection exists between directive as an instrument of EU law and the instrument of national law the interpretation of which is the issue, meaning that the national legislative instrument being interpreted need not be enacted as implementing legislation. That; however, doesn't mean that there will be no connection whatsoever. If nothing else, as was the case with the two regulatory instruments in case, usually, the national legislative act being interpreted and the directive it is to be interpreted in accordance with will be regulating the same (or similar) type of legal relations.

Further confirmation of the above conclusions, as well as further development of the concept of indirect effect of directives in particular and EU law in general was witnessed in *Pfeiffer*,[28] in which CJEU stated:

"Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive."[29]

Hence in *Pfeiffer*, CJEU has taken the position that it is duty of the national court to interpret and implement entire domestic law in line with the provisions of directive in order to avoid the implementation of domestic law provision(s) resulting in legal consequence(s) opposite to results aimed by the directive in case. Of course, as in other judgments promoting the concept of indirect effect of directives and EU law in general, CJEU has limited this duty by generally leaving to national court to decide if and "to what extent national law may be applied so as not to produce a

[27] Directive 68/151/EEC, which is, as of 2017, incorporated in the codification of EU company law, the so-called "Company Law Directive" (Directive (EU) 2017/1132).
[28] C-397/01 - C-403/01 Bernhard Pfeiffer and Other v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (5 October 2004) EU:C: 2004:584.
[29] *Ibid*, par. 115.

result contrary to that sought by the directive".[30] However, notwithstanding this limitation, it would seem that, when adjudicating, national judges are required to take into consideration each and any directive that may pursue results overlapping with the legal consequences that are to be achieved by the judgment, which does put additional weight on their shoulders.

### C. Incidental Effect of EU Directives: Beyond or Behind Indirect Effect?

If considered in conjunction with the principle of indirect effect of EU law, the principle of incidental effect of EU law could seem as a result of further development of the principle of indirect effect. More specifically, as potentially viable solution for those situations in which national judges, based on the limitations of the principle of indirect effect recognized by the CJEU itself, establish that the relevant provisions of national law, as well as applicable national rules of interpretation, do not allow interpretation extensive enough for aligning legal consequences of the judgment with the results pursued by certain specific directive(s). This point of view is supported directly even in the case law relating to incidental effect. For instance, in *Dominguez*,[31] following conclusion was put forward by CJEU:

"It should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible."[32]

Hence, given that, as explained bellow, "disapplication" of conflicting provisions of national law is the key consequence of incidental effect, it would seem that the tribunal itself regards this principle to be of auxiliary nature to principle of indirect effect of EU law. This could, in turn, imply that the predominant purpose of application of incidental effect is to rectify the inherent shortcomings of application of the principle of indirect effect of EU law.

Notwithstanding the above conclusions and dilemmas, the concept of incidental horizontal itself is still far from being considered clear and comprehensive

[30] *Ibid.*
[31] C-282/10 Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre (24 January 2012) EU:C:2011:559.
[32] *Ibid*, par. 23.

enough. Namely, the two most prominent cases in the field had left considerable room for different interpretations and corresponding applications of the principle.

In *CIA Security*,[33] case that the concept of incidental effect of directives originates from, CIA Security was a company selling on the territory of Belgium a burglar alarm incompatible with national technical specifications. However, those specifications were not reported by Belgian Government to the EU, as was specifically required by Directive 83/189/EEC at the time. In turn, CJEU ruled that this constituted a substantial procedural defect rendering said national law on technical regulations for burglar alarms inapplicable to private parties, i.e. individuals.[34] In an attempt to justify the apparent shift in relation to previous case law establishing that provisions of directives may not influence (directly) relations between private parties, CJEU invoked cases *Becker*[35] and *Francovich*[36] by underlying that "it is settled law that, wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on against any national provision which is not in accordance with the directive".[37] However, the fact remained that both of these cases were about allowing private parties to rely on the provisions of a directive in a proceeding against a public body, i.e. the (member) state, but not in a proceeding against another private party, as was the case in *CIA Security*.

In *Unilever*,[38] the same directive as in *CIA Security* was invoked (Directive 83/189/EEC) in an attempt to preclude the enforcement of national legislative instrument that, although notified to EU in a timely manner, was adopted in breach of the so-called "standstill clause" embedded in Article 9 of the said directive. Once again, by simply invoking its arguments put forward in *CIA Security*, CJEU has established that the breach of the obligations of postponement of adoption set out in the standstill clause is another case of substantial procedural defect requiring the national court to render said technical regulations inapplicable in a proceeding between two private parties. However, in spite of some apparent clarifications made

[33] C-194/94 CIA Security International SA v Signalson SA and Securitel Sprl (30 April 1996) EU:C:1996:172.
[34] *Ibid*, par. 48.
[35] C 8/81 Ursula Becker v Finanzamt Münster-Innenstadt (19 January 1982) EU:C:1982:7.
[36] C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic (19 November 1991) EU:C: 1991:428.
[37] C-194/94 CIA Security International SA v Signalson SA and Securitel Sprl (30 April 1996) EU:C:1996:172, par. 42.
[38] C-443/98 Unilever Italia SpA v Central Food SpA (26 September 2000) EU:C:2000:496.

by the tribunal in subsequent case law,[39] it remains unclear what would be the criteria for establishing that there is a substantial procedural defect (in implementing a directive) that would oblige a national court to render domestic legislative instrument inapplicable between two or more private parties? Put differently, the question remained, once there is no room for application of the principle of indirect effect of EU law, what specific criteria are to be utilized so as to establish when to apply and when to not apply the principle of incidental effect of EU law as the auxiliary principle?

The above question is a subject of voluminous academic literature, offering numerous attempts to explain the tribunal's *ratio decidendi* in the two cases analysed above, as well as in some other cases belonging to streak of "incidental effect case law".[40] Among those, the most exploited one seems to be "the shield and sword theory";[41] however, this (conference) paper has no room nor the ambition to join that otherwise interesting debate. As explained in the introductory notes, it predominantly serves to depict principle of indirect effect and the auxiliary principle of incidental effect of EU law, as well as the manner and the key consequences of their application in the most relevant case law.

## III Instead of Conclusion: CJEU Withdraws from *Terra Incognita*?

Instead of attempting to establish comprehensive and firm theoretical foundation for the CJEU's case law on indirect and, particularly so, on incidental effect of EU law, which is purportedly seen by this very tribunal as the auxiliary principle to the former,[42] in its concluding remarks, or better yet, instead of those, this paper will point out to one recent and, at least in view of its author, important case in providing clarity to dilemmas raised by emergence of these legal concepts.

[39] See *infra* Part III - Instead of Conclusion: CJEU Withdraws from Terra Incognita?

[40] For instance, one of the most comprehensive overview of these efforts would be: Squintani Lorenzo, Lindeboom Justin, "The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions", Yearbook of European Law, Vol. 38(1), (2019), p. 18–72.

[41] See Hilson Chris, Downes Tony, "Making Sense of Rights: Community Rights in EC Law" European Law Review 24(2), 1999, p. 121 – 138.

[42] See *supra* note 32.

Namely, in *Smith*,[43] a case in which CJEU has actually denied its consent for the implementation of principle of incidental effect, following standpoint was made:

"A national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals…"[44]

Based on the cited formulation alone, it could seem that CJEU had somewhat reverted from its position in cases such as *CIA Security* and *Unilever* in which it has found that a provision of a national law that is contrary to a directive, under certain conditions, can be set aside even where provision of directive is relied on by one against another private party, including such private parties that cannot in any way be subsumed under the notion "emanation of the state".[45] Moreover, in view of this author, such approach could even be defended as a sound course of action, given the difficulties with implementing this principle to cases between two or more (strictly) private parties, some of which are that a private party/defendant is effectively being made responsible for the shortcomings of a Member State (i.e. non-implementation of a directive), or that by disregarding otherwise applicable provision of national law, essentially, a Member State court allows horizontal direct effect of the relevant provisions of directive(s) in case.[46]

However, in Smith, CJEU also stated the following in relation to *CIA Security* and *Unilever*:

"In that particular situation, the Court held, in essence, that those national technical regulations were inapplicable in a dispute between individuals on the ground that non-compliance with the obligations stemming from Directive 83/189 constituted a 'substantial procedural defect' that had vitiated the adoption of those regulations by the Member State concerned, and that that directive, which created neither rights nor obligations for individuals, did not determine the substantive content of the legal rule on the basis of which the national court had to decide the

[43] C-122/17 David Smith v Patrick Meade and Others (7 August 2018) EU:C:2018:631.
[44] *Ibid*, par. 45.
[45] See, *supra* note 13.
[46] For more on the related problems, for instance, see Craig Paul, De Burca Grainne, *op. cit.*, p. 219 – 220.

case before it, meaning that the case-law to the effect that a directive that has not been transposed may not be relied on by one individual against another was not relevant in such a situation…"

However, the situation in the main proceedings is not comparable to that described in the two preceding paragraphs of the present judgment. Article 1 of the Third Directive, in providing that it is compulsory that insurance against civil liability in respect of the use of the motor vehicle at issue should cover personal injury to all the passengers, excluding the driver, that results from that use, defines the substantive content of a rule of law and falls, consequently, within the scope of the case-law to the effect that a directive that has not been transposed or has been incorrectly transposed may not be relied on by one individual against another."[47]

Hence, conclusion can be put forward that CJEU has not formally reverted from its position(s) in *CIA Security* and *Unilever*. However, at least in view of this author, the notion of substantive procedural defect, the establishment of which allows for utilization of incidental effect, is yet to be made clear enough. Namely, it would seem that a substantive procedural defect exists only in cases featuring failure to implement a directive (or even only a provision of it?) that does not "determine the substantive content of the legal rule on the basis of which the national court has to decide the case before it".[48] If this is the case, the question remains, why is this so? More specifically, why are provisions of a certain directive not determining the substantive content of the legal rule on the basis of which the national court has to decide certain specific case more important in terms of non-implementation consequences than the ones that do?

Be the above as it may, the another important question still remains. If there can be no incidental effect of directives at least in some disputes between two (strictly) private parties, what can be done in such cases when it is also not possible to implement the principle of indirect effect of EU law, in spite of the collision between national law and directive(s) persisting? Seemingly, the one option remaining to a party affected by the incompatibility of national with EU law would be the invocation and thereby utilization of the principle of responsibility of the

[47] C-122/17 David Smith v Patrick Meade and Others (7 August 2018) EU:C:2018:631, paras. 53 and 54.
[48] *Ibid.*

Member States for non-transposition of EU directives.[49] After all, that was suggested by the CJEU itself.[50]

[49] See *supra* note 15.
[50] C-122/17 David Smith v Patrick Meade and Others (7 August 2018) EU:C:2018:631, par. 56.

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## Case law


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# ACHMEA RIPPLE EFFECT AND ITS REVERBERATIONS IN THE INVESTMENT WORLDS

Summary

*After Achmea case, international investment regime has not been the same. Once the investor-state dispute settlement (ISDS) mechanism, envisaged under the EU BITs, was found contrary to autonomy and effectiveness of EU law, this controversial issue has had the ripple effect throughout the investment arena. This has not provided the conclusive answers to the disputed legal issues, already long - standing compelling arguments on the award potential impact on the states' regulation power and its detrimental effects on the democratic process, consistency, predictability and correctness of arbitral decisions, integrity and conflict of interests of the arbitrators; cost and duration of ISDS disputes, etc, have urged and accelerated the process of the reforms of the dispute settlement mechanisms. Among many of the proposed reform initiatives, EU has proposed the establishment of the Multilateral Investment Court (MIC) as the major step towards transparent forum of rendering predictive decision at a reasonable cost, protecting not only rights of investors but also the rights of states. The justification of the establishment and the effects of MIC are yet to be witnessed and analyzed.*

**„Keywords"** *"Achmea case"; "intra EU BITs"; "reform of the ISDS system"; "Multinational investment court (MIC)".*

## I Introduction to Achmea World

Achmea stands for the CJEU precedent which determined the incompatibility of arbitration clauses contained in intra-EU BITs with EU law. It immediately deployed the various forum of discussions and actions and raised the questions such as the implication of Achmea decision. In two years, CJEU's ruling has generated the far-reaching repercussions for investor-state disputes and triggered the termination of 196 intra-EU (intra BITs), causing the more profound changes such as the eventual termination of 1,200 bilateral investment treaties which the EU Member States have concluded with third States (extra BITs), its effects on the enforceability of the judgements, Energy Charter Treaty, and its impact on the reform of current ISDS regime.

A. Achmea ruling

After privatization of the health insurance market in Slovakia, the Slovak Government decided to renationalize that industry, which led to expropriation of Dutch insurance company - Achmea. Achmea started an international arbitration procedure against Slovakia on the basis of the BIT between the Netherlands and Slovakia,[1] and won for 22 million EUR in compensation. Slovakia challenged jurisdiction arguing that the arbitral tribunal could not hear the claims because of the arbitration clause. The annulment proceeding has been initiated against the award before the Higher Regional Court of Frankfurt, which found that BIT was not incompatible with the aforementioned provisions of the TFEU.[2] Slovakia appealed at the German Federal Civil Court, in accordance with the Treaty on functioning of European Union, arguing that the responsibility for reviewing decisions with the compatibility of international arbitral awards with substantive EU law through the public policy reservation lies with the court of the Member States.[3] The German Federal Court of Justice requested a preliminary ruling on the compatibility with EU law of the BIT's arbitration clause.[4]

Contrary to the Opinion of the Advocate General Wathelet in his Opinion of 19 September 2017,[5] which stated that the arbitration clause in Article 8 of the 1991 Netherlands-Slovakia BIT is compatible with EU law and that arbitral tribunals

[1] Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federal, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2650/netherlands---slovakia-bit-1991-

[2] The decision of the *Oberlandesgericht Frankfurt, Decision of 18 December 2014 – Case 26 Sch 3/13*

[3] OPINION OF ADVOCATE GENERAL WATHELET delivered on 17 March 2016 (1) Case C-567/14
Genentech Inc. v Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH (Request for a preliminary ruling from the our d'appel de Paris (Court of Appeal, Paris) (France)), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CC0567&rid=2, paras. 60 and 61. On the other hand, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters provides on responsibility for ensuring compliance with EU law to the court hearing the substance of the dispute and not the downstream court of recognition and enforcement.

[4] The Highter German Court found that the BIT was not incompatible with the aforementioned provisions of the TFEU, see more at: *Oberlandesgericht Frankfurt*, decision of 18 December 2014 – Case 26 Sch 3/13

[5] CJEU to rule that EU law did not preclude the application of an investor-state dispute settlement mechanism ("ISDS") established by means of a BIT between two EU Members States.

established thereunder may refer questions of EU law to the Court of Justice of the European Union ("CJEU") for review, the European Court has concluded that BIT Investor –State arbitration clause is incompatible with EU law. CJEU has made it obvious that foreign arbitral tribunals are ineligible to ask the European Court for preliminary judgements since they are not considered to be "domestic courts" of the Member States. Since they function "outside" of the system for preliminary rulings, they are not subject to the European court's ultimate authority.

a) Pre-legal steps to Achmea ruling

The entry into force of the Lisbon Treaty in 2009, has initiated the new EU investment policy, by adding foreign direct investment to the terms of the article 207(1) of the TFEU and gave the competence to the EU.[6] This legislative change has inaugurated the adoption of a single and comprehensive approach to the foreign investment regime.

The Opinion 2/13 on the Accession of the European Union to the ECHR has stated that the Court has exclusive jurisdiction over the definitive interpretation of EU law. The exclusive jurisdiction must be respected in order to ensure the autonomy of the EU legal order. [7]

In addition to it, the Opinion 1/09 on Agreement on the creation of a unified patent litigation system stated that there is an incompatibility with the autonomy of the EU legal order where an international court or tribunal established by an agreement that is binding on the Union may be called on to interpret and apply not only the provisions of that agreement but also provisions of primary and secondary EU law, [8] general principles of EU law or fundamental rights of EU law.

[6] Article 207 (1) of the TFEU: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

[7] Para. 246 of Opinion 2/13 on the Accession of the European Union to the ECHR of 18 December 2014 (EU:C:2014:2454), available at: https://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN

[8] The Opinion 1/09 on the Agreement on the creation of a unified patent litigation system of 8 March 2011 EU: C:2011:123, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CV0001

## II Termination of the BIT and other Consequences of ACHMEA Ruling

In the life after Achmea case, the entry into force of the Termination Agreement of bilateral investment treaties between the Member States of the European Union on the treatment and protection of investments between Member States, marked an immediate and significant success for Slovakia.[9] The Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union has been envisaged as the international agreement between 23 member states of the European Union, and it terminates most Bilateral Investment Treaties between the signatory countries, including the cease of the transition periods foreseen in many BITs (sunset clauses).[10]

The Common provisions of the Termination Agreement specify that "the contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and incompatible with the EU law". As a result of this incompatibility between Arbitration Clauses and the EU Treaties, it has determined that the Arbitration Clause in such a bilateral investment treaty cannot serve as legal basis for Arbitration proceedings. Therefore, it ensures that all procedural and substantive provisions of the specified BITs cease to have any further effect.

The consequences of these provisions are clear for concluded and new proceedings. Concluded proceedings assume the situation where the award has been either executed before before 6 March 2018 or set aside before the termination agreement enters into force and they will not be reopened,[11] in fact, they are deemed closed.[12] Whereas, the new proceedings, related to the proceedings raised after 6 March 2018 are to be regarded as defective as the arbitration clauses contained in

[9] May 29, 2022, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AL%3A2020%3A 169%3ATOC

[10] Sunset clause is defined as the defined a measure within the regulation that provides for the law to cease to be effective after a specified date, unless further legislative action is taken to extend it. Unlike most laws that remain in force indefinitely unless they are amended or repealed, sunset provisions have a specified expiration date. Investment arbitration will continue to be impacted in about 32 intra-EU BITs because Austria, Finland, Ireland, and Sweden are not parties to the Termination Agreement. Some Member States who don't adhere to the ratification criteria of national legislation for the termination agreement may join them.

[11] Article 6 (1) Termination Agreement

[12] Article 6 of the Termination Agreement

the intra-EU BITs "cannot serve as a legal basis" for arbitration.[13] On the other hand, the Arbitration Proceedings, initiated before 6 March 2018, involve two types of the cases: 1) Proceedings that are pending before the arbitral tribunal and 2) Annulment or set aside proceedings pending before the state courts.[14] When a signatory country is involved in a Pending Arbitration Proceeding, they must inform the arbitration tribunal that arbitration clauses in intra-EU BITs are incompatible with EU law.[15] In addition, they must ask the competent national courts to reject an award that has already been issued by an arbitration tribunal but has not been enforced.[16] The Termination agreement provides in details the procedure related to the structure dialogue which is determined as the possibility for both parties – Investor and the State party for the out of court settlement of dispute.[17]

Achmea ruling has generated three immediate legal repercussion related to the 1) enforcement of the arbitral award, 2) validity of the Energy Charter Treaty and 3) the termination of the treaties signed between EU member states and non-member states extra-BITs.

### A. ACHMEA immediate repercussions

One of the immediate consequences of Achmea judgment for the investment arbitration is the enforcement of the judgement stemming out the BITs.

[13] Article 4 of the Termination Agreement

[14] Article 1 (5) Termination Agreement stating: Arbitration Proceedings that arise from intra-EU BITs are 'Concluded' if a final award or settlement agreement was executed before 6 March 2018 or if the award was set aside or annulled before the Termination Agreement enters into force Art. 1 (4) Termination Agreement.

[15] Article 7 (1) Termination Agreement

[16] Article 7 (2) Termination Agreement

[17] If the CJEU or a national court have already decided that the relevant State action/measure breaches EU law,[17] structured dialogue is mandatory and it cannot be initiated or continued until a final decision has been made. On the other hand, if the CJEU, national court or the European Commission have decided that there is no violation of EU law, the parties are not allowed to proceed with the structured dialogue for the pending proceedings, initiated from March 6, 2018. Investor involved in Pending Arbitration Proceedings may be asked by a Contracting Party to enter into a settlement procedure, overseen by the impartial facilitator with the aim to find amicable, lawful and fair out-of-court and out-of-arbitration settlement of the dispute. The settlement procedure shall be impartial and confidential, and it shall allow each party to convey its views. The facilitator shall be designated by common agreement of the investor and the Contracting Party concerned acting as respondent in the relevant Pending Arbitration Proceedings. Additionally, the Investor is entitled to judicial remedies under national law against a measure contested in pending arbitration proceedings.

Termination Agreement has raised the question of the enforceability of the awards of the arbitral tribunals acting upon the BITs. The case that triggered a number of legal challenges, highlighting the conflict between EU legislation and international investment arbitration is Micula case, in theory and practice already serving as an illustration of the difficulties that arise when trying to enforce arbitral judgments after the Termination Agreement.

In Micula case, Swedish citizens and businessmen-Micula brothers, invested in the food and beverage sector between 1998 to 2003 and began to receive the subsidies, in accordance with the introduced long-term incentive programme.[18] According to EU regulation, this incentive program constitutes the illegal state aid under EU law, and therefore, in February 2005, Romania cancelled the subsidies, in preparation for its accession to the European Union[19] Micula brothers commenced arbitration procedures against Romania under the Sweden-Romania Bilateral Investment Treaty (BIT). Whether Romania's conduct in canceling the investment incentives violated the protections provided to the Micula brothers under the BIT, and if so, whether the investors were entitled to compensation, was the main question in the Micula case. The enforcement of the arbitral ruling was one of the case's key aspects, despite its many phases and legal difficulties. Romania delayed enforcing the decision when the arbitral panel ruled in favor of the Micula brothers.

The European Commission claimed that the award was illegal state aid and argued against its enforcement. It interfered by prohibiting Romania from paying the award. In *Micula* case it has been stated that acting under Micula verdict would constitute illegal state aid. According to Romania's stance, the award broke EU state aid regulations, and as a result, it could not comply with the award without breaking EU law. Micula case conveys the clash between on the one hand the international treaty obligations and EU law. This basically means that it is impossible to enforce judgments from these tribunals before courts in EU member states. This also applies to decisions made by tribunals at the International Centre for Settlement of Investment Disputes (ICSID), as EU law prevails above any agreements between EU member states that conflict with applicable international law. Those awards may also be contested in front of EU courts. Furthermore, the Commission may file a

[18] *Case C 638/19 P*, European Commission v. Micula et al 25 January 2022. EU:C:2022:50

[19] Baltag Crina, Stanic Ana, *The Future of Investment Treaty Arbitration in the EU, Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*, Wolters Kluwer, 2020.

lawsuit in front of the EU courts accusing EU member states of breaking EU law. The end outcome of this might be financial sanctions against EU member states.

The second question that has been opened by Termination Agreement is the future of the agreements signed between EU member states and non-member states (extra-EU BITs). It is evident from the ECJ's reasoning that arbitration provisions found in such type of agreements are subject to challenge. In fact, tribunals established by such agreements may very likely remove from the jurisdiction of courts in EU member states disputes involving issues of EU law and EU remedies. As a result, these agreements might need to be terminated by EU member states, and it is uncertain if awards can be enforced in front of EU member state courts. However, we will have to wait until the ECJ renders a firm ruling on the issue in the future. In any case, given the parameters outlined in Article 351 TFEU, EU member states may still be able to fulfill their responsibilities under BITs signed before to EU accession. In accordance with the Article 351 TFEU, which could be applied in general to all extra EU BITs concluded before 1 December 2009, the agreements which are not compatible with the Treaties, the Member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established. This provision enables EU member states to uphold their obligations to other nations. However, the article's phrasing makes it seem as though it exclusively pertains to the duties that EU members have toward other countries, not to people. In accordance with the Grand-fathering regulation the old rule continues to apply to some existing situations while a new rule will apply to all future cases.[20]

The third issue that has taken the attention is the future of the Energy Charter Treaty's dispute resolution clause which is said to be incompatible with the dispute clause within the EU. In fact, the Court of Justice of the European Union (CJEU) in light of the recent Republic of Moldova v. Komstroy LLC (C-741/19) determined that the Energy Charter Treaty (ECT) in question contains a contentious mechanism for resolving disputes between investors and the state that is not applicable for resolving intra-EU disputes.[21] In this ruling, the Court of Justice of the European Union determined that Article 26 (2) (c) of the Energy Charter Treaty is incompatible with EU law.[22] Regarding Article 26 ECT, the CJEU observed that:

[20] Regulation No. 1219/2012 on Grandfathering Regulation.

[21] Case C-741/19 Republic of Moldova v Komstroy LLC (2 Septembar 2021) EU:C:2021:655.

[22] CJEU recent cases brought by fossil fuel investors under the ECT demonstrate that the objectives and climate policies of the EU and member states are actually under danger from investor protection measures under the Charter. The Dutch government's intention to phase out fossil fuels by 2030 was

They cannot be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU, and Awards rendered pursuant to Article 26 ECT are not subject to review by a court of a Member State capable of ensuring full compliance with EU law and guaranteeing that questions of EU law can be resolved. Arbitral tribunals established under Article 26(6) ECT are required to interpret, and even apply, EU law.[23]

Although Komstroy makes it abundantly apparent that the Energy Charter Treaty does not apply to conflicts involving other EU members or the EU itself, the ruling does not address whether the ECT as applied to disputes involving investors from outside the EU is compatible with EU law.[24]

## III The Challenge of the Current ISDS System and the Major Legal Consequences

Achmea judgement could have implications not only for the validity of the BIT,[25] but also of ISDS and applicable law clauses in BITs.[26] The termination of ISDS for intra-EU BITs is the stated objective of the termination agreement. The European Parliament Briefing recognizes two distinct approaches. First approach, relying on the adopting of the binding rules for the arbitrators and setting the advisory body for smaller economies and small and medium-sized enterprises to complement the current system. Second approach favored by European Union,

challenged in arbitration proceedings in 2021 by the German firms RWE and Uniper, who sought damages of 3.5 billion euros.

[23] Clement Fouchard, Vanessa Thieffry, CJEU Ruling in Moldova v Komstroy: The End of Intra-EU Investment Arbitration Under the Energy Charter Treaty, available at: https://arbitrationblog.kluwerarbitration.com/2021/09/07/cjeu-ruling-in-moldova-v-komstroy-the-end-of-intra-eu-investment-arbitration-under-the-energy-charter-treaty-and-a-restrictive-interpretation-of-the-notion-of-protected-investment/

[24] Christina Eckes, Laurens Ankersmit, *Komstroy: the beginning of the end for the Energy Charter Treaty?,* available at: https://europeanlawblog.eu/2021/10/04/komstroy-the-beginning-of-the-end-for-the-energy-charter-treaty/ (18.9.2023)

[25] Case C-284/16 Slovak Republic v Achmea (6 September 2018) EU:C:2018:158

[26] Clement Fouchard, Marc Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!,* available at: https://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ (9.9.2023)

argues for the establishment of two-tier system - multilateral investment court (MIC).

A. Multilateral Investment Court (MIC)

The system of investor-state dispute settlement (ISDS), which enables international investors to file claims against states for alleged abuses of investment safeguards, has been suggested as a potential reform. The Multilateral Investment Court (hereinafter: MIC) is intended to replace the ad hoc arbitration courts that currently hear these matters with a permanent international court to resolve investment disputes. The creation of a Multilateral Investment Court is a difficult and continuous international negotiating process involving numerous nations and interests. The development of a MIC is one prospective reform of ISDS that has been investigated and worked on by the United Nations Commission on International Trade Law (UNCITRAL).[27]

In the context of the UNCITRAL Working Group III process on ISDS reform, the EU has also put out the MIC.[28] In fact, on the occasion of the 28 session of UNCITRAL[29] the idea of the establishment of the Multilateral Investment Tribunal has been conveyed. In order to restore stakeholder confidence in international investment agreements, the European Commission seeks to set up a system of multilateral investment courts that address their concerns.[30] These concerns are mainly focused on the impartiality of arbitrators, the complexity and unpredictability of ISDS judgements, the time-consuming and expensive procedures that deter smaller respondent countries.[31]

Multinational investment court is, by European Union proposal envisaged as the two -tier system: The first instance court and an appellate body, with the secretariat which would provide assistance. Both bodies would be staffed by tenured adjudicators nominated and paid on a permanent basis by the member States. Such

[27] Ankersmit Laurens, The Beginning of the end of the ISDS in and with Europe, available at: https://www.iisd.org/itn/en/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/, (13.5.2023)
[28] Laurens Ankersmit, op.cit.
[29] Available at: *https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/092/76/PDF/V2109276.pdf?OpenElement*
[30] Laurens Ankersmit, op.cit. p. 95
[31] Laurens Ankersmit, op. cit.95.

a court would hear cases involving investment treaties that member states have chosen to delegate authority over to the MIC.[32]

B. Reform with the focus on Dispute Prevention and Mitigation

The incorporation of the ISDS into international agreements and its aim on depolitization, has been the subject of critique and re-consideration based on the various determined ISDS features such as lack of consistency, predictability, lack of transparency-lack of impartiality.[33] In addition, the number of the cases brought against EU countries has boomed in two decades. In early 2000s there was no case against EU Member States, whereas in 2015 was launched 9 cases, so that of today there are around the 360 cases against EU countries.[34] The cost and benefits analysis of the current ISDS system provides that "the average ISDS proceeding costs around $13mil for the claimant and respondent". Complicated and high stakes cases go up to $25.5mil. "As of June 2021, the average amount sought by investors in each ISDS claim is US$1.16 bill. The average amount states are ordered to pay is US$437.5mil... whereas tribunals ordered governments to pay an average of US$315.5 mil each time they were successfully sued.[35] If investor wins, host state pays an average US$169.5mil, whereas if state wins it pays its own legal fees US$5mil.[36] Thus, ISDS has proven to be very costly, and thereby has opened the

[32] Guillaume, Croisant Multilateral Investment Court, available at: https://jusmundi.com/en/document/publication/en-multilateral-investment-court (13.9.2023)

[33] Bernasconi-Osterwalder Nathalie, Brauch Martin Dietrich, *Brazil's Innovative Approach to International Investment Law*, available at: https://www.iisd.org/articles/insight/brazils-innovative-approach-international-investment-law available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3661138 (17.8.2023)

[34] European Parliament. Briefing. Multilateral Investment Court Overview of the reform proposal and prospects. https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)646147, p.6

[35] Data from BIIL&Allen, Overy 2021 Empirical Study published in Columbia Center on Sustainable Investment, A joint center of Columbia Law School and Columbia Climate School, Primer on International Investment Treaties and Investor-State Dispute Settlement, available at: https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement (14.8.2023)

[36] See more on: https://investmentpolicy.unctad.org/investment-dispute-settlement.

door to alternatives "to better catalyze and govern international investment than the ISDS model pursued in recent decades".[37]

UNCITRAL working document named *Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation-Means of alternative dispute resolution* underlines "the importance of measures to prevent disputes from arising and address means to solve disputes through methods alternative to arbitration."[38] It further states that gathered data suggest that around 20% of ISDS cases are settled. It is not possible to assert whether the settlements have been reached through the mediation. With respect to the use of mediation, Working Group mentioned the difficulties regarding coordination among relevant government agencies, lack of legal certainty for the decisions taken and pre-defined political authority to agree to a settlement.[39] The current ISDS structure lacks the coordination among different-scattered competent institutions and thereby it emanates tremendous risk that investment objectives often will not be achieved, but that it will produce damage for the economy. The investment policy reform shall ensure the appropriate institutional response to the investor's claim/complain and thereby prevent the receipt of the notice of dispute. In addition, the available UNCTAD data have conveyed that there is obvious need for setting up and identify the institution/lead agency and procedure/protocol so to minimize the risk of escalation of the problem into legal disputes and be better prepared for them by timely handling all issues related to: 1) the investor's interaction with the public entities, 2) action upon the receipt of notifications about emerging disputes, 3) coordination the consultations between the investor and the public entity involved in the dispute at hand, and lastly 4) management of the arbitral proceeding.

[37] Lise Johnson, Jesse Coleman, Brooke Guven, Lisa Sachs, *Alternatives to Investor-State Dispute Settlement, Columbia Center on Sustainable Investment*, CCSI Working Paper, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3661138 (13.9.2023)

[38] See more at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/002/56/PDF/V2000256.pdf?OpenElement, (15.3.2023), also see: https://uncitral.un.org/en/strengtheningmechanisms (10.8.2023)

[39] The UNCITRAL Working Group III (ISDS-reform) for already several years are advocating for a reform of the current ISDS system, while the EU has declared intra-EU ISDS as contrary to EU law. The Western Balkans countries have to improve the ISDS framework in accordance with the already defined EU investment protection elements such as mediation as a form of alternative dispute resolution between foreign investors and the host State. UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) *Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation - Means of alternative dispute resolution A/CN.9/WG.III/WP.217*

The UNCITRAL working document, as the compilation of the worldwide best practices in dispute prevention, gathers the established procedures within the national legal systems to ensure effective inquiry-dispute notice.[40] In accordance with the announced UNCITRAL policy it is to conclude that the effective coordination among public entities in the context of investor-state disputes shall ensure: 1) the responsible bodies for decision or legal act to be enforced at the national level, 2) clear rules regarding public and confidential documents, including raising awareness of public officials regarding public statements they are making in relation to foreign investments, 3) an alert system of early warnings to maximize possibilities of amical settlement and dispute resolution. UNCITRAL aims to develop the platforms to prevent investment conflicts through the use of amicable dispute resolution. It has been cited as one of the national-regional priorities by a number of national, regional and global players. While the EU has proclaimed intra-EU ISDS to be against EU law, the UNCITRAL Working Group III (ISDS-reform) has already been pushing for a reform of the current ISDS system for a number of years.

In the EU and global arena, adopting the specific procedure and setting up the centralized authority-lead institution-devised as the focal point for all matters related to the investor-state dispute has been seen as the tremendous need. That institution shall constitute the core of institutional arrangements to implement ISDS commitments, including registration and collection of all information and evidence from the public entities and other relevant institutions, so to ensure adequate defense. The analysis of EU good practices has shown that it is considered inevitable and helpful to have clear rules that guide the foreign investors smoothly and effectively through dispute process. These rules are to be adopted to allow the initiating party to adequately, timely and duly notify and report the problem on the right address. On the other hand, defendant State may also rely on these rules to make: 1) an informed decision on how to proceed with the investor dissatisfaction, 2) whether to go ahead with amicable settlement and/or 3) to proceed with the arbitration.

The primary goal of discussions on the reform of Investor-State Dispute Settlement (ISDS) among UNCITRAL, various investors' associations, and governments has been the prevention of disputes between governments and

[40] See more on: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wg_iii_compilation_on_dispute_prevention8_0.pdf, (1.15.2023)

investors. All of these reform process participants have emphasized the importance of procedures for addressing measures to resolve disputes through methods as an alternative to court and arbitration.[41] The investor-state arbitration's intrinsic adversarial dispute settlement mechanism has sparked significant unhappiness and, at the same time, sparked important discussions about the need to settle disputes peacefully rather than through litigation. At the time the foundational instruments on ISDS were formed, resolving investment disputes between States and foreign investors in a mutually agreeable and amicable manner was underemphasized.[42] In fact, the previous dearth of information on amicable ways of resolving disputes, particularly in the investor-state context, has now been mitigated by increasing attention to ADR. Namely, new rules, as well as academic works emerged in recent years, providing the state and investor with the advantages and disadvantages related to that technique of resolving disputes.[43]

C. Transitory time towards Multilateral Investment Treaty – ICS

In the recent trade and investment accords, Brussels has negotiated investment court systems (ICS) in place of the existing ISDS mechanism, which would act as the forerunners of this future court. The ICS is included in the EU agreements with Canada, Singapore, Vietnam and Mexico. The ICS's key novelty is its permanent two-tier dispute resolution system, which includes an appeals process and a tribunal of first instance. The method is also constructed to assure enforceability under the ICSID and New York Conventions. Because the New York Convention applies to permanent bodies where the disputing parties do not select their adjudicators as long as both parties declare their permission to be bound by the adjudication, there is enforceability under the New York Convention. The original award is also enforceable under the ICSID Convention since it is viewed as a preliminary award that is subject to appeal. The appeal tribunal returns the case to the first instance

[41] Kessedjian, Catherube Van Aaken Anne, Runar Lie, Mistelis Loukas, *Mediation in Future Investor – State Dispute Settlement, Academic Forum on ISDS Concept Paper* 2020/16, available at: https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf (10.9.2023)

[42] Clodfelter Mark A., *Why Aren't More Investor-State Treaty Disputes Settled Amicably", Investor- State Disputes: Prevention and Alternatives to Arbitration II*, available at: https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf (15.8.2023)

[43] Rubins QC Noah, Papanastasiou Thomas-Nektarios, Kinsella N. Stephan, *International Investment, Political Risk, and Dispute Resolution*, OXFORD University Press, second edition 2020.

tribunal for resolution. The first instance tribunal must complete and issue the award after receiving the matter from the appeal tribunal.[44]

ICS has been also envisaged as the part of Comprehensive Economic and Trade Agreement (CETA). Under Article 218 TFEU, the Kingdom of Belgium requested opinion on the compatibility of ICS with EU law. CETA envisages the provision on the establishment of the Tribunal and an Appeal Tribunal. In the long term, it also provides for the establishment of the Multilateral Investment Court.[45] ICS has sparked debate within the EU on whether the ICS is consistent with the principle of the legal order's autonomy. The CJEU decision has generated the huge implications on all similar provisions as the CETA, including EU-SIPA.[46]

Regarding the Comprehensive Economic and Trade Agreement (CETA) with Canada, the CJEU, following the Advocate General's Bot Opinion, has stated that „international agreement providing for the creation of a court responsible for the interpretation of its provisions"[47] is compatible with the EU law. The CJEU has set the six arguments purperting its position on the compatibility issue. First, it stated that courts established under CETA were seperate from domestic courts of Canada, EU and its Member States, so CETA mechanisms did not adversely affect the autonomy of the EU law. Second, EU law does not prevent the creation of (Appelate) Tribunal and Multilateral Investment tribunal.[48] Third, the Tribunals of CETA do not have the jurisdiction to interpred the EU law, but only the law set in the agreement. Fourth, under the doemestic law the Tribunal does not have the competence to question the validity of the measure alleged to constitute breach of CETA. Fifth, the Tribunal is requested to decide on the compliance of a measure by a host state with CETA. Sixt, CETA cannot adversely affect the exclusive jurisdiction of the CJEU over the definite interpretation of EU law.[49]

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[44] Baltag Crina, Stanic Ana, *The Future of Investment Treaty Arbitration in the EU, Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*, Wolters Kluwer, 2020, p. 223.

[45] See Article 8 of the CETA:

Establishment of a multilateral investment tribunal and appellate mechanism.

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

[46] Baltag Crina, Stanic Ana, op.cit. p. 202.

[47] Opinion 1/17 of the CJEU, 30 April 2019 (Opinion 1/17), para.106.

[48] Baltag Crina, Stanic Ana, op.cit, p. 201

[49] Ibid.

Some authors argue that investment protection measures in TTIP, CETA, and other recent EU Free Trade Agreements present the asymmetrical structure of the current international investment system (ICS) and that they prevent effective reforms because it conveys the change which is incompatible with a system that was created to protect investors and investments, not states. The real change may occur only when the investment treaties ensure the good governance, the protection of investors' rights, and the obligations and rights of the host state, and that liability is part of its crucial component.[50]

## IV Concluding Remarks

Achmea confirmed a definite determination of the EU institutions to preserve the powers of EU courts, pointing out that the investment tribunals are not part of it, but on contrary, that they stand as the treats. The question on the compatibility of the envisaged ISDS mechanism with the autonomy of the EU legal order have been undoubtedly expressed in Achmea ruling. On the other side, the Opinion 1/17 of CJEU has confirmed the compatibility of the CETA with EU law and thereby it has undoubtedly influenced the direction of EU investment policy and the subsequent development of a multilateral investment court system on a global scale. It is viewed as a significant advancement in the EU's new approach to ISDS and it increases clarity for the future regime, at least in terms of the provisions' compliance with EU law. Furthermore, UNCITRAL makes the effort to establish the platform with the aim of preventing investment disputes by resorting to the amicable settlement of disputes and has been recognized as the regional need of paramount significance. These endeavors have confirmed the necessity for the further development of the adequate, effective and clear dispute resolution mechanism as the *sine qua non* for promoting investment.

[50] Christian Tietje, Kevin Crow, The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU FTAs: Convincing?, Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations (ed. Stefan Griller), Oxford Scholarship Online, 2017.

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- Case C-741/19 Republic of Moldova v Komstroy LLC (2 Septembar 2021) EU:C:2021:655.
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# THE CONTENT OF CONSTITUTIONAL PREAMBLES IN EU MEMBER STATES

Summary

*This paper analyzes the constitutional preambles of European Union member states, examining their increasing significance in contemporary constitutionalism. The author identifies various elements within these preambles and groups them into two categories: those that refer to God or religious traditions, and those that feature historical narratives but no religious elements. A distinction is made between countries where religious elements are central to the preamble (such as Ireland and Hungary), and those where references to God only serve the purpose of rejecting totalitarianism but have no ideological significance (as in Germany). The analysis clearly shows that historical narratives are dominant in Eastern and Central European countries that gained independence after the fall of communism. Key characteristics of individual preambles are also presented, as the research framework allows.*

**„Key words"** *„preamble"; „constitution"; „EU member states"; „religion"; „history"; „constitutionalism".*

## I The constitutional preamble

The preamble is a part of the constitution that is meant to express the fundamental values and aspirations of the people, and bind them together as a nation.[1] The preamble refers to the precedents that created the constitution and explains their political motivation. Additionally, it can contain vows, wishes, and affirmations of principles that are not always easy to explain in the text.[2] It can place the law in its historical and political context[3], and according to Frosini, the preamble is at a crossroads between politics and law.[4] The preamble can represent cultural

[1] Gordon S. Wood, *The Creation of the American Republic 1776–1787*, University of North Carolina Press, 1998, p. 345.
[2] Giuseppe de Vergottini, *Diritto costituzionale comparato vol. 1*, CEDAM, Padova, 2013, pp. 284-285.
[3] Wim Voermans, Maarten Stremler, Paul Cliteur, *Constitutional preambles, A Comparative Analysis*, Edward Elgar Publishing Limited, Cheltenham, 2017, p. 6.
[4] Justin Frosini, *Constitutional Preambles. At a Crossroads between Politics and Law*, Maggioli, Santarcangelo Di Romagna, 2012, p. 22.

development and heritage, or the part of the constitution where morality, law and politics come together. It can be considered an "ideological constitution" that is connected to the legally normative constitution, where there is a noticeable difference between the philosophical, political and social premises on one side, and the regulations on the other.[5] The preamble presents the history behind the constitution's enactment, as well as the nation's core principles and values. Its purpose is to set down the basic structure of society and its constitutional faith, expressing the constitutional identity.[6] Tushnet underlines that the preamble could explain the origins of a constitution that continues to structure government, provide directive principles of public policy to guide legislation, and identify the fundamental rights guaranteed to the people.[7]

In terms of form, the preamble is a continuous text that does not contain articles and sounds solemn, which sets it apart from the normative part of the constitution.[8] Preambles are sometimes not written in the official language and can be literary or even poetic, as is the case in Portugal. The free form of expression in the preamble enables it, through the values it proclaims, to provide a kind of landmark for the future development of a society. In some constitutions, the introductory part is not explicitly termed "preamble" (i.e. it can be unnamed or labeled differently) but is still considered as such, as in the case of the Croatian constitution, which begins with "'Historical foundations".[9]

The preamble can be considered either a part of the constitution or something that precedes the constitution. Bobbio distinguishes between "preambles of" which are "general or introductory principles that are an integral part of the document, and "preambles to" which contain preliminary considerations to a true and proper legal document and are formulated with a certain degree of solemnity so as to underscore

[5] *Arsen Bačić*, „Konstitucionalizam, historizam i postmodernizam", Zbornik radova Pravnog fakulteta u Splitu, god. 50, 1/2013, p. 7.
[6] *Liav Orgad*, „The preamble in constitutional interpretation", International Journal of Constitutional Law, vol. 8, no. 4, 2010, pp. 716, 738.
[7] *Mark Tushnet*, „How do constitutions constitute constitutional identity?", International Journal of Constitutional Law, 8(3), 2011, p. 671.
[8] Miodrag Jovičić, *O ustavu – teorijsko-komparativna studija*, Savremena Administracija Beograd, 1977, p. 109-110.
[9] W. Voermans, M. Stremler, P. Cliteur, op. cit., p. 15.

the historical and ideal reasons for enacting the latter."[10] In traditional constitutional thought, as Belov explains, because the preamble contains no self-executable legal norms, it has no regulative influence on state bodies, on the people, or on the mediative institutions of the public sphere, such as political parties and the media.[11] However, modern constitutionalism distinguishes three ways of thinking about the legal nature of the preamble, if it is not already clearly defined by the constitution. According to the first point of view, the preamble is a solemn political declaration and a kind of introduction to the normative part of the constitution, which is why it lacks operational legal value. The second point of view attributes limited legal significance to the preamble and considers it only as an auxiliary means of interpreting unclear constitutional norms, positioning them into the appropriate socio-political context. The third point of view agrees that the preamble is an integral part of the constitution, and its legal effect is equated with the normative part of the constitution.[12] If the preamble is proposed, amended and approved the same way as any other part of the constitution, it shall be considered an integral part of the constitution and consequently has the legal force of constitutional norms. It is unquestionable that the text of the constitutional preamble can contain different sociological functions, including symbolic, legitimating, integrative, ideological, educational, and programmatic functions.[13]

## II The content of preambles

The content of preambles expresses the political, moral and religious ideas that the constitution intends to implement.[14] Haberle pointed out that the preamble contains the basic truths, including religious ones, of a particular state.[15] The content of the preamble can be distinguished based on whether it mostly contains national or universal values. Some preambles commit to peace; others sound like foreign

[10] *Norberto Bobbio*, "Il preambolo della Convenzione Europea dei Diritti dell'Uomo", Rivista di diritto internazionale, 1974, 437 f.
[11] *Martin Belov*, „The Preamble of the Constitution in the European Constitutionalism", Revista General de Derecho Romano 20, 2013, p. 1.
[12] *Darko Simović*, „O pravnoj prirodi preambule ustava", Zbornik radova Pravnog fakulteta u Nišu, vol. 87, no. LIX 2020, p. 18.
[13] *Darko Simović*, „Funkcije preambule ustava i osobenosti preambule Ustava Republike Srbije", Zbornik Pravnog fakulteta u Novom Sadu, vol. 54, br. 1, 2020, p. 175.
[14] Hans Kelzen, *Opšta teorija prava i države*, Pravni fakultet Univerziteta u Beogradu, 2010, p. 360.
[15] Peter Haberle, *Ustavna država*, Politička kultura, Zagreb, 2002, p. 185.

policy statements or threaten military action; others still highlight very important, open questions for the country in the context of international relations.[16] Certain preambles refer to specific historical[17] or religious figures[18], while socialist constitutions praise historic thinkers such as Augusto Sandino (Nicaragua 1987) and José Martí (Cuba 1976).[19]

The content of preambles has changed over time under the influence of global or regional innovations. Ginsburg, Foti and Rockmore distinguish between vertical and horizontal innovations in the text of the preamble, with the former occurring within the history of a state, and the latter occurring within the universe of preambles of other countries.[20] Therefore, there are different classifications of preamble content. Voermans, Stremler, and Cliteur recognize three categories of elements: those that concern the general structure of the constitutional system, such as constituent power, national sovereignty, rule of law, and democracy; those that relate to fundamental rights, in the broad sense of the word, such as human dignity, rights and freedoms, and equality; and finally those elements that concern national characteristics, such as history, religion, secularism, pluralism, and minorities.[21] Frosini distinguishes five elements: constituent power, form of state and government, historical references, references to God and religion, and territory.[22] According to Orgad, the content of preambles can be classified into five categories: the sovereign, historical narratives, supreme goals, national identity, and God or religion.[23] Kutlešić notes that almost half of all preambles across the world contain historical or religious expositions.[24]

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16 The Preamble to the Chinese Constitution outlines the sovereignty of the territory of Taiwan, the North Korean preamble speaks of reunification (of North and South Korea), while the Serbian preamble of 2006 saw the status of Kosovo as an integral part of the territory of Serbia.

17 Vietnam's 1960 preamble referred to Ho Chi Minh; China's 1975 preamble referred to Mao Zedong; and Cuba's 1976 preamble refers to Fidel Castro.

18 Jesus Christ, for example, appears in the constitutional preambles of Greece and Ireland. Brunei mentions the Prophet Muhammad and Iran mentions Allah.

19 *Tom Ginsburg, Nick Foti, Daniel Rockmore*, "We the Peoples": the Global Origins of Constitutional Preambles", The George Washington International Law Review, vol 46, 2011, pp. 111.

20 Ibid, pp. 124-125.

21 W. Voermans, M. Stremler, P. Cliteur, op. cit., p. 25.

22 J. Frosini, op. cit., pp. 34-47.

23 L. Orgad, op. cit, pp. 716-718.

24 *Vladan Kutlešić*, „Preambule ustava, uporedna studija 194 važeća ustava", Anali Pravnog fakulteta u Beogradu, vol. LVIII, no. 2/2010, p. 72.

## III Preambles of the EU members' constitutions

Regardless of the fact that the preamble is not a mandatory part of the constitution and that almost a third of the countries across the world do not contain a preamble in their constitutions[25], modern constitutional thought recognizes the growing importance of the preamble. Among the EU member states, in addition to Sweden, which does not have a codified constitution, there are ten other EU countries that do not have a preamble to the constitution, namely Italy[26], Austria, the Netherlands, Belgium, Luxembourg, Denmark, Finland, Romania, Cyprus and Malta. The absence of a constitutional preamble in these countries does not indicate a broader trend towards adopting constitutions without preambles in a wider comparative perspective. Rather, it can be regarded as their national specificity determined by the concrete context of their adoption.[27] Nevertheless, it is noteworthy that the constitutions of countries that break with the past by creating a new state, implementing revolutionary changes, or proclaiming a new social order usually contain preambles to legitimize the new order or condemn the previous regime.

Among the preambles of the constitutions of EU countries, we can find references to certain values, the most common of which are sovereignty, independence, territorial integrity, democracy, rule of law, social justice, justice, freedom, equality and human rights.[28] One characteristic of the constitution's preamble is that it determines who enacts the constitution. In the majority of EU countries, it is the people, the nation or the citizens - based on the famous preamble of the US Constitution.[29] In four EU countries (Portugal, Hungary, Bulgaria, Slovenia), the parliament is defined by the preamble as the body that enacts the

[25] Ibid., p. 62.

[26] Strictly speaking Italy does not have a preamble. However, it is worth noting that, following a debate on whether to include a preamble or not, the Italian Constituent Assembly set out the fundamental principles in the first twelve articled provisions before Part One of the Constitution of 1948. These were referred to as the 'catalogue of preambular articles'., J. Frosini, op. cit., pp. 28-29. We will exclude such quasi-preambles in this article.

[27] M. Belov, op. cit., 3.

[28] V. Kutlešić, op. cit., p. 66.

[29] *"We the People of the United States*, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

constitution, while Croatia and Greece are exceptions because the preamble of their constitutions does not specify the enacting body.

For the purposes of this work, we will analyze the preambles of the EU member states individually, classifying them into two categories: those which include references to God or religious traditions, and those without religious content. In the preambles belonging to the second group, historical narratives dominate. Bearing in mind that values such as national identity, self-determination, and sovereignty overlap with the historical narrative, where the latter often serves to reinforce national identity while self-determination and sovereignty are also related to the historical context, we will group preambles with such content together.

### A. Reference to God or religious traditions

Referring to God in preambles does not necessarily have to be a threat to the secular character of the state. Instead, it primarily has a symbolic purpose aimed at strengthening the legitimacy of the constitution and national identity in states where a large part of the population is religious.[30] Preambles often directly or indirectly refer to God or religious traditions[31], while only a few of them speak of the secular basis of the constitutional order.[32] The percentage of preambles of living constitutions with a reference to God or religion was the highest in 1945, at 63 percent. However, between 1990 and 1995, there was a significant decrease, with only 51 percent of constitutional preambles in the world today containing such a reference.[33] This can be largely explained by the new constitutions of post-Soviet

[30] *Darko Simović*, „Funkcije preambule ustava i osobenosti preambule Ustava Republike Srbije", Zbornik Pravnog fakulteta u Novom Sadu, vol. 54, br. 1, 2020, 179.

[31] Among the first constitutions using a preamble to invoke religion were the Constitution of Cádiz, adopted in Spain in 1812, which spoke "in the name of God Almighty, Father, Son, and Holy Ghost, Author Supreme Legislator of society," and the Peruvian constitution of 1826, which had the shortest preamble - "In the Name of God"., T. Ginsburg, N. Foti, D. Rockmore, op. cit., pp. 109-110., A much more well-known and influential preamble of religious content is related to the Constitution of the Swiss Confederation of 1848, whose preamble begins with the words, "In the name of the almighty God!" The preambles to the 1874 constitution and the current constitution of 2000 begin in the same way.

[32] The Constitution of the Republic of Turkey of 1982 protects Atatürk's legacy, including secularism. It states that „sacred religious feelings shall absolutely not be involved in state affairs and politics, as required by the principle of secularism."

[33] W. Voermans, M. Stremler, P. Cliteur, op. cit., pp. 59-60.

states, previous communist states, and current communist states, where the vast majority did not adopt such practices.

References to God, other religious authorities, or religious traditions are characteristic of the preambles of six EU member states, namely Greece, Ireland, Germany, Poland, Hungary and Latvia. The Greek constitution has the shortest preamble of all the constitutions, not only among EU member states, but in the whole world. It consists of only 11 words[34] which emphasize the solemn character of the adoption of the constitution. It refers to the Holy Trinity, and thus clearly belongs to the group of preambles that have religious content, since the entire preamble has religious content. However, the Greek constitution does not specify the enacting body, leaving it unclear through which political entity God legitimizes the constitution.[35]

The preamble to the Constitution of Ireland of 1937 refers to the Holy Trinity and enshrines the obligations of the Irish people towards the "Divine Lord, Jesus Christ".[36] It should be noted that these strong references are not only to the general values of Christianity, but also to the specific values of Catholicism. This is because Catholic Ireland, at the time when the constitution was adopted, had just won its independence from Anglican England, and the fight for freedom also implied a religious struggle.[37] Tushnet raises the question of who "the people" are who govern themselves. He presents the thesis that "the people" of Ireland in 1937 were very different people, and that the preamble no longer fits Irish social reality since more than eighty years after the constitution was enacted, the people of Ireland no longer take Roman Catholicism (and the express reference to the Trinity, or the use of the Thomistic "final end") to be central to their identity.[38]

The Constitution of Poland, which, after the Constitution of Croatia, has the longest preamble of all EU member states, speaks in its preamble on behalf of both believers and non-believers.[39] However, this approach did not convince opponents

[34] "In the name of the Holy and Consubstantial and Indivisible Trinity".
[35] W. Voermans, M. Stremler, P. Cliteur, op. cit., p. 26.
[36] "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred... Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial..."
[37] J. Frosini, op. cit., p. 40.
[38] M. Tushnet, op. cit., pp. 671-672.
[39] "We, the Polish Nation—all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources..."

from the right and Catholic circles, who did not consider it a worthy substitute for the desired express reference to God ("In the name of God Almighty..." was included in the Polish constitutions of 1791 and 1921). The dualist formula was also criticized by supporters of a consistent secularisation of the Constitution. Nevertheless, this approach, judged as moderately successful in Poland, was taken into consideration when the Convention on reform of the European Union worked on the Preamble to the Constitutional Treaty.[40] Furthermore, the preamble invokes the responsibility of Polish citizens before God or their own consciences, and states that their culture is rooted in the Christian heritage of the Polish nation and in universal human values.

The preamble of the German constitution (Basic Law) of 1949 provides that the German people are responsible not only towards their fellow humans, but also towards God.[41] This inclusion of the Jewish idea of God in the preamble was a logical step taken to atone for the sins committed during the Nazi regime's genocide of the Jews and to seek forgiveness.[42] In 1990, during the constitutional revision procedure, the preamble was amended to replace all references to reunification[43] and the transitional character of the Basic Law after completion of German unity.[44] Although the reference to God remained in the amended preamble, the predominant view minimizes its importance, denying any religious or ideological message in the stricter sense. It is argued that emphasizing responsibility before God and Men is tantamount to a rejection of all forms of totalitarianism and to confessing a minimum standard of preset values.[45]

The Hungarian constitution of 2011, known as the Fundamental Law of Hungary, begins with the words "God bless Hungary", and its preamble highlights

[40] *Ewa Poplawska*, „Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland", Acta Juridica Hungarica, Vol. 52, No. 1, 2011, p. 43.
[41] "Conscious of their responsibility before God and man..."
[42] Gerhard Robbers, *Religion and Law in Germany*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 294.
[43] The original preamble included the following text: ... *filled with the resolve to preserve its national and political unity... It has also acted on behalf of those Germans to whom participation was denied. The entire German people is called on to achieve in free self-determination the unity and freedom of Germany."*
[44] Jürgen Bröhmer, Clauspeter Hill & Marc Spitzkatz (Eds.) *60 Years German Basic Law: The German Constitution and its Court,* Konrad-Adenauer-Stiftung, Berlin, 2012, p. 72.
[45] See *Michael Silagi*, "The Preamble of the German Grundgesetz–Constitutional Status and Importance of Preambles in German Law", Acta Juridica Hungarica, 52, No. 1, 2011, pp. 61-62.

the role of Christianity in preserving national identity.[46] The reference to Christianity in the preamble of the Hungarian constitution not only signifies its decisive importance in the historical development, formation and survival of the Hungarian state, but also its continued relevance in Hungarian society today.[47] The emphasis on Christianity in making Hungary a part of Christian Europe, on its role in preserving nationhood, and in particular on Catholicism (as evidenced by the reference to 'King Saint Stephen') and on the 'Holy Crown,' which embodies the constitutional continuity of Hungary's statehood and unity of the nation, as well as the 'God bless the Hungarians' in the opening line of the constitution is unprecedented in European constitutionalism. However, the preamble to the current Latvian constitution (Constitution of the Republic of Latvia from 1922), which was amended in 2014 to include Christian values as significant to their identity, concludes with the words „God bless Latvia."

### B. Historical narratives

The preamble of a constitution typically highlights the historical context leading to the adoption of the document, as well as the fundamental principles and values of the nation. Therefore, references to historical events may also be included in the preamble. This is particularly evident in the preambles of Eastern and Central European countries, which often glorify the struggle for independence and self-determination, such as in the cases of Estonia, Slovakia, Slovenia, and Croatia.[48]

In terms of historical narrative, the Preamble to the Constitution of the Republic of Croatia is unparalleled in scope in comparative constitutionalism.[49] At

[46] ..."We are proud to declare that one thousand years ago our first king, Saint Stephen, set the Hungarian State on solid foundations, and made our country a part of Christian Europe... We acknowledge the role of Christianity in preserving our nation. We respect all religious traditions that may exist within our country."

[47] *Laszlo Heka*, „Ustavnopravni poredak Mađarske u svijetlu Ustava iz 2011. godine", Pravni vjesnik, god. 29, br. 3-4, 2013, p. 164.

[48] Darko Simović, Vladan Petrov, *Ustavno pravo*, Kriminalističko-policijska akademija, Beograd, 2018, pp. 86-87.

[49] "...Historical right of the Croatian nation to full sovereignty, manifested in: the formation of Croatian principalities in the seventh century; the independent mediaeval state of Croatia founded in the ninth century; the Kingdom of Croats established in the tenth century; the preservation of the identity of the Croatian state in the Croatian-Hungarian personal union; the independent and sovereign decision of the Croatian Parliament (Sabor) of 1527 to elect a king from the Habsburg dynasty; the independent and sovereign decision of the Croatian Parliament of the Pragmatic

513 words, the largest part of it aims to showcase the state continuity of the Croatian people throughout history, outlining the historical–political moments of national and state identity.[50] This historical sequence of events in the preamble is quite logically the subject of criticism, not only because it makes the text of the preamble the longest within the EU, but also due to the rather romanticized understanding of certain historical events or periods. Therefore, contemporary Croatian historiography rightly raises questions about the existence of Croatian principalities in the VII century, the actual position of Croatia in the Croatian–Hungarian personal union, the real definition of the Croatian state's legal position during Croatian–Hungarian settlements, and whether the Croatian Parliament, which passed the decision on the termination of Croatia's legal relations with Austria–Hungary on October 29, 1918, could generally sanction the decision on the unification of the State of SHS with the Kingdom of Serbia on December 1, 1918.[51]

The preamble to the Constitution of the Republic of Slovenia states that the basis of Slovenian statehood is the "permanent and inalienable right of the Slovenian

Sanction of 1712; the conclusions of the Croatian Parliament of 1848 regarding the restoration of the Triune Kingdom of Croatia under the authority of the Banus grounded on the historical, national and natural right of the Croatian nation; the Croatian-Hungarian Compromise of 1868 on the relations between the Kingdom of Dalmatia, Croatia and Slavonia and the Kingdom of Hungary, grounded on the legal traditions of both states and the Pragmatic Sanction of 1712; the decision of the Croatian Parliament of 29 October 1918 to dissolve state relations between Croatia and Austria-Hungary and the simultaneous affiliation of independent Croatia, invoking its historical and natural right as a nation, with the state of Slovenes, Croats and Serbs, proclaimed on the former territory of the Habsburg Monarchy; the fact that the Croatian Parliament had never sanctioned the decision of the National Council of the State of Slovenes, Croats and Serbs to unite with Serbia and Montenegro in the Kingdom of Serbs, Croats and Slovenes (1 December 1918), subsequently (3 October 1929) proclaimed the Kingdom of Yugoslavia; the establishment of the Home Rule (Banovina) of Croatia in 1939, by which Croatian state identity was restored within the Kingdom of Yugoslavia; establishing the foundations of state sovereignty during the course of the Second World War, by the decisions of the Antifascist Council of National Liberation of Croatia (1943), as opposed to the proclamation of the Independent State of Croatia (1941), and subsequently in the Constitution of the People's Republic of Croatia (1947) and all later constitutions of the Socialist Republic of Croatia (1963-1990), on the threshold of the historical changes, marked by the collapse of the communist system and changes in the European international order, the Croatian nation by its freely expressed will at the first democratic elections (1990) reaffirmed its millennial statehood. The new Constitution of the Republic of Croatia (1990) and the victory of the Croatian nation and Croatia's defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995), wherein the Croatian nation demonstrated its resolve and readiness to establish and preserve the Republic of Croatia as an independent and autonomous, sovereign and democratic state..."

[50] *Vojko Rešetar*, „O preambuli (izvorišnim osnovama) Ustava Republike Hrvatske", Zbornik radova Pravnog fakulteta u Splitu, god. 58, 4/2021, pp. 1089-1090.

[51] A. Bačić, op. cit., p. 13.

people to self-determination.[52] Unlike the Croatian preamble, it does not refer in detail to the historical sources of statehood, nor to the anti-fascist struggle or the period when it was part of SFR Yugoslavia.

The preamble to the Czech constitution recalls the historical parts of the Czech Republic, namely Bohemia, Moravia, and Silesia.[53] This is partly due to the manifestation of some regional political movements that existed in 1992, especially in Moravia, which demanded consideration of Moravian identity.[54] It is worth noting that the constitutional writers outlined the continuity and close connection of the Czech with the former Czechoslovak state, which is not the case in the preamble to the Slovak constitution.

The preamble to the Constitution of the Republic of Slovakia refers to the heritage of Great Moravia, based on the natural right of the people to self-determination.[55] However, it does not draw on the traditions of Czechoslovakia, despite the peaceful dissolution of this two-member communist federation, also known as the "Velvet divorce". Unlike the preamble to the Croatian Constitution, which clearly distinguishes the Independent State of Croatia (NDH) as a fascist puppet state during World War II, the preamble to the Slovak constitution does not mention the period of the Slovak Republic from 1939 to 1945, which was established as a German satellite state by the priest Jozef Tiso.[56]

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[52] „Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood, the Assembly of the Republic of Slovenia hereby adopts..."

[53] „We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia, At the time of the restoration of an independent Czech state, Faithful to all good traditions of the long-existing statehood of the lands of the Czech Crown, as well as of Czechoslovak statehood..."

[54] It should be pointed out that the enumeration of the historical countries does not entail any territorial claims, bearing in mind that the vast majority of the historical region of Silesia is now in Poland., *Jan Kudrna*, „Two Preambles in the Czech Constitutional System", Acta Juridica Hungarica, vol. 52, No 1, 2011, p. 28.

[55] „We, the Slovak nation, bearing in mind the political and cultural heritage of our ancestors and the centuries of experience from the struggles for national existence and our own statehood, mindful of the spiritual heritage of Cyril and Methodius and the historical legacy of Great Moravia, recognizing the natural right of nations to self-determination, together with members of national minorities and ethnic groups living on the territory of the Slovak Republic..."

[56] Certain circles in society, sometimes close to the government, recognized Tiso's regime and the continuity of his state and constitutional heritage (The Constitution of Slovakia of 1939). This was particularly supported by the fact that Tiso was a priest and was killed by the Soviets, so he could be given the status of victim of the new totalitarianism. A certain rehabilitation of the Tiso's regime is

Because of its ceremonial and poetic language, the preamble to Portugal's Constitution is the perfect example of the "ceremonial–symbolic preamble".[57] Portugal is the only country in Western Europe that has historical content in the preamble of its constitution.[58] The preamble to the Portuguese Constitution of 1976 refers to the political events which inspired the drafting of the constitution, such as the fall of the fascist regime and the end of colonialism.[59]

Another important characteristic feature of these historical narratives in preambles is that they aim to stress the continuity of national statehood. The Preamble to the Constitution of the Republic of Lithuania of 1992 outlines centuries-old state continuity and legal origins.[60] Most of the countries in the region, including Lithuania, have suffered heavy losses in their history, with states disappearing in long battles, or being revived under favorable conditions. Therefore, the desire to emphasize the tradition of statehood is understandable.[61]

In the preamble to the Constitution of the Republic of Estonia, we can observe the signs of institutionalization of ethno-national sentiments, as it clearly distinguishes between two groups of people - the people of Estonia and the Estonian people (nation), with the latter being in a privileged position.[62] This constitutionally establishes one ethnic group as the core ethnic nation, with specific

clearly connected with the independence tendencies in the period from 1990 to 1992 and during the premiership of Vladimir Mečiar until 1998, but these tendencies weakened as Slovakia approached the European Union and NATO. *Budislav Vukas*, „Pravnopovijesne reference u ustavnim preambulama država srednje i jugoistočne Europe u postkomunističkom razdoblju", Zbornik Pravnog fakulteta u Zagrebu, vol. 63, no. 5-6, 2013, p. 1245.

[57] See L. Orgad, op. cit., pp. 722-723.

[58] „On the 25th of April 1974 the Armed Forces Movement crowned the long years of resistance and reflected the deepest feelings of the Portuguese people by overthrowing the fascist regime. Freeing Portugal from dictatorship, oppression and colonialism was a revolutionary change and the beginning of a historic turning point for Portuguese society. The Revolution restored their fundamental rights and freedoms to the people of Portugal..."

[59] J. Frosini, op. cit., p. 37.

[60] "The Lithuanian nation, having created the State of Lithuania many centuries ago; having based its legal foundations on the Lithuanian Statutes and the Constitutions of the Republic of Lithuania; having for centuries staunchly defended its freedom and independence... by the will of the citizens of the reborn State of Lithuania, adopts and proclaims this Constitution."

[61] *Beinoravičius Darijus, Mesonis Gediminas, Vainiutė Milda*, „The Role and Place of the Preamble in Lithuanian Constitutional Regulation", Baltic Journal of Law & Politics, Vol. 8, No. 2, 2015, p. 153.

[62] "With unwavering faith and a steadfast will to strengthen and develop the state, which embodies the inextinguishable right of the people of Estonia to national self-determination [...] which must guarantee the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages."

claims to the state. Therefore, the somewhat paradoxical conclusion can be drawn that citizens (i.e. all ethnic groups together) establish a state and adopt a constitution in order to preserve the language and culture of one specific ethnic group—the Estonians.[63]

The Bulgarian constitution-makers opted for a general approach by referring to universal values such as liberty, peace, humanism, equality, justice and tolerance. Their aim was to create a democratic and social state governed by the rule of law. The Grand National Assembly in 1991, which has been amended several times since then, has a very general preamble that does not delve into the foundations of Bulgaria's rich constitutional history.[64] For example, there is no mention of constitutionality during the time of the constitution of the Bulgarian principality, which was established during the so-called Eastern Question (Trnovsk Constitution from 1879). Understandably, neither does it mention examples of socialist Bulgarian constitutionalism such as Dimitrov's constitution from 1947 or Zhivkov's constitution from 1971.[65]

The preamble to the French Constitution of the Fifth Republic of 1958, makes reference, inter alia, to the Declaration of the Rights of Man and Citizens of 1789 and the preamble of the Constitution of the Fourth Republic, the latter being an 'updated' version of the Declaration given the fact that it contains a long list of social and economic rights known as second generation human rights.[66] In addition, the preamble was amended to include the Charter for the Environment of 2004.[67] Until the early 1970s, there were theoretical discussions about the legal value of the preamble. Malberg and Esmein argued that the Declaration had no substantial legal value and was merely a cultural manifesto of a philosophical nature, unable to

[63] *Priit Järve*, „Ethnic Democracy and Estonia: Application of Smooha's Model", European Centre for Minority Issues, Working Paper No.7, 2000, p. 7.

[64] „We, the Members of the Seventh Grand National Assembly, guided by our desire to express the will of the people of Bulgaria, by pledging our loyalty to the universal human values of liberty, peace, humanism, equality, justice and tolerance; by holding as the highest principle the rights, dignity and security of the individual; in awareness of our irrevocable duty to guard the national and state integrity of Bulgaria, hereby proclaim our resolve to create a democratic and social state, governed by the rule of law, by establishing this CONSTITUTION."

[65] B. Vukas, op. cit., pp. 1246-1247.

[66] J. Frosini, op. cit., pp. 64-65.

[67] "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004..."

produce binding legal effects. Conversely, Duguit and Hauriou agreed that the Declaration and the Constitution of 1791 were both the result of the same 'process of foundation' of the modern state and had the same source of legitimization: the Constituent Assembly.[68] The Constitutional Council, in a decision from 1971, confirmed that the preamble is an integral part of the constitution, thus providing constitutional protection for human rights from the Declaration.

The Constitution of Spain of 1978 represents the culmination of a political transition to democracy following Franco's death. Therefore, it is a typical liberal constitution which in its preamble includes commitments to democracy, the rule of law, and respect for human rights. The preamble defines the 'nation' as the entity enacting the constitution[69], and Spain belongs to the group of EU member states (comprised of Lithuania, Estonia, Slovenia and Bulgaria) whose preamble is placed before the word "constitution". The preamble to the Constitution of Spain is proposed, amended and approved in the same procedure as any other article of the constitution, and therefore represents an important instrument for interpretation.[70]

## IV Conclusion

Preambles were unfairly neglected by the classic constitutional doctrine, which reduced them to declarative solemn statements without legal significance. However, interest in the study and analysis of preambles is growing, primarily because some constitutional makers have made them an integral part of the constitution, granting them the power of constitutional norms, or using the preamble as an auxiliary tool in the interpretation of constitutional norms. Although we dealt with the legal relevance of the preamble indirectly by outlining the importance of the decision of the French Constitutional Council in the early 1970s, our goal was to shed light on the content of the preamble by focusing on the member states of the European Union. We highlighted the religious content in one group of states, and the historical narratives in another.

We can assert that referring to God or religious traditions is not limited to a certain ideological–political or religious context. In fact, it is also present in the

[68] J. Frosini, op. cit., 64-65.
[69] "The Spanish nation, desiring to establish justice, liberty, and security and to promote the wellbeing of all its members, in the exercise of its sovereignty, proclaims its will to..."
[70] Ibid., p. 151.

preambles of founding countries of the EU, such as Germany, and post-communist countries of Eastern Europe, such as Hungary. Besides, the reference to religion is not exclusive to EU countries where the Catholic Church has significant influence, such as Ireland and Hungary, but also extends to Orthodox Greece and other countries, such as Germany, where it merely has a symbolic character and poses no threat to the secular character of the state. The example of Poland is noteworthy because its preamble addresses both believers and non-believers.

In EU member states that do not refer to religious authorities, the preamble is dominated by historical narratives which emphasize the tradition of statehood in order to strengthen national identity. This is especially characteristic not only of post-communist EU states that gained independence after the collapse of communist federations, such as Croatia, Lithuania, the Czech Republic, and Slovakia, but also of Portugal as a country in Western Europe which celebrated the fall of the fascist regime with its "ceremonial–symbolic preamble". On the other hand, there are preambles that do not have historical narratives despite their rich constitutional and state history, such as Bulgaria.

The comprehensive survey presented in this paper can contribute to the research of the preamble as a form of ideological constitution, reflecting the values and history of a society. It could also point the way towards future research on the differences between communist and post-communist preambles in Eastern European EU member states, by analyzing their constitutions before and after the fall of the Berlin Wall.

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# HARMONIZATION OF CUSTOMER CREDIT LAWS IN MONTENEGRO: CHALLENGES AND PERSPECTIVES

Summary

*The road to harmonisation of the Montenegrin consumer law was all but smooth and is still far from European standards. The Montenegrin experience ranges from always-present tardiness to a rarity of zealousness phases. Although, tardiness in harmonisation is a usual aspect of interest, zealousness can also have interesting consequences. This paper is devoted to presenting the results of zealous and reckless legislative activity as a result of the initiatives of the members of parliament, which have led to the creation of an insecure system of consumer protection, despite the efforts of its creators to perfect the system by harmonizing the national rules. Legislative initiatives by MPs and their interest in consumer protection can sometimes have unexpected results, despite the best intentions.*

**„Key words"** *„Harmonisation of consumer law"; „Montenegrin consumer law"; „consumer credit"; „legislative initiative of MPs".*

## I Introduction

Consumer protection is a term had originated in more recent Montenegrin legislation. Although some rules regarding the protection of consumers originated even before the opening of the accession negotiations, the serious efforts and results in legislation have been connected to the opening of negotiations with the EU. The first law in this field was the Law on Consumer Protection in 2002.[1] The following changes were brought about by the Law on Consumer Protection from 2007.[2] The current Law on Consumer Protection was introduced in 2014 as an umbrella piece of legislation in the area of consumer protection.[3] Although this law was intended to harmonise the Montenegrin law with the EU *acquis,* it was not fully harmonised

[1] Law on Consumer Protection, Official Journal of Socialist Republic of Yugoslavia, no. 37/02 (hereinafter: LCP 2002).
[2] Law on Consumer Protection, Official Journal of Republic of Montenegro, no. 26/07, 40/11, 35/13, 1/14, 14/14 (hereinafter: LCP 2007).
[3] Law on Consumer Protection, Official Journal of Montenegro, no. 02/14, 06/14, 43/15, 70/17, 67/19, 146/21 (hereinafter: LCP 2014).

with the Directive on Consumer Rights from 2011,[4] and all amendments to this law up until 2019 were related to practical problems of its implementation. By the amendments of 2019 and 2021, the Montenegrin Law on Consumer Protection was fully harmonised with the Directive form 2011.

Until 2013, consumer credits were regulated in the Montenegrin legal system only in principle, by the rules of previous consumer protection laws or in the Law on obligations.[5] Specific rules on consume credits were defined in the Law on Consumer Credits from 2013[6] in the process of harmonisation of the Montenegrin law with the Consumer Credit Directive (2008/48/EC).[7]

Since Montenegro, as a candidate country, is making serious efforts to align its legislation with European Union law in the field of consumer protection, we will look at the process of harmonisation, legislative initiatives in this field, and the problems identified in the practical application of the rules on consumer credits.

We will present a historical overview of the events that led to the zealousness phase of the Montenegrin parliament harmonisation efforts, but up front, it is questionable if we can call it harmonisation.

The Law on Consumer Credits is a milestone in Montenegrin consumer protection. We will take a closer look at this legal text, and we will compare the legal provisions with the Law on Consumer Protection – users of financial services. Since the Law on the Conversion of Swiss Franc-Denominated Loans into Euro-Denominated Loans and the Law on Consumer Protection-Users of the Financial Services were in parliamentary procedure around the same time, we will also take a closer look at these two laws, at least in the procedural aspects, since the first was passed in the summary procedure and the second in the regular procedure, which ran shorter than the summary procedure.

[4] Directive on Consumer Rights (2011/83/EU), which amended the Directive on unfair terms in consumer contracts (93/13/EEC) and the Directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC), and repelled the Directive to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC) and Directive on the protection of consumers in respect of distance contracts (97/7/EC).

[5] Law on Obligations, Official Journal of Montenegro, no. 47/08, 04/11, 22/17

[6] Law on Consumer Credits, Official Journal of Montenegro, no. 35/13, 73/17, 72/19, 08/21 (hereinafter: LCC 2013).

[7] DIRECTIVE 2008/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

## II Law on Consumer Credit and Problems with CHF-denominated Loans

The Law on Consumer Credit was a giant leap in the area of consumer protection in Montenegro, having in mind the rules implemented in this law. Since the Directive on Consumer Credits was a minimal harmonisation directive, Montenegro used the options available to implement the stricter rules in order to provide more protection in the area of consumer credits.

But the first problems in the area of consumer credits arose in 2013 before the adoption of this law. The problem was common in East European countries: the problem of credits denominated in Swiss francs. All the countries of Eastern Europe were affected, and according to the preliminary findings, about 700 of these credits were approved by one Montenegrin bank.[8]

After the adoption of the Law on Consumer Credits, the problem only escalated since the provisions of this law couldn't be applied to the existing problems of consumers. The discontent of the public was evident, and the media coverage of the cases of the denominated loans was common in the everyday local and national press.

The problem was so present that it had attracted the attention of the local and national politicians, who had acted on the wings of the public's outrage with this case and came up with a "*lex specialis*" solution to this case. The Montenegrin Parliament adopted the Law on the Conversion of Swiss Franc-Denominated Loans into Euro-Denominated Loans in August 2015,[9] in a summary proceeding.

During the summary parliamentary proceeding, the draft was significantly amended by its proponents after the negative opinion of the Montenegrin government. Summary proceeding is reserved for the laws needed to be passed in order to regulate the issues and relations that arose as a result of circumstances that could not be foreseen, and when failure to pass the law could cause harmful consequences.[10] This procedure is extraordinary, and should be used cautiously and rarely, but unfortunately, this is not the case in the workings of the Montenegrin Parliament. The summary procedure started in February 2015 and ended on the last

[8] See: Nikola Dožić, CHF denominated loans – a case study of Montenegrin approach, *Juridical Tribune*, Volume 8, Issue 1, page 88.
[9] Law on the Conversion of Swiss Franc - Denominated Loans into Euro - Denominated Loans (Official Gazette of Montenegro, No 46/2015.
[10] See: Article 151 of the Montenegrin Parliament Rules of Procedure.

day of July 2015. This means that, through summary proceedings, the Parliament took 6 months to deliberate and pass the law.

Problems with the implementation of the law were evident even prior to the adoption of the law, but the Parliament had passed the law only with the amendments of the proponent. The law consisted only of six articles, was lacking in so many ways, and was full of inconsistencies and contradictions. Only 0,02% of the total amount of loans denominated in CHF were covered by the text of the original law. These were the major reasons why this Law was so hard to implement and why amendments were necessary shortly after its adoption. Novelties brought about by the amendments were more detailed and again created more problems.[11]

So, the problem of CHF-denominated loans was the one preoccupying the Montenegrin public and the MPs. The problem was so present, and the public outrage was so high that the MPs were zealous to argue the solutions that would prevent this from happening again.

One of the points would bring new "solutions" for the Montenegrin legislators. Somehow the MPs have forgotten about the novelties they already brought to the Montenegrin legal system by introduction of the Law on Consumer credits and the debate on the need for additional consumer protection in the area of consumer credits.

## III Law on Consumer Credit and the Law on Consumer Protection-Users of Financial Services

The new "solution" began with the intent of the parliamentarians to protect consumers in the field of financial services, so the debate on the need for the new rules in the area of financial services was brought to the parliament, and was the need for regulation of the consumer credits. The procedure began in March 2015 with the proposal of the Law on Consumer Protection-Users of Financial Services.[12] The procedure began only one month after the beginning of the summary procedure on the law on CHF.

[11] For more on CHF-denominated loans in Montenegro, see: Nikola Dožić, CHF denominated loans – a case study of Montenegrin approach, *Juridical Tribune*, Volume 8, Issue 1, page 93.

[12] Law on Consumer Protection – Users of Financial Services, Official Journal of Montenegro, no. 43/15

It would seem that the 2013 debate on the law on consumer credits was not most memorable one in the history of Montenegrin parliamentarism since the new debate on the new set of rules on exactly the same topic was introduced in the Montenegrin Parliament.

We will first take a look at the procedural aspects of passing this law, and then at its provisions and problems that arose in its implementation.

### A. The Law on Consumer Protection-Users of the Financial Services – Procedural Aspects

This proposal for the law was made in Parliament procedure, by one of the MPs. Since the government of Montenegro was not the proposing entity, which was the most common in the event where the proposing legislation was being made in order to harmonise the national law with the EU law, the procedure in the Parliament was more expedient which was the question of special interest since the law was brought in a little over a four-month period.

This is very fast, even in the event of the laws set in the expedient procedure reserved for the most burning questions and a special procedure in the parliamentary system.

There was no public debate on the proposal of the law since this proposal was made by the member of the parliament, and by the rules of procedure, the public debate is needed only in the event where the initiative is brought by someone outside of the Parliament.

Even the parliamentary procedure was very fast. In little over a month, Committee on Economy, Finance, and Budget was finished going through the text, and it was set for the following procedure, with a critique to the government for not responding at the initiative of the Parliament and the notation that it would be useful that the Central Bank of Montenegro would give a comment on the text. The Committee on Economy, Finance, and Budget also pointed out the problem of technical errors in the law that needed to be corrected. One of the conclusions of this committee was especially problematic: that with this law our national legislature was being harmonised with the EU acquis in this area. But we will return to this issue in the following text.

The most interesting were the conclusions of the Legislative Committee, with proposed ten amendments and numerous technical corrections. Only two

amendments were directed to the substantial text change, and all others were more significant technical and wording corrections. The list of technical corrections was full of grammatical and wording mistakes since all the words corrected were in the Croatian language, which was the first hint that this text originated in Croatian-speaking territory (not necessarily Croatia). The proponent of this law has accepted all the amendments proposed by this committee.

Only one of the MPs had suggested two amendments to this text. These amendments were focused on the substantial changes in the proposal of the law, and we will comment on these in the following text, in the part of the text dedicated to the substantial provisions of this law. In less than 15 days, the Committee on Economy, Finance, and Budget deliberated on these amendments, and both were accepted by the law proponent.

Nine days after the Committee deliberated on the amendments, this law was passed in Parliament by the middle of July 2015.

The Law on Consumer Protection–Users of Financial Services was passed in ordinary procedure in the Parliament faster than the Law on CHF-denominated loans in the summary procedure that started a month earlier. The expediency of passing the Law on Consumer Protection – Users of Financial Services superseded the expediency needed for the summary proceeding of the Law on CHF-Denominated Loans.

The major conundrum is which one of these laws was actually necessary in the Montenegrin legal system. The target was missed by a mile in the CHF-denominated loan case. But the target was missed much more in the case of the Law on Consumer Protection–Users of Financial Services.

We must emphasize the observations made during the comparison of the Bosnia and Herzegovina Draft of the Law on Consumer Protection–Users of Financial Services and Montenegrin Draft of the Law on Consumer Protection–Users of Financial Services. Both texts in the original format, before the amendments in parliament, look identical. The level of similarity is evident even in the rationale of these two laws, to the extent that the rationale of the Montenegrin version contains an explanation of the competence of the Parliament in the federal state. Obviously, the proponent of the Montenegrin version of the text took a liberty to propose the text prepared in Bosnia and Herzegovina in 2014. This would explain the mistakes in wording of the proposal, some substantive in nature, some amended by the committees of the Parliament, and many that survived in the official text of

the law after the procedure had ended. Some of these mistakes will be analyzed in the following text, since some of them made the text of the law inapplicable in the Montenegrin legal system.

### B. The Law on Consumer Protection–Users of Financial Services – Substantive Aspects

As we said before, we will compare the legal provisions of two laws, the Law on Consumer Credits and the Law on Consumer Protection–Users of Financial Services, since these two laws pretend to regulate the same area in consumer financial services.

After a closer analysis of these two laws, we can say with certainty that these two laws indeed regulate the same questions and that they are both implementing the same Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (in later text: Directive).

The matter of "double harmonization" is the first and foremost problem with the later law, and is the problem of the implementation of two laws of the same legal effect.

The second problem is that the proponent was intending to ensure the greater protection of consumers with the implementation of this directive. We will analyze the substantial differences between these two laws to check this claim.

The third and substantially greatest problem was that the draft law was justified by the necessity of harmonising the Montenegrin legislation with EU acquis, and the drafting of the law began in 2015, after the Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 was adopted. The implementation of the rules of this directive in Montenegrin legislation could bring the next level of consumer protection to Montenegrin consumers. But the legislators didn't decide to harmonize the Montenegrin consumer law with this directive until 2021, when the first draft containing the new rules on this matter was presented for public debate. We will get back to the substantive rules of this draft at the end of this paper.

The answer to the first question can only be attributed to the forgetfulness of the MPs and mistakes by the administrative bodies of the Parliament, which allowed that this text be deliberated, although the harmonization of the Montenegrin law was already achieved by the passing of the Law on Consumer Credits in 2013.

The Law on Consumer Credits was passed in the ordinary legislative procedure, which was initiated by the Government of Montenegro as the proponent of the text. The proposal for this law was drafted in consultation with all actors in the field of consumer law, as well as the regulators who were supposed to implement it. After the first draft was prepared, a wide public debate took place before the text was adopted as a government proposal referred to the legislative procedure in parliament.

Since the intent of the MPs in the "second run" was to additionally protect consumers in the field of financial services, the differences between crucial rules in these two laws are a major problem. We will look at the problematic aspects of the latter law and compare them with the Law on Consumer Credits, where the differences have led to a minimization of consumer protection and where there is a rule that is problematic for the practical implementation itself.

If we start from the beginning of the text, in the paragraph 1, article 3, are listed the cases in which the law does not apply. The differences are many, but one is of special importance since it states that this law does not apply to loan agreements in the amount of less than 500 euros or more than 75,000 euros.[13] By this provision, the initial sealing of protection was raised to 500 euros, which in first is not in consumer interest. By the provisions of article 2, paragraph 2, of the Directive on Consumer Credits the lower limit is 200 euros.[14] But the lowering of consumer protection standards was not stopped there. By this provision, only credit arrangement from 500 to 75.000 are covered by this law. By the Section 10 of the preamble of the Directive allows the limits to be lifted by national legislation and consumer protection strengthened. This option was used by the Law on Consumer Credits there are no limits in this sense. This is clearly the case of the lowering of consumer protection by the latter law.

[13] See article 3 paragraph 1 of the Law on Consumer Protection – Users of Financial Services, Official Journal of Montenegro, no. 43/15

[14] See Directive 2008/48/EC of the European Parliament and of the Council on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC

In paragraph 4 of Article 15 of the Law on Consumer Protection–Users of Financial Services, the "agency" is the public body that has the competence to prescribe additional elements of the standard information sheet, depending on the type of service that is delivered to the user as an offer.[15] This is problematic because the competent body in the Montenegrin legal system in the area of financial services is Central Bank of Montenegro. This was one indication that the draft law was "borrowed" from some other country.

In the Law on Consumer Protection–Users of Financial Services, there is no definition of microcredit organisations, even though this term is used in Article 11 Paragraph 6, Article 15 Paragraph 1, and Article 44 Paragraph 3.

More problematic is the other case of delegation of power set by the Law on Consumer Protection–Users of the Financial Services in Article 40 Paragraph 8. In this provision, the competence of the banking ombudsman is to prescribe the conditions and method of lodging complaints about the bank's actions upon complaints and reporting to the Central Bank of Montenegro, as well as the manner of actions of the Central Bank of Montenegro after receiving notifications and complaints. This is problematic because the banking ombudsman in Montenegro was in that period elected by the Council of the Central Bank with a specific set of competences and was in 2019 stripped of the competence to act in the complaint proceedings. Now, under the new rules of the Law on Credit Institutions the Central Bank is the only address for client complaints.

Some of the wording in the articles is also a symptom of "borrowing" of the draft law. Some of the wording in Article 44 Paragraph 1, "njezine dalje uporabe", is also indicative of the text that was prepared in another language area, more precisely Bosnia and Herzegovina.

More problematic norms are the ones that are not present in the text that was "borrowed", and was entered in the parliamentary procedure in the draft text at the insistence of the MPs. Some of the constructions are so unfamiliar of the contract law that they will seriously impede the implementation of the norms. The norms of the rules of contracting are supplemented with the new set of rules. After the undisputed rules on the form of the contract, the rule that guarantees that each party will receive a copy of the contract, and the rule that states that a contract cannot

[15] See Article 15 Paragraph 5 of the Law on Consumer Protection – Users of Financial Services, Official Journal of Montenegro, no. 43/15

contain rules that state that the contracting party is waiving its rights guaranteed by this law, a new set of rules was added that introduce the unknown concepts in the contract law in the Montenegrin legal system.

In paragraph 2 of Article 7 after the contracting parties were named, the ones that would receive a copy of a contract were the guarantor and mortgage creditor as well.[16]

Paragraph 4 of Article 7 states that the contract enters into force with the final consent of all contracting parties.[17]

This set of rules was meant to provide additional protection to all contracting parties after the signing of the contract and to give them the chance to react, but the contract is signed between the bank and the client and does not need subsequent approval by the guarantor, or mortgage creditor which is the bank, which is one of the contracting parties. It could be that the MPs were meant to protect the mortgage debtor, since this person does not have to be a contracting party but can be the mortgagor for someone else's debt. But in ignorance of mortgage rules, the two parties were mixed, and the bank now has the option to not consent to a contract that was already signed by the bank. There is an aspect to the subsequent approval by the general law on obligations,[18] but this question requires additional analysis, which can be presented in a separate article. Also, there is a question of realization of the contract in the case in which one of the consenting persons has neither objected nor not objected. This would mean that realisation of all contracts in similar cases signed by the bank and client has to be postponed up until the expiry of a 30-day deadline, since paragraph 6 of the same article states that if the contracting parties do not give their consent within the prescribed period, it will be considered that the contract has not been concluded.[19]

But we must emphasize additional problems to these rules. In the Article 3, Paragraph 1, of the Law on Consumer Protection–Users of Financial Services, it is stated that this law does not apply to credit agreements in which the claim is secured by a mortgage on real estate or another comparable means of securing real estate or

[16] See Paragraph 2 of the Article 7 of the Law on Consumer Protection – Users of Financial Services.
[17] See Paragraph 4 of the Article 7 of the Law on Consumer Protection – Users of Financial Services.
[18] Article 22 of the Law on Obligation, Official Journal of Montenegro, no. 47/2008 and 4/2011.
[19] See Paragraph 2 and Paragraphs 4-6 of the article 7 of the Law on Consumer Protection – Users of Financial Services.

another right on real estate. This would mean that MPs have introduced the rules and rights of mortgage debtors into the law that do not apply to mortgage loans. [20]

The next article presents similar problem in the Montenegrin legal system. Again, the norms were entered into parliamentary procedure in the draft text as amendments by the MPs. In the event that the financial service contract was concluded on the basis of unauthorized use of personal data, as well as in the case of forgery of the client's or guarantor's signature, such a contract is considered absolutely void, and the contractual relationship is immediately terminated and the citizen acquires the right to compensation from the financial institution.[21] This norm on its own is not so lacking in legal context, except when it states that a contractual relationship is immediately terminated, because termination in this sense is not known in our legal system since the contract is not existent since it is absolutely void. Again, it should state that in this case, the "injured party" (not "citizen") has the right to seek compensation for damages. Actually, the intent was good, since there were cases in the Montenegrin financial sector where misuse of personal data and signature forgery created a great deal of problems. But these earlier problems were treated by the general rules on contracting in the Law on Obligations.

The amendment of the MPs in the next paragraph can cause more problems in the future than it can solve. The voidance of the contract and subsequent right of compensation are conditioned only by presentation of a criminal complaint for the criminal offense of signature forgery, misuse of personal data, and abuse of official position to the competent state authority for prosecution of the criminal offences.[22] The next paragraph introduces the obligation the financial institution to, after the client logs the complaint to the public prosecutor, initiate court proceedings to determine the nullity of the contract, on the basis of which the parties in the proceedings will be compensated.[23]

The wronged side has only to present the complaint to the public prosecutor, and this creates the obligation for the bank to conduct the court proceedings. This would mean that the bank is obliged to conduct the court process, probably the civil proceedings, in determining the validity of the contract on the basis of the clients' complaints. But who will be the defendant if the bank is the plaintiff? This question,

[20] See Paragraph 1 of the Article 3 of the Law on Consumer Protection – Users of Financial Services.
[21] See Paragraph 9 Article 8 of the Law on Consumer Protection – Users of Financial Services.
[22] See Paragraph 10 Article 8 of the Law on Consumer Protection – Users of Financial Services.
[23] See Paragraph 11 Article 8 of the Law on Consumer Protection – Users of Financial Services.

like the others before it, requires a separate article to be answered. A criminal complaint against an unknown person can be lodged, but the proceedings, even in criminal cases can be conducted only against a specific person.

In the case of an informative example that the bank is obliged to present to the consumer, there are evident differences between the Law on Consumer Credits[24] and the Law on Consumer Protection–Users of Financial Services.[25] We cannot present all the differences between these two articles, but on first glance, the more detailed set of rules is presented by the Law on Consumer Credits, since there is 19 different obligations are the Law on Consumer Credits against 16 in the Law on Consumer Protection–Users of Financial Services.

Even in the case of early repayment of the credits, there are significant differences. The differences are evident in the number of cases in which consumers are entitled to an early repayment without compensation. The right to an early repayment without compensation in the Law on Consumer Credits is reserved for cases where the borrowing rate is not fixed, but in the Law on Consumer Protection–Users of Financial Services, beside this case, the same rule applies if the credit is dedicated to the purchase of real estate in the case of a fixed borrowing rate.

According to the norms of the Law on Consumer Credit, a creditor's right to compensation is conditional if the amount of early repayment over a period of 12 months exceeds 10,000 euros. [26] Law on Consumer Protection–Users of Financial Services, doesn't have a similar proposition.

In the end, the Law on Consumer Credits sees the right of the bank to compensation for early repayment as a right guaranteed by the law,[27] and the Law on Consumer Protection–Users of Financial Services sets that this type of compensation must be negotiated and contracted.[28]

We must emphasize that the Law on Consumer Protection–Users of Financial Services contains rules that are still necessary in the Montenegrin legal system. If there is one bright shining moment of the Law on Consumer Protection–Users of Financial Services, then it is the practical application of one of its rules in the collective redress case in Montenegro. According to the provisions of the Article 35, Paragraph 7, that in the case of the cancellation of the payment card, the bank cannot

[24] See Article 9 of the Law on Consumer Credits.
[25] See Article 13 of the Law on Consumer Protection – Users of Financial Services.
[26] See Paragraph 6 of the Article 23 of the Law on consumer credits.
[27] See Article 23 of the Law on consumer credits.
[28] See Article 27 of the Law on Consumer Protection – users of the financial services.

ask for any fee. This was the ground for one of the collective redress cases in Montenegro that was settled in the initial phase by the acceptance of one of the Montenegrin banks changing its rules of operation, in which there was a provision on charging a commission for closing a payment card. In this one case, this Law has lived up to the expectations of its creators, since there are no specific rules in the other areas of financial services in the Montenegrin legal system regarding consumer protection.

## IV Way to a Solution – a light at the end of the tunnel

After the passing of two laws regulating the same area in different ways the Montenegrin legal system could come to a standstill since the rules of two laws in many aspects take a different approach to the same question, and many contain diametrically opposite solutions, almost in all cases in a less favorable position for the consumer by the latter text intended to increase the level of protection of consumers in the area of financial services in the Montenegrin legal system. We must emphasize that the latter law has a much broader scope of coverage and does not concern only consumer credit, so in some cases it has norms that are very useful in consumer protection.

This has created uncertainty in the application of the law, but fortunately only in the theoretical sense, since the Montenegrin courts have never taken the latter law into consideration when deliberating in practice. In one case we discussed, the latter law was implemented in the collective redress procedure in the pre-court process, in which one of the Montenegrin banks changed its rules of procedure regarding the fees on the closing of the bank cards. But again, this was out of court procedure, preceding the possible collective redress case, which was ended by the will of the bank.

But there is a light at the end of the tunnel–the new draft Law on Consumer Credits will bring the solution. In this draft, at the closing norms, there is a norm regulating that all the norms in the Law on Consumer Protection–Users of Financial Services, regarding the rules on consumer credits will be annulled by the rules of this law. In that sense, after the passing of this law, we will have a much clearer set of rules, which will allow the existence of these two laws, each with their own set of rules, but without the overlapping of the rules in the area of consumer credits.

Also, work on the implementation of the new Directive on collective redress and the new collective compensatory relief is on the way, so new challenges await Montenegrin consumer law in the upcoming year.

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# ON THE CONCEPT OF THE RULE OF LAW IN THE EUROPEAN UNION

Summary

*The article examines the rule of law as one of the principles the European Union is founded on, i.e. which forms the essence of contemporary constitutionalism at both national and postnational levels. Specifically, it examines the evolution, content and nature of this EU principle. The aim of the research was to explore the concept of the rule of law as a principle of the European Union in relation to the traditional understanding of the rule of law, common to European countries. In other words, whether the Union or the Court of Justice of the EU has created an autonomous understanding of the rule of law. The founding treaties qualify the rule of law as a value but also as one of the principles of the EU foreign policy. However, to understand the rule of law at the EU level, it is certainly of crucial importance to analyze the practice of the Court of Justice, which has shaped its views over time and developed its own understanding of this principle. It is concluded that the conception is inspired by the traditional doctrine to a tremendous extent. Notwithstanding, some improvement of the rule of law at the EU level, i.e. an expanded capacity that goes beyond national conceptions is recognized, pointing to its evolutionary character.*

**„Keywords"** *„rule of law"; „postnational constitutionalism"; „European Union".*

## I Introduction

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

This is written in Article 2 of the Treaty on European Union. The rule of law has been declared as one of the values on which the Union is founded. Therefore in this paper we will examine the evolution, content and nature of this EU value, i.e. whether and to what extent the concept of the rule of law in the EU simulates concepts dominant in comparative constitutionalism. In other words, whether the Union, i.e. the Court of Justice of the European Union has created a distinctive concept of the rule of law, as for most general legal principles common to the

Member States has always stressed that those are originally European, autonomous principles only inspired by national law. The answer to this question indicates the accomplishments of an ideological and political project that is developing within the framework of the EU and has been following European integration since its very beginning, with strong aspirations to get closer to the federal state order. Namely, with the emergence of regional and global authorities an internationalization of constitutionalism occurred, since the basic principles of national constitutionalism such as the rule of law as well as democracy, protection of human rights, etc. appear, develop and can be detected in international law.[1] This phenomenon indeed is largely the result of the process of European integration. Therefore, over the past few decades attention of constitutional law scholars is increasingly paid to a new debate, at the center of which are theories of the so-called postnational constitutionalism[2], global constitutionalism[3], or multilevel constitutionalism[4]. The postnational non-state nature of the European Union, as a developing political-legal order, certainly requires to analyze whether the principles of national constitutionalism, including the rule of law, may be applied at the Union level unchanged. More precisely, what the rule of law could mean when transposed into the context of the European legal order.

Analyzing the principle of the rule of law in the European Union is certainly not an easy task. This requires first of all an analysis of the traditional understanding of the rule of law in European countries, i.e. what this principle traditionally entails. Therefore, in the next part of the paper, the rule of law in terms of comparative constitutionalism and legal theory be discussed. In doing so, the focus will be on the most influential European constitutional systems.[5] Next, the third part will analyze

[1] Stefan Griller, Is this a Constitution? Remarks on a Contested Concept, In: Stefan Griller and Jacques Ziller (eds.), The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty, Springer-Verlag Wien, 2008, p. 31.

[2] Jurgen Habermas, *The Postnational Constellation: Political Essays*, Mit Press, 2001.

[3] J. H. H. Weiler, Prologue: Global and Pluralist Constitutionalism – Some Doubts, In: Grainne de Burca and J. H. H. Weiler (eds.), The Worlds of European Constitutionalism, Cambridge University Press, 2012; Daniel Halberstam, Local, Global and Plural Constitutionalism: Europe Meets the World, In: Grainne de Burca and J. H. H. Weiler (eds.), *op.cit.*

[4] *Ingolf Pernice*, Multilevel Constitutionalism and the Crisis of Democracy in Europe, European Constitutional Law Review, Volume 11, Issue 3, 2015.

[5] On the English, German and French concepts of the rule of law in the EU context, see also: *Laurent Pech*, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09, 2009; *Dimitry Kochenov*, The EU Rule of Law: Cutting Paths through Confusion, Erasmus Law Review, Vol. 02 Issue 01, 2009; *Tanja Karakamisheva-Jovanovska*, The Model of the Rule

the concept of the rule of law in the European Union, in particular: the emergence and evolution of this principle in the EC/EU legal order, and then the current concept established by the Treaty of Lisbon and relevant legislation. Finally, in the last part of the paper conclusions will follow.

## II The Rule of Law in Comparative Constitutionalism and Legal Theory

Although the rule of law is a fundamental principle on which national constitutional systems are based, it is not precisely interpreted in any of them, given that the constitutions that explicitly provide for it do not define the content of this term. That is left to legal science. The famous English constitutional scholar Albert Venn Dicey, who shaped the classical doctrine of the rule of law in English law, in his 1885 work „An Introduction to the Study of the Law of the Constitution" points to the meaning of the rule of law. According to Dicey, the rule of law implies first and foremost the supremacy of laws and limitation of state power by laws, i.e. the exclusion of its arbitrariness, as well as equality of all before law. Further, that no one be punished or subject to any sanction unless provided for by law, i.e. without a breach of law stipulated in legal norms as such and confirmed before the ordinary court of the state; as well as everyone is subject to law and jurisdiction of the ordinary courts.[6] The rule of law as a basic principle in English constitutionalism was for the first time explicitly envisaged in the *Constitutional Reform Act* of 2005, which stipulates that the act shall not affect the existing constitutional principle of the rule of law. This confirms that the rule of law is the foundation of English constitutionalism laid long before the adoption of this legal act. Following the example of the English rule of law doctrine another concept developed, which nevertheless manifested certain differences and peculiarities. The *rechtsstaat* („state based on law") is a legacy of German political and legal theory in the second half of the nineteenth century. It ows its linguistic expression to Robert von Mohl (1799-1875). The content of this term implied the legal organization of the state, the method of exercising power (and not its goal), i.e. the strict attachment of state power to law, the limitation of power

of Law in the European Union – Reality or…, Journal of Constitutional Law in Eastern and Central Europe, Vol. 24. No. 1. (2017), pp. 81-102.

[6] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution,* Lightning Source, 2009, p. 180.

by the objective law that establishes the separation of power. The formal aspect of *rechtsstaat* therefore implied: the separation of the state power (a concept formulated long ago by Locke and Montesquieu), the principle of legality, the hierarchy of legal acts, legal certainty, the prohibition of retroactive effect, proportionality. This narrower understanding of *rechtsstaat* was particularly emphasized by Kelsen and other proponents of legal positivism. Hayek particularly emphasizes the importance of legal certainty, which enables everyone to „foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one´s individual affairs on the basis of this knowledge".[7] Radbruch also emphasizes legal certainty as an element of *rechtsstaat,* pointing out that legal certainty requires positivity, and positive law applies regardless of its justification.[8] Later (after World War II), there would be a radical change in his reflections, and while shaping the famous „Radbruch formula" he formulates the concept of the „statutory lawlessness", emphasizing the importance of justice as an element of *rechtsstaat*.[9] The formal aspect of *rechtsstaat* is fully supplemented by substantive one after World War II and the collapse of Nazi Germany, in the circumstances of facing the consequences of war and with the ultimate necessity of full protection of human rights: the *rechtsstaat* is not only the legal organization of the state but also implies certain goals, i.e. the fulfillment of certain values such as human dignity, democracy, full feasibility of civil rights and freedoms, social rights of citizens, etc. This is expressed in Art. 20 of the German Basic Law of 1949: „The Federal Republic of Germany is a democratic and social federal state" (*sozialstaat*). The explicit reference to *rechtsstaat* is contained in Art. 28 of the Basic Law: „The constitutional order in the states must conform to the principles of the republican, democratic and social state under the rule of law, within the meaning of this Constitution". The German *rechtsstaat* principle significantly influenced constitutional law in France. The term *etat de droit* appeared in France in the early nineteenth century as a concept that emphasized the importance of review of legislation. However, it did not remain but is replaced by the principle of *etat legal*, established in the second half of the nineteenth century, similar to the German concept of that time, based on formal elements. Unlike the German concept, *etat legal* implied parliamentary sovereignty,

[7] Friedrich Hayek, *The Road to Serfdom*, University of Chicago Press, 1994, p. 80.
[8] Gustav Radbruh, *Filozofija prava*, NOLIT Beograd, 1980.
[9] *Gustav Radbruch*, Statutory Lawlessness and Supra-Statutory Law (1946), Oxford Journal of Legal Studies, Volume 26, Issue 1, Spring 2006, pp. 1-11.

so *etat de droit* returned to use after the adoption of the Constitution in 1958, which provided for the assessment and review of the constitutionality of laws by the Constitutional Council.

Comparing these three concepts, we would say that the English concept of the rule of law is based on formal elements more than substantive ones and differs from the German and French concepts also with regard to the absence of judicial review of the constitutionality of laws in the United Kingdom (given that there is no constitution in the formal sense and a law is the highest legal act). Certainly, there is control over the legality of bylaws. Furthermore, unlike the United Kingdom and Germany, during the very dynamic development of French constitutionalism there has never been an explicit reference to the principle of *etat de droit*, not even in the current 1958 Constitution. Nevertheless, France is not the only country whose constitutional provisions lack an explicit reference to the rule of law. On the contrary, it is the case with the largest number of western European countries that are members of the European Union. On the other hand, in the constitutions of the so-called „countries in transition" of Europe, which are in the process of democratizing their political systems and have undergone a long-lasting process of joining the European Union, the principle of the rule of law is written as a fundamental principle.

We would say that the concept of the rule of law is more or less very similar in the aforementioned most influential European constitutional systems as well as in practically all constitutional systems in Europe, and that all these concepts imply the unity of certain formal and substantive features. In short, we would say that the rule of law represents the basis for independent and effective judicial power as well as for the judicial competence of control and assessment of constitutionality and legality, and the limitation of state power by formal and substantive elements, with the aim of protecting individuals and their rights and freedoms from arbitrariness and illegal activity of state power. The concept of the rule of law in comparative law implies that a positive legal order, in order to qualify as an order established on the rule law, must contain the following principles: legitimacy of power, the principle of separation of powers, the independence of the judiciary, the principle of constitutionality and legality, constitutional guarantees of human rights, freedom of the economy and economic activity.[10]

[10] Ratko Marković*, Ustavno pravo i političke institucije*, IP Justinijan, Beograd, 2003, p. 606.

## III The Concept of the Rule of Law in the Supranational Domain

### A. Development of the Rule of Law as a Principle of EC/EU Law

The original founding treaties did not mention the terms „rule of law" or „rechtsstaat" at all. The Treaty on European Union in the Maastricht, Amsterdam and Nice versions describes the rule of law as a „principle", while the Treaty of Lisbon describes it as the „value" on which the Union is founded (Art. 2 TEU). In *Les Verts* case, the Court of Justice noted for the first time that „it must be emphasized that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[11] The assessment of the „Community based on the rule of law" was continued to be confirmed by the Court of Justice through its further practice. Such an understanding of the Community was to reinforce the general legal principles of the Court of Justice, which laid the foundations for the development of EU constitutionalism: the autonomy of the Community legal order, the supremacy of community law over national law of the Member States, the direct effect of the Community legal rules and, accordingly, the compulsory conformity (and review) of the legal acts of the Member States and of the Community institutions with the so-called primary law, i. e. the founding treaties.[12] The Court also qualified the founding treaties in *Les Verts* as „the constitutional charter of the European Communities". It seems that in *Les Verts* the Court of Justice understood the rule of law in the Community precisely as a principle of constitutionality and legality and the right of natural and legal persons to judicial protection, i.e. to seek examination of the legality of acts that directly affect them. Having in mind the other cases before the Court, it may be concluded that the Court

[11] C-294/83 *Parti ecologiste „Les Verts" v European Parliament* (1986) ECR I-1339

[12] Some authors point to the „other side of the rule of law coin" in Europe, as a crucial tool in the hands of the Court of Justice to reinforce EU law´s supremacy claim, sometimes by over-simplifying complex substantive constitutional dillemas, not always in the interests of the preservation of high level of protection of fundamental rights in Europe and the respect of crucial constitutional principles. See: *Dimitry Kochenov*, Rule of Law as a Tool to Claim Supremacy, RECONNECT Working Paper No.9, September 2020 (Leuven), Available at SSRN: https://ssrn.com/abstract=3698700. Also: *Dimitry Kochenov* and *Nikos Lavranos*, *Achmea* versus the Rule of Law: CJEU´s Dogmatic Dismissal of Investors´ Rights in Backsliding Member States of the European Union, Hague Journal on the Rule of Law (2022) 14: 195-219

of Justice initially conceived the Community/Union rule of law first as a principle of legality as well as judicial protection and review of that principle. Therefore at first glance one would say that the approach to the rule of law in the EC/EU is more formal than substantive. Following Norberto Bobbio´s terminology, we would say that within the framework of such a formal approach to the rule of law, there is both the rule of law *per legem* – law-making in the EC/EU, i.e. the legislative power of the Union, and the rule of law *sub lege* – the principle of constitutionality and legality, i.e. the hierarchy of legal acts and judicial control of that principle. That is, the principle of the rule of law is realized both in the application of EC/EU law and in its creation.[13] Further, inspired by the formal elements of *rechtsstaat* in Germany such as legal certainty, proportionality, prohibition of retroactive effect, protection of legitimate expectations, etc., the Court of Justice itself introduced these principles into EC/EU law and developed them as general legal principles.[14] For example, in the early 1960s the Court began to invoke the principle of legal certainty. In many cases the Court emphasized the importance of this principle as a general legal principle of EC/EU law.[15] In a similar way, the Court began to assert the principle of proportionality as a general legal principle as well.[16] This means that a number of principles that are known as general legal principles in the Union legal order actually are aspects of *rechtsstaat* (the rule of law), although the Court has never invoked the rule of law when developing these EU principles. When the Court invoked the rule of law, it always used the term *rule of law* inherent to the English concept of this principle and English language; even in the decisions in French and German the Court used a literal translation of *rule of law* instead of the traditional terms, the French *etat de droit* and the German *rechtsstaat* (which were later used in the French and German versions of the Maastricht Treaty). It seems that the Court of Justice wanted to avoid these terms , i.e. concepts that contain a link with the word „state" and thus deny the reasons for criticism of the well-known state-building aspirations.

[13] *Budimir Košutić*, Načelo pravne države i konstitutivni ugovori Evropske unije, Zbornik Škole prava Evropske unije, Fakultet pravnih nauka Univerziteta Donja Gorica, 2012, p. 21.

[14] Takis Tridimas, The General Principles of EU Law, Oxford University Press, 2006, p. 242.

[15] C-42/59 and C-49/59 *SNUPAT v High Authority of the European Coal and Steel Community* (1961) ECR I-53;
C-325/85 *Ireland v Commission* (1987) ECR I-5041;
C-345/06 *Gottfried Heinrich* (2009) ECR I-1659

[16] C-11/70 *Internationale Handelsgesellschaft* (1970) ECR I-1125;
C-44/79 *Liselotte Hauer* (1979) ECR I-3727

The principle of the rule of law was explicitly mentioned first in the founding treaties in the Maastricht version and later confirmed in the Amsterdam version (Art. 6): the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States. In the French and German versions, as we have already pointed out, the terms *etat de droit* and *rechtsstaat* are used, however Article 6 emphasizes precisely that the EU is a polity that complies with this *principle* rather than being itself a state founded on the rule of law.[17] Or, a polity other than a state, which is founded on principles that address the state, or rather the *staat* or *etat*.[18] It is also affirmed that these principles are common to all Member States of the European Union. This provision strengthens the direction of the EU development on the basis of liberal constitutionalism at the core of which these principles are. Nevertheless at first glance this provision indicates a formal approach to the rule of law, since the rule of law is separated i.e. it differs from the other *principles*, specifically: democracy and the protection of human rights and fundamental freedoms, which are listed separately.[19] Again, the role of the Court of Justice as an undisputed „interpreter" as well as creator of EU law is of importance, so it may be noticed that the Court is increasingly turning to substantive elements of the rule of law, as in numerous cases the rule of law is associated with other, separately listed principles/values. For example, in *UPA* case, it is associated with the protection of fundamental rights: „The European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights".[20] This understanding of the rule of law is certainly close to the German *rechtsstaat*, oriented towards the protection of human rights. Therefore, it may be concluded that the Union concept of the rule of law implies not only formal but also substantive features. Also, Article 7 of the Amsterdam Treaty stipulates that a Member State that seriously and persistently violates the principles referred to in Art. 6 TEU be subject to sanctions. Further, Art. 49 TEU stipulates that any European state wishing to become a member of the European Union must respect the principles set out in Art. 6 TEU. The Treaty of Nice modified Article 7 TEU in

[17] Laurent Pech, *op.cit.*, p. 18.
[18] *Neil Walker*, The Rule of Law and the EU: Necessity´s Mixed Virtue, Michell Working Papers, 4/2008, University of Edinburgh, School of Law, p. 16.
[19] Budimir Košutić, *Osnovi prava Evropske unije*, CID, 2014, p. 80.
[20] C-50/00 *Union de Pequenos Agricultores v Council of the European Union* (2002) ECR I-6677

the way that sanctions against a Member State are also possible in the case of a „clear risk of a serious breach of principles referred to in Art. 6 TEU".

B. Positive Normative Framework

The principles set out in Art. 6 TEU of Amsterdam and Nice versions in the Lisbon Treaty are labeled as the „values" on which the Union is founded. A value framework established in Art. 2 TEU, which may be recognized as the essential substrate of liberal constitutionalism, may also be seen as one of the grounds for building a common European identity. Among the proclaimed EU values is the rule of law. It is also confirmed that these values are „common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". This terminological change certainly opens the question of the intention of using new, more abstract term. As Pech argues, „if the term *value* indicates, however, that Member States intended to make it more difficult to sanction any violation of the former principles mentioned at Article 6 (Amsterdam), either by themselves or by the EU, this would hardly be reconcilable with the long advertised goal of increasing the EU´s legitimacy and the successive Treaty amendments which have been adopted to strengthen the democratic and rule of law dimensions of the EU".[21] Although *values* represent ethical convictions rather than legal norms, there are also opinions that "since the values of Article 2 TEU have been agreed upon in the procedure of Article 48 EU and produce legal consequences (Articles 3(1), 7, 49 TEU-Lisbon), they are legal norms, and since they are overarching and constitutive, they are founding principles".[22] On the other hand, Art. 21 TEU states the rule of law as a principle: „The Union´s action on the international scene shall be guided by the *principles* which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law". Therefore the supranational rule of law has a twofold nature: value and principle. It is a value (principle) applied and promoted at: national, supranational and international levels.

[21] Laurent Pech, *op.cit.*, p. 21.
[22] *Armin von Bogdandy*, Founding Principles of EU Law, European Law Journal, 16 (2010)

At the national level, the effect is double: the rule of law appears as a pre-accession as well as a post-accession requirement towards states. Namely, Art. 49 TEU stipulates that „any European state which respects the values referred to in Article 2 and is commited to promoting them may apply to become a member of the Union. Therefore this article confirms that the rule of law is at the core of the European Union´s enlargement policy. The rule of law in the Union appears as a requirement for EU membership - candidate countries respect the principle of the rule of law.

On the other hand, after acquiring membership the obligation of the Member States to respect the rule of law is subject to supervision, which makes this principle effective not only at the national but also at the supranational level of the European Union (as a specific community of states). Namely, Art. 7 TEU provides for a post-accession mechanism for the rule of law supervision, prescribing two grounds of responsibility of the Member States: 1) „existence of a serious and persistent breach of the values referred to in Article 2 TEU"; and 2) if there is „a clear risk of a serious breach of the values referred to in Article 2 TEU". So the provision is not formulated in such a way that the breach or risk of breach may refer to „one of the values referred to in Art. 2 TEU". Given that „serious and persistent breach" or „clear risk of a serious breach" refers to all values mentioned in Art. 2 TEU together, it is concluded that all values are firmly connected. Therefore human dignity, democracy, equality, fundamental rights, etc., although particularly stated, constitute an inseparable part of the rule of law. Thus it confirms once again the substantive characteristics of the rule of law in the Union. Determining the „guilt" of a Member State will certainly not be an easy task, taking into account the abstraction of these terms as well as the procedure provided for in Article 7 TEU: on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2, on which occasion the Council may address recommendations to the Member State in question. When it comes to the existence of a serious and persistent breach of the values, the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine it after inviting the Member State in question to submit its observations. Where such a determination has been made, the Council,

acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. Also, according to Art. 354 TFEU the Member State whose responsibility is examined under Art. 7 procedure does not participate in the vote in the Council and the European Council (otherwise unanimity could not be reached when deciding in the European Council). Nevertheless, these requirements will be difficult to meet and impose suspension measures to the Member State in the final. However, it may be questioned if it is justified that the Council and the European Council determine and decide on a breach of the rule of law (and other values). Namely, that it is not decided by the Court of Justice, which, in fact, represents a constitutional court and examines the compliance of the EU legislative acts and acts of the Member States with the founding treaties and the general legal principles. The fact that the Court of Justice is completely excluded from this scrutiny of respect for the values of the Union (including the rule of law) indicates that the provisions concerning breaches of the Union values are political in nature.[23]

Yet the Commission may launch an infringement action to the Court of Justice against a Member State if the state breaks or fails to apply EU law generally. However, it is regularly used to enforce the rule of law. The rulings of the Court are binding and often involve financial penalties.

Due to an increasing number of challenges to the rule of law after entering into force of the Treaty of Lisbon, in 2014 the European Commission adopted the Rule of Law Framework. It has been described by the EU Justice Commissioner as a new „pre-Article 7 procedure" and this mechanism envisions three main procedural stages: 1. Commission's assessment: the Commission will first have to assess whether there are clear, preliminary indications of a systemic threat to the rule of law in a particular Member State and send a „rule of law opinion" to the government of this Member State should it be of the opinion that there are; 2.

[23] Moreover, as some writers point out, the political procedure of Art. 7 TEU does not preclude the parallel application of legal routes to ensure respect for the rule of law in the EU legal order, i.e. the jurisdiction of the Court of Justice on the basis of combined reading of Articles 2 and 19 TEU, especially after entering into force of the Treaty of Lisbon and against the background of the rule of law crisis in several EU Member States. In this way the Court ascertains its own jurisdiction in areas where this is not always straightforward, such as Common Foreign and Security Policy. See: *Peter van Elsuwege and Femke Gremmelprez*, Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice, European Constitutional Law Review, 16, 2020, pp. 8-32.

Commission's recommendation: in a situation where no appropriate actions are taken, a „rule of law recommendation" may be addressed to the authorities of this country, with the option of including specific indications on ways and measures to resolve the situation within a prescribed deadline; 3. Follow-up: finally, the Commission is supposed to monitor how the relevant Member State is implementing the recommendation mentioned above. Should there be no satisfactory implementation, the Commission would then have the possibility to trigger the application of Article 7 TEU. In 2016, the Commission initiated an assessment under the Framework for the first time. It related to Poland, particularly a Polish law on the power of the constitutional court. However, after the Commission found new concerns with regard to the rule of law in Poland in 2017, the Commission activated Article 7 procedure. So the first EU Member State undergoing the Article 7 TEU procedure was Poland, due to the government´s violation of the Polish Constitution and EU law by adopting controversial laws that enable sanctions against judges and consequentely breaching the independency principle of the judicial power. This has been assessed by the EU as problematical for the functioning of the Polish judiciary while on the other hand the Polish government claimed that „Brussels has no right to intervene in what it regards as a domestic matter". The Polish government stated that „the Member States remain sovereign and that, therefore, the Polish Constitution takes undisputed precedence over EU law". The procedure of Article 7 TEU has been activated also against Hungary as it has been acused by the EU *inter alia* of systemically undermining independent institutions, breaching the principle of judicial independence, breaching LGBTQ rights, controlling the media, as well as allowing figures close to the ruling party to be involved in corruption, including misuse of EU funding.

With adoption of the Rule of Law Conditionality Regulation in 2020, it became possible to protect EU funding when it is established that „breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way". [24] The link between EU budget and respect for the rule of law has enabled the Commission to freeze EU payments, terminate legal commitments, seek early repayment of loans, or prohibit the Member State from entering new financial agreements. This mechanism has significantly

[24] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget

increased the EU´s authority in relation to the rule of law, i.e. the protection of EU rule of law.

At the international level the activities and foreign policy of the European Union are based on the aim of promoting the rule of law as well as other principles. In addition, Art. 21 TEU stipulates that „the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to… consolidate and support democracy, the rule of law, human rights and the principes of international law…" Therefore the supranational rule of law is a concept that has both an internal and external dimension.[25] Its external dimension implies effect towards third countries and international organizations. So this is one specific reach of the EU rule of law, that indicates a tendency to further develop the concept of the rule of law in the Union and expand its capacity.

## IV Conclusions

At last, we will summarize some important findings. First, the founding treaties of the European Union show the absence of a formal and precise definition of the rule of law, as in comparative law. The main role in this respect has been played by the Court of Justice for a long time, as an interpreter but also a source from which more specific aspects and standards of this principle are derived. Due to the rule of law growing crisis in the European Union, this deficiency is compensated by the adoption of the already mentioned, so-called Conditionality Regulation of 2020. The Regulation stipulates that „the rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union and other applicable instruments, and under the control of independent and impartial courts". Further, it requires that „the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected". Two EU countries (Hungary and Poland) which were both subject to special EU procedures on

[25] Laurent Pech, Rule of Law as a Guiding Principle of the European Union´s External Action, CLEER Working Papers, 2012/3, p. 47.

account of the systemic threat to the rule of law their repeated actions have caused, have claimed before the Court of Justice that the rule of law is neither defined in EU law, nor could it be defined, thus seeking the annulment of the Regulation[26]; on the other hand, the European Commission has presented the rule of law as a well-established and well-defined principle whose core meaning is furthermore shared as a common value among all Member States.[27] Secondly, we may conclude that the concept of the rule of law in the European Union, although initially more of formal components (according to the views of the Court of Justice) nevertheless equally respects both formal and substantive elements of the rule of law recognized in the constitutional systems of the Member States. As Pech points out, this concept has an „umbrella" character – it includes a number of „subprinciples" (formal and substantive components).[28]

Therefore, we would say that the rule of law as a principle of the European Union is largely inspired and similar to the national concepts that exist in European countries (which are also very similar to each other). It seems that the Union does not give up on traditional patterns that originate from national constitutional traditions, but that due to its peculiarities it necessarily forms its own pattern that goes beyond the limits of the national understanding – towards the postnational concept of constitutionalism or metaconstitutionalism[29], as denominated by Walker. The peculiarities recognized at the EU level are reflected in the fact that the EU concept of the rule of law has some specific reaches and thus an expanded capacity. The supranational rule of law has a twofold nature: value and principle; while it is applied and promoted at: national, supranational and international levels. We will remind that the rule of law is stated as one of the principles and goals of the EU´s foreign policy, which is a specific and extra reach of the EU rule of law, since it has an external effect. Further, the rule of law together with other values referred to in Art. 2 TEU constitutes a requirement that must be respected by both Member States and candidate countries for EU membership (a pre-accession and a post-accession

[26] Hungarian government has claimed that the rule of law „cannot be the subject of a uniform definition in EU law and must be specifically defined by the legal systems of each Member State"
[27] *Laurent Pech*, The Rule of Law as a Well-Established and Well-Defined Principle of EU Law, Hague Journal on the Rule of Law, 2022
[28] Ibid, p. 48.
[29] Neil Walker, Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe, In: Grainne de Burca and Joanne Scott (eds.), Constitutional Change in the EU: From Uniformity to Flexibility?, Hart Publishing, 2000

requirement for European countries). Therefore, the rule of law is at the core of the European Union´s enlargement policy. Moreover, we will remind that the post-accession protection of the rule of law is achieved through four, already elaborated, procedures: an infringement action to the Court of Justice against a Member State, pre-Article 7 procedure, Article 7 procedure, as well as the so-called conditionality mechanism. Due to those additional uses for the EU rule of law, it can be qualified to some extent as a distinctive, or rather, improved concept of the rule of law. This indicates its evolutionary character and tendency for further development. Beyond doubt, it may be concluded that the incorporation of the rule of law in the founding treaties of the European Union confirmed that this principle is the core of modern constitutionalism at both national and postnational levels. Certainly, not only the constitutionalism in the formal sense, but the constitutionalism that is established in reality. This is demonstrated by the fact that the rule of law is increasingly dominating the European Union´s agenda.

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# THE RIGHT TO AN EFECTIVE REMEDY AND SOME SPECIFIC ISSUES REGARDING THE TIMELINESS OF THE APPEAL

Summary

*The right to an effective remedy and to a fair trial before the national authority is provided both in the European Convention on Human Rights and Charter of Fundamental Rights of the European Union. As is well known, the state of Montenegro has ratified the European Convention on Human Rights, giving it a stronger force of obligation in relation to legal regulations. The Convention and the Charter is just a framework for the right to a legal remedy from which the signatory country derives guidelines in further regulation of this matter.*

*In accordance with the practice of competent international institutions, the right to a legal remedy means the existence of an appropriate legal remedy in the domestic legal system which can effectively protect the rights and freedoms guaranteed by the Convention. Starting from this point of view, in this paper the author deals with the analysis of positive legal regulations concerning the fulfillment of prerequisites for filing a complaint. The aim of this paper is to indicate whether there is a satisfactory level in the domestic legal system that guarantees the right to an effective remedy. The efficiency of the legal remedy implies both the timeliness and the possibility to eliminate the violation of rights, as well as the appellant to receive adequate satisfaction for the violation that has been committed.*

**„Key words"** *„right to legal remedy"; „court proceedings"; „international conventions"; „efficiency and timeliness"; „appellate deadlines".*

## I Introduction

Litigation proceedings are a general and regular system of providing legal protection when subjective rights are disputed, endangered or violated. The role of litigation is to make a lawful and correct court decision that satisfies the applicant regarding judicial protection. The courts in the Montenegro act in accordance with the Constitution and the laws that regulate the subject matter and their actions are motivated by the goal of making a correct and lawful court decision. This also achieves the purpose of litigation. However, the intentions of the courts do not always stand in line with their actions. There is a lot of pressure for the court to provide quality protection in the shortest possible time, with as few resources as

possible. The court also has an obligation to regulate the provision of legal protection in a way that excludes any doubt and uncertainty. Namely, a wide network of civil procedural rules requires an accurate and precise system that refers to the actions of the court, as well as the actions of the parties and other participants in the proceedings. The system of procedural rules should be equally focused on achieving legal certainty, but also equality of parties and efficiency of proceedings. Due to such a complex task, civil procedural law is very extensive and diverse in the modern legal order. All this leads to the fact that in certain cases, the termination of the first-instance litigation procedure does not end with a legal decision.

The new Civil Procedure Act (CPA), in Montenegro was passed in 2004, including numerous amendments up to 2020. The goal of the legislator was to create the necessary conditions for efficient work in the judiciary, concretize the right to a trial within a reasonable time, and accelerate the duration of the procedure. This Act is (among other things) in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] as well as with the Charter of Fundamental Rights of the European Union.[2] The explanation of the new litigation procedure states that the our legal answers are directly related to country's commitment to membership in the European Union, in accordance with which, we have undertaken obligations to implement efficient and continuous reform in terms of implementing European standards into national legislation. Starting from that, the aim of the paper is to point out the importance of an effective legal remedy and, considering that, to resolve certain doubts regarding the timeliness of the appeal as a regular legal remedy for the protection of subjective rights in civil proceedings.

The amended solutions of the Civil Procedure Act affect all citizens and subjects of law as participants in the procedure in terms of facilitated access to court and a fair trial. The case law of the European Court indicates that participants in civil proceedings must not be denied the right to judicial protection only due to lack of financial resources, and special mention should be made of Recommendation no. R. (81) 7 on measures to simplify access to justice. The right to legal protection is

[1] The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.

[2] The Charter of Fundamental Rights of the European Union, C 326/321, 2012/C 326/02.

strictly related to the idea of subjective right. Unlike court proceedings in Roman law, which relied heavily on self-help, in today's social order it has lost its former significance as a way of protecting subjective law. In that sense, the legal entity must go to the court for intervention when the opposing party refuses to regularize its position with the legal order. That mean, the legal system authorizes only the court to change the content of certain civil law relations. "The right of every legal entity to seek legal protection before the court corresponds to the general duty of the courts to consider the specific claim and to make a decision."[3]

During judicial protection between a party and a court, an obligation-based legal relationship is not established, in which the court would have an obligation of protection towards the complaint, but the court acts in accordance with its public law powers. The court decision that is made does not only concern the parties that participated in the procedure, but it also represents the fulfillment of that public law duty of the court towards the social community in general. In other words, the state, as the guardian of the legal order, providing judicial protection, also works on the realization and preservation of the legal order itself. In order to provide the possibility of implementing authority to the person to whom the right to protection objectively belongs, it is necessary to allow those who are not absolutely sure that their request for protection is justified to go to court. In other words, the right to seek protection should be recognized to all who claim that this right belongs to them.[4] In the procedure that will follow after the filing of the lawsuit, it will be determined whether the specific lawsuit have legal right or not. When the claim is taken into consideration, it does not mean that the court decision will be in favor of the one who filed the lawsuit.

Based on the cited provisions of the Convention, the provisions of the Charter of Fundamental Rights of the European Union were created, they also speak of the right to an effective remedy and a fair trial. Every legal entity has the opportunity to decide its case by an independent court in a public hearing within a reasonable time. However, the right of access to court and the right to sue, is not an absolute right, it is also subject to certain restrictions. In that sense, judicial protection will not occur if an arbitration agreement is signed. This means that the state has a monopoly over the enforcement of court decisions but no monopoly over the provision of

[3] Triva-Dika, *Građansko parnično procesno pravo*, Zagreb, 2004, p.32.
[4] Triva-Dika*, Građansko parnično procesno pravo*, Zagreb, 2004, p.23.

legal protection.[5] Article 6 of the Convention guarantees the right to a fair trial before an independent and impartial tribunal. In this way, the principle of legality of civil procedure is realized. Having in mind the importance of the principle of legality, the state has provided in its legal system certain legal remedies by which the legality of the procedure is examined. Legal remedies are used to raise the issue of legality of acts, both legal and material. However, legal remedies do not mean an endless series of controls of legality, but the law determines the limits to which control can be performed. That limit, as a rule, is represented either by the highest instance court or the time limit within which the appropriate legal remedy can be used.[6]

## II Effective remedy before national authority

Article 13 of the Convention also specifies the obligation of the state to provide an effective remedy against court decisions. By implementing the right to appeal, subjects not only protect their rights and interests, but also effect the correction of illegalities and irregularities in the work of state bodies. Legal action and remedy are not synonymous. A legal action is any action in the procedure by which the complaint of that action opposes a certain procedural act. A legal remedy is only one of the legal actions that seeks legal protection and which aims to challenge a decision that is considered illegal. It can be accomplished through a decision on modification or a decision on revocation.[7] Accordingly, remedies are an act taken by the parties to challenge those court decisions that they consider to be illegal.

The right to file a legal remedy depends on the will of the party, it belongs to the so-called "dispositive right" of the party. The court will not initiate proceedings on legal remedies ex officio. By filing a legal remedy, the party pledge its protest and its dissatisfaction against the decision of the acting court, and asks the court of a higher instance to make a decision that will be more favorable for the party. By declaring a legal remedy, therefore, the existing litigation moves to a new stage. The subject of the legal remedy is the request for legal protection of the appellant, which requires the revocation or modification of the challenged decision. The effectiveness of a legal remedy means that it eliminates the violation of rights and provides

[5] Jakšić Aleksandar, *Komentar evropske konvencije o ljudskim pravima*, Beograd, 2006, p. 176.
[6] Lukić-Košutić-Mitrović, *Uvod u pravo*, Beograd, 2002, p.459.
[7] Lukić-Košutić-Mitrović, *Uvod u pravo*, Beograd, 2002, p.459.

compensation, and that is compensation for the damage suffered. With the legal remedy, the party does not have the right to point out a possible new request, except for the one that refers to the compensation of litigation costs that will be incurred in connection with the legal remedy.[8] If the court decision is revoked or changed, the conditions for establishing legality are created again.[9] The disputed decision may be challenged in its entirety or only one part of it. The way of implementing effective remedy before a national authority is a freedom of choice of each State member to the Convention. In accordance with the constant practice of the Convention control bodies, the member state is responsible only for the result.[10]

The Convention has no jurisdiction or ambition to regulate the stages of civil proceedings in each member state. The general guidelines that the Convention provides concern only an effective remedy. An effective remedy means nothing more than a legal action that can lead to a final decision in a reasonable and relatively short time. It is up to the member state to ensure the efficiency of the trial within a rational time. However, it is not possible to predict in advance how long a civil proceedings will last, so the state has prescribed the conditions for filing an opposition to speed up the procedure if the party considers that its procedure is delayed.[11] In this regard, it should be noted that Horvat v. Croatia,[12] in which the applicant claimed to the European Court of Human Rights that the proceedings she had instituted had not been completed within a reasonable time. Also, a contrary to Article 13 of the Convention she had not had objective protection relation to the length of the proceedings. The meaning of an effective legal remedy is to declare it before a certain state body that stands and acts independently in relation to other state bodies, but also that guarantees parties either acceleration the procedure or compensating for damage due to unreasonably long duration of the procedure.

The party that pledge the legal remedy aims primarily to eliminate the shortcomings of the court decision. These shortcomings can be produced by the court itself in its activity of providing legal protection, but also the party can lead to

[8] Poznić, Borivoje, *Građansko procesno pravo*, Beograd, 1989, p. 299.
[9] Čalija Branko*, Građansko procesno pravo*, Sarajevo, 1982, p. 237.
[10] Jakšić Aleksandar, *Komentar evropske konvencije o ljudskim pravima*, Beograd, 2006, p. 338.
[11] Marjanović, Pane, Suđenje u razumnom roku kao pravni standard i vreme trajanja postupka kao najbitnije merilo za njegovu primenu, IUSTITIA, n. 1/2018, Beograd, p. 24; *Vraneš Mile*, Analiza Zakona o zaštiti suđenja u razumnom roku sa posebnim osvrtom na postupak po prigovoru za ubrzanje postupka, IUSTITIA, n. 1/2018, Beograd, p. 10.
[12] About that: Horvat protiv Hrvatske, zahtev n. 51585/99.

the illegality of the decision by its illegal actions. If a party considers that a court decision is illegal or incorrect, it has the right to appeal. The party who filed the legal remedy initiates the procedure in which the legality of the challenged decision is controlled. Only the litigation that was the subject of the trial of the court whose decision is being challenged may be brought before the court competent to decide on the legal remedy.

## III Timelyness of appeal - The issue of an efective remedy

According to the legal certainty that must be present in the legal system, the possibility of using legal remedies is bound by strict legal frameworks. In that sense, our legislator also prescribes that the deadline for appeal in our law is 15 days. In some specific civil proceedings, special deadlines for appeal are provided. This deadline is preclusive. The deadline for filing an appeal begins to run separately for each party. In the case of united co-litigants, the deadline runs simultaneously for all off them. This is one of the legal fictions because the united co-litigants are seen as one litigant. This has further consequences when it comes to the finality of the verdict. The verdict becomes formally final at the moment when none of the united co-litigants can no longer challenge the first instance verdict.[13] If the party authorized to file an appeal does not do so within the prescribed legal deadline, then that party loses the right to a legal remedy. In that case, the court will reject the appeal as untimely.[14] Due to the loss of the right to file an appeal, the party may request a return to the previous state.[15] These specific issues also affect the effectiveness as a characteristic of the remedy, so in the following we will highlight some specific issues related to the timeliness of the appeal.

The appeal must be delivered to the opposing party which is entitled to submit a replay to an appeal. Only a timely appeal has a suspensive effect. Appearance of legal effectiveness of a judgement prevents not only a timely appeal, but also the duration of the deadline for its submission. During this period, the judgment cannot become effective. The suspensive effect of the appeal period ceases if the appeal has been rejected in the meantime, since it has been determined that it is inadmissible.

[13] Ivošević Zoran, *Suparničarstvo*, Beograd, 1979, p.128.
[14] Art. 371. Zakon o parničnom postupku Crne Gore, ("Sl. list RCG", br. 22/2004, 28/2005 - odluka US i 76/2006 i "Sl. list CG", br. 47/2015 - dr. zakon, 48/2015, 51/2017, 75/2017 - odluka US, 62/2018 - odluka US, 34/2019, 42/2019 - ispr. i 76/2020).
[15] Art. 112. Zakon o parničnom postupku Crne Gore.

By filing an appeal, an appeal procedure is opened, which consists of a procedure before the first instance court and a procedure before the second instance court.

The appellant has the right to supplement, change, correct and expand a timely submitted appeal until the expiration of the deadline for filing a legal remedy. However, the question arises whether he has that right if the deadline for filing a legal remedy has expired? In the case law, we find contradictory views from those who consider the appeal as a final action that cannot be supplemented after the deadline for its filing, to those views saying supplementing the appeal is allowed depending on the content.[16] There are also opposing views in theory. There is an understanding that supplementing the appeal could not be taken into account because supplementing the appeal would violate the principle of mutual hearing. On the other hand, there is an opinion that goes in favor of material truth, insisting on the application of the principles of material truth.[17] It is considered that the court should also consider supplementing the appeal if such an appeal fulfill two conditions. First: it is necessary for the amendment to be within the bounds of contested judgement set by a timely appeal, and second: if court already doing ex officio by that reasons.

Our point of view is, after the deadline for the appeal, no supplement to the appeal should be received, because it means violating the principle of mutual hearing, also, it would importantly affect the delay of the procedure and be directly against the principle of procedural economy.[18] Similary, a submission called "supplement to the appeal" cannot be considered a timely appeal if it challenged the part of the first instance decision that was not the subject of contested in the appeal.[19] However, if the amendment of the appeal does not expand the reasons for the same appeal, the court will take into account the examination of the announced reasons for the appeal provided, if a second instance trial hearing is held.[20] The amended law on civil procedure introduced positive innovations by reducing the time needed to move from the first instance to the second instance phase of civil

[16] Boranijašević Vladimir, Žalba protiv presude, Pravni Život, n. 12, Beograd, 2001, p. 203.
[17] Kitić Svetlana, Pitanje važnosti neblagovremeno podnete dopune žalbe u slučaju nedostataka iz tač. 2 i 3. Člana 339. Zakona o parničnom postupku, Glasnik, n.6, Novi Sad, 1963, p. 26.
[18] A contrario: *Kitić Svetlana*, Pitanje važnosti neblagovremeno podnesene dopune žalbe u slučaju nedostataka uslova iz tač. 2. i 3. člana 339. Zakona o parničnom postupku, Glasnik, n. 6, Novi Sad, 1963, p. 26. Also: Stanković Gordana, *Građansko procesno pravo*, Niš, 1998, p.432.
[19] Viši trgovinski sud u Beogradu, Pž. 11721/2005.
[20] Vrhovni sud Srbije, Rev. 2096/97, Krsmanović Tomislav, *Parnica u praksi*, Beograd, 2003, p.257.

proceedings, simplified access to court and obliged the court to conduct the procedure within a reasonable time with as little cost as possible.[21] In accordance with the intention of the legislator, court practice must be formed.

In the situation when the appeal is filed by the party's attorney and the party itself, the day when the appeal was filed should be considered the day when the first appeal was sent by registered mail. The second appeal that arrives in court will be considered only as a supplement to the appeal.[22] We have already said that when the supplement to the appeal is filed after the expiration of the legal deadline, the court should reject it. However, if the amendment to the appeal only specifies the reasons for the appeal, and does not present new facts, so there is no violation of the principle of mutual hearing, we believe that such an amendment should be accepted. In accordance with this point of view, this kind of supplement will not be rejected as untimely. An appeal subsequently filed may be dismissed as out of time only if the reasons for the first and additional appeals do not match.

## IV Some problems regarding the legal deadline

In practice, the question of calculating the deadline was raised,[23] in situation when the deadline for the appeal starts to run if delivery was made to a member of the household. Thus, if the party did not personally receive the first instance verdict, but its household member, the question may be asked whether the deadline for filing an appeal begins to run from the moment the household member received the verdict or the day the party becoming aware of the verdict. In Art. 136, paragraph 1 of the CPA, it is prescribed that the complaint, payment order, extraordinary legal remedy, judgment and a ruling against which a special appeal is permitted, shall be served on the party or his or her legal representative or attorney, in person. The provision of Art. 135a. paragraph 1 of the CPA stipulates that if the person on whom a communication of the court is to be served is not found in his or her dwelling, service shall be effected by delivering the communication of the court on an adult member of his or her household, who shall be obliged to receive the communication of the court.[24] Accordingly, if the judgment was served on a household member in

[21] Art. 11. Zakon o parničnom postupku Crne Gore.
[22] Viši trgovinski sud u Beogradu, 135/2003.
[23] Viši sud u Podgorici, Gž, n. 3470/2019.
[24] Art. 135. 136. Zakon o parničnom postupku Crne Gore.

compliance with the conditions provided by law, there is no reason not to consider the delivery properly and that the appeal period does not begin to run from the day the household member receives the judgment. In accordance with this, the case law states that if the relationship between the addressee and the recipient is indicated on the delivery note itself, and if the delivery was made correctly according to the cited legal provisions, it should be considered that the delivery was done properly.[25]

Delivery to legal entities is done by handing over the letter in the locations of the legal entity, to the person authorized to receive the letter. Therefore, if the verdict was delivered in the business premises of the legal entity to the employee who was found in the office, the delivery is in order.[26] Any appeal filed after the expiration of the legal deadline in this case will be considered untimely and the court will reject it as such. If the delivery was made by post during public holidays, it will count, because the legal provision that delivery is done only on working days does not apply to delivery by mail.

The court's errors regarding the deadline for filing an appeal can be twofold: in the first situation the court may simply fail to announce the deadline, in the second situation it may publicise the wrong deadline which may be either shorter or longer than the statutory deadline.

In the situation when the appellant, acting on the wrong instruction of the court, submits a legal remedy after the expiration of the legal deadline, and within the deadline set by the court, the question of the timeliness of such an appeal arises. The jurisprudence considers such an appeal timely, although the deadline prescribed by law has not been respected.[27] In practice, therefore, an parallel rule from the administrative procedure is applied, according to which a party cannot have consequences of a failure of a state body and therefore its appeal should be considered timely if it has declared a legal remedy by the deadline.[28] In theory, however, there are understandings that the court should not consider such an appeal and that such an appeal should be rejected as untimely.[29] We think that the point of view in court practice is correct, which says that in such a situation, the appeal is timely, even though the legal deadline has not been respected.

[25] Okružni sud u Novom Sadu, Gž. 2727/2006.
[26] Rajović-Kašćelan, *Enciklopedija građanskog procesnog prava*, Beograd, 2022, p. 78
[27] Keča Ranko, Blagovremenost žalbe protiv presude u parničnom postupku, Glasnik, n.3, Novi sad, 1985, p. 43.
[28] Tomić Zoran, *Upravno pravo*, Beograd, 2002, p.446.
[29] Juhart Jože, *Civilno procesno pravo*, Ljubljana, 1961, p.79.

In the case when the final judgment is subsequently delivered to the respondent, the question arises whether the subsequent delivery has an impact on the extension of the legal deadline for filing an appeal? Having in mind the provision of Art. 107 of the CPA, according to which if the deadlines are not determined by law, they are determined by the court, it follows that the legal deadlines must be respected and cannot be extended.[30] Thus, the decision of the second instance court[31] states that the subsequent delivery of the court decision at the moment when the deadline for filing an appeal has already expired does not affect the extension of the legal deadline for filing an appeal, because the legal deadlines cannot be extended.

If the submission related to the deadline is submitted or sent to the incompetent court before the expiration of the deadline, and reaches the competent court after the expiration of the deadline, it will be considered timely if its submission to the incompetent court can be attributed to ignorance or obvious failure of the party.[32]

The question remains, what happens if it cannot be reliably determined whether the parties have received a judgment? In that case how is the legal deadline calculated and how does it affect the timeliness of the appeal? Since the CPA does not contain a provision that speaks about this situation, we have different interpretations in case law.[33] Thus, one court decision states that the appeal is untimely and as such was render in that case (notice: there is an error in the dispositive of the court decision because it is stated that it is due to inadmissibility instead of untimeliness). Appeal is render regardless of the fact that on the basis of investigative actions it could not be established that whether the party was properly received judgment or not. The second position is expressed in the decision of the Higher Commercial Court in Belgrade, which states that if the court cannot reliably determine from written evidence and witness statements whether and when the judgment was served on the party, then the court cannot dismiss the appeal under the Civil Procedure Act as untimely, regardless of when it was filed. We think that this position is rightfull, especially if the hearing of the deliverer in this particular

[30] Art. 107. Zakon o parničnom postupku Crne Gore.
[31] Okružni sud u Valjevu, Gž. 1779/2005.
[32] Art. 109. Zakon o parničnom postupku Crne Gore.
[33] Viši sud u Beogradu, Pž. 128/2006.

case cannot determine with certainty whether the delivery was made according to the rules of the CPA.

Also, we can rise the question of the timeliness of the intervener's appeal. Namely, the intervener in the procedure is a third person who, by his activities, takes the side of the plaintiff or the respondent.[34] Since the intervener has the right to participate in the procedure, the court is obliged to call him to the hearing and submit all necessary papers to him.[35] The same position should be taken with regard to the delivery of court decisions.[36] However, the deadline for the legal remedy runs to the intervener from the delivery of the decision to the party. The case law agrees with this point of view.[37] If the intervener submit a legal remedy, a copy of his submission will be delivered to the party he joined.[38] Also, the intervener is not entitled to his special deadlines for taking litigation actions, but must take them within the deadlines for the parties.

As we have already stated, after the verdict is rendered, the party has the right to submit a legal remedy. An appeal may be filed within the legal deadline before the contested judgment becomes legal effective.[39] What happens if a party files an appeal against the final decision of the first instance court? Will such a complaint be treated as untimely or inadmissible? There are different solutions in case law.[40] Thus, the decision of the District Court in Belgrade states that the plaintiff filed an appeal against the decision that became final after the expiration of the legal deadline. The first instance court rejected this appeal as untimely. The district court reversed the decision of the first instance court by rejecting the plaintiff's appeal as inadmissible because the appeal can only be filed against a non-legal effective decision.

We think that this explanation of the second instance court is wrong for several reasons. First, one is the issue of formally submitting a legal remedy and the other is the issue of deciding on a submited legal remedy. In that sense, an appeal can be formally filed against a final court decision, but, the court will reject such an

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[34] Starović-Keča: *Građansko procesno pravo*, Novi Sad, 1998, p. 260.

[35] The same view: Poznić Borivoje, *Građansko procesno pravo*, Beograd, 1989, p. 354; Triva-Dika, *Građansko parnično procesno pravo*, Zagreb, 2004, p. 457; Opposite: Culja Srećko*, Građansko procesno pravo Kraljevine Jugoslavije*, sveska 1. Beograd, 1936, p. 398.

[36] Poznić Borivoje, *Građansko procesno pravo*, Beograd, 1989, p. 354; Triva-Dika, *Građansko parnično procesno pravo*, Zagreb, 2004, p. 457.

[37] Vrhovni sud Srbije Prev. 204/99.

[38] Art. 207. Zakon o parničnom postupku Crne Gore.

[39] Apelacioni sud Crne Gore Pž 361/2014.

[40] Okružni sud u Beogradu Gž. 11726876/02.

appeal. Second, the CPA unequivocally states[41] that an appeal should be considered inadmissible only if the appeal was filed by a person who is not authorized to file an appeal, or a person who waived the appeal, or if the person who filed the appeal has no legal interest in filing an appeal. In the specific case, none of the conditions from Article 371 of the CPA to dismiss the appeal as inadmissible was met.

Since the court practice allows the filing of legal remedies by telegraph, it is necessary to determine which day is taken as the day of submission to the court. Thus, the decision of the Higher Commercial Court in Belgrade states that if the appeal is sent by telegraph, the day of delivery to the post office is considered the day of delivery to the court to which it was sent, and not the day of receiving the telegram in court. The same provision is contained in the CPA, if a submission is sent to the court by registered mail or by telegraph, it shall be considered that the date of delivery to the post office is the date of enclosing the submission to the court. In case the submission is sent by telegraph, it will be considered given within the deadline only if the proper submission is subsequently submitted to the court by registered mail within three days from the day of delivery of the telegram to the post office.[42] Court practice also supports this view.[43]

When it comes to the timeliness of a remedy, the question may be asked, what is the date relevant for determining the timeliness of an appeal? Thus, in court practice, it is stated that in order to determine the timeliness of the appeal against the verdict, the date of receipt on the notice of delivery is in the court records, and not the date that the respondant marked on the verdict and stamped.[44] We think that the Higher Commercial Court in Belgrade acted correctly in this case because the date and stamp put by the respondant on the verdict is an internal matter of the respondant and does not affect the time of receipt of the verdict, because the only valid evidence is when the verdict was received. Therefore, the deadline is calculated from the date on the notice of delivery.

In the situation when the appellant timely lodges an appeal within the prescribed period and states that he will submit an explanation for the appeal within

[41] Art. 371. Zakon o parničnom postupku Crne Gore.
[42] Art. 109. Zakon o parničnom postupku Crne Gore.
[43] Vrhovni sud Srbije Gž. 2382/66.
[44] Viši trgovinski sud u Beogradu Pž. 6822/2000.

a certain period, the first instance court will order the party to submit the same within a certain period only if the deadline set by the party has not expired.[45]

## V Conclusion

Article 13 of the Convention specifies the obligation of the state to provide an effective remedy against court decisions. By implementing the right to appeal, subjects not only protect their rights and interests, but also effect the correction of illegalities and irregularities in the work of state bodies.

The right to file a legal remedy depends on the will of the party, it belongs to the so-called "dispositive right" of the party. The court will not initiate proceedings on legal remedies ex officio. By filing a legal remedy, the party pledge its protest and its dissatisfaction against the decision of the acting court, and asks the court of a higher instance to make a decision that will be more favorable for the party. By declaring a legal remedy, therefore, the existing litigation moves to a new stage. The subject of the legal remedy is the request for legal protection of the appellant, which requires the revocation or modification of the challenged decision. The effectiveness of a legal remedy means that it eliminates the violation of rights and provides compensation, and that is compensation for the damage suffered. With the legal remedy, the party does not have the right to point out a possible new request, except for the one that refers to the compensation of litigation costs that will be incurred in connection with the legal remedy. If the court decision is revoked or changed, the conditions for establishing legality are created again. The disputed decision may be challenged in its entirety or only one part of it.

The way of implementing effective remedy before a national authority is a freedom of choice of each State member to the Convention. In accordance with the constant practice of the Convention control bodies, the member state is responsible only for the result.

The Convention has no jurisdiction or ambition to regulate the stages of civil proceedings in each member state. The general guidelines that the Convention provides concern only an effective remedy. An effective remedy means nothing more than a legal action that can lead to a final decision in a reasonable and relatively

[45] Session of the Civil Division, Vrhovni sud Srbije, 24, 1975. Krsmanović Tomislav, Parnica u praksi, Beograd, 2003, p. 247.

short time. It is up to the member state to ensure the efficiency of the trial within a rational time.

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