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STUDIES

DEVELOPMENTS IN FAMILY REUNIFICATION CASES BEFORE THE CJEU

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Abstract: Family reunification is defined by primary and secondary EU law and by the case law of the CJEU. The cornerstones are the Charter of Fundamental Rights encompasses the principle of the respect of family life and the fundamental European standards for family reunification of third-state nationals are based in the Council Directive on the Right to Family Reunification. The EU directive explicitly confirms among others that family reunification is a necessary way of making family life possible. The article analyses the way the jurisdiction of the CJEU widens the notion of family reunification and how it offers more realistic picture for the growing importance of family reunification.

Keywords: family life, Charter of Fundamental Rights, Family Reunification Directive, CJEU, third-country national, EU law, family law.

1 INTRODUCTION

Family reunification is defined by primary and secondary EU law and by the case law of the CJEU. When looking at the Charter of Fundamental Rights, it contains the principle of the respect of private and family life, and the right to marry and to found a family.[1] Respect for private and family life, home and communications as this article is the same as the rights guaranteed by Article 8 of the ECHR.[2,3] This gives the frame of respect and protection of family, which is standard also for third-state nationals living in European territory.

The fundamental European standards for family reunification of third-state nationals are based in the Council Directive 2003/86 of 22 September 2003 on the Right to Family Reunification. Its Preamble contains values such as establishment of an area of freedom, security and justice, free movement of persons, protection of family and family life. It does make express reference to Art. 8

[1] The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

[2] 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[3] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union C 303/17 – 14. 12. 2007.

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of ECHR and to the Charter of Fundamental Rights. The EU directive explicitly confirms that family reunification is a necessary way of making family life possible, helps create sociocultural stability in order to integrate the third country nationals into the State and helps to promote economic and social cohesion that are Community objective based in the Treaty.[4] According to the ECtHR's case-law, Art. 8 can be applied in two life-situations. First, when family members want to join for the purpose of family reunification another member of the family abroad, usually the breadwinner. Second, when a member of the family is expelled or threatened with expulsion – often as a result of sanctions resulting from criminal proceedings – from the country where he/she and the family live. The article starts from this cornerstones and analyses the way the jurisdiction of the CJEU widens the notion of family reunification and how it offers more realistic picture for the growing importance of family reunification.

2 THE FRAME OF FAMILY REUNIFICATION

Regarding primary EU law, the CJEU ruled in *Akberg Fransson* that the Charter is only applicable when the measure falls within the scope of EU law, that is to say, in situations governed by European Union law but not outside such situations. Thus, the Charter cannot be relied upon for purely national family reunification policies.[5]

Family reunification of European citizens and their third-country national family members is not covered by EU law. Member States have discretion to regulate it according to their own interests but the CJEU gave several limits to the freedom of Member States through its case-law,[6;7] The Court has as well broad case-law on the right of family reunification between third-country nationals,[8] that is based on the Family Reunification Directive. The *Chakroun* case was the one where the CJEU held that the Directive established a right to family reunification.[9] The Directive only applies to legally residing third-country nationals who ask to be reunited with third-country national family members.[10;11] But the Court pointed out that the right to private and family life

4 Ibid., para 4.

5 CJEU, Case C-617/10, Åklagaren *v. Hans* Åkerberg *Fransso*n, 26 February 2013, para 19.

6 Töttős, Á. Family reunification rules in the European Union and Hungary. [online]. Available at < https://migrationtothecentre.migrationonline.cz/en/family-reunification-rules-in-the-european-union-and-hungary > [q. 2019-02-30].

7 See CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011, Case C-155/07, Sahin v. Bundesminister fur Inneres, Reasoned Order of the 7th Chamber, 19 Dec. 2008, Case C-127/08 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, Case C-256/11 Judgment of the Court (Grand Chamber) of 15 November 2011 Murat Dereci and Others v Bundesministerium für Inneres, C-86/12 Judgment of the Court (Second Chamber) of 10 October 2013 Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration, C-83/11 Judgment of the Court (Grand Chamber) of 5 September 2012 Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others, C-423/12 Flora May Reyes v Migrationsverket, C-82/16 K.A. and Others v Belgium.

8 C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi*, 8 March 2011, and its follow-up cases law, such as C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, and the joined cases C-356/11 and C-357/11, *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v. L*, 6 December 2012.

9 Case C-578/08, *Chakroun*, 4 March 2010; Cases C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto* and *Maahanmuuttovira*sto v. L, 6 December 2012; C-540/03, *European Parliament v Council of the European Union*, 27 June 2006.

10 Council *Directive 2003/86/EC* of 22 September 2003 on the right to family reunification (Family Reunification Directive).

11 Third country national means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty.

is not an absolute one. Member States' interests can be taken into account, but any restriction imposed shall be in accordance with the law and necessary in a democratic society. Thus, the Court has set limits on a State's ability to limit the right, emphasising the need to respect the principle of proportionality,[12] and Member States must not interpret the provisions of the Directive restrictively and should not deprive them of their effectiveness.[13] They are obliged to make a balanced and reasonable assessment of all the interests in play, both when implementing Directive 2003/86 and when examining applications for family reunification.[14] According to the above-mentioned Directive, the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin must be taken into account where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.[15]

Family reunification can be refused if the person concerned poses a threat to public policy or public security. According to the case ZH. and O., the concepts of (risk to) 'public policy' and 'public security' are Community concepts, which cannot be defined solely by the various national systems.[16] Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another but interpret those requirements strictly.[17] They are not at liberty to give their own interpretation, based solely on national law, to the concept of 'risk to public policy' in Article 7(4) of Directive 2008/115.[18] The concept of 'risk to public policy' is neither included in the concepts defined in Art. 3 of Directive 2008/115 nor defined by other provisions of that directive.[19] Public security is generally interpreted to cover both internal and external security[20] with preserving the integrity of the territory of a Member State and its institutions, whereby public policy is generally preventing disturbance of social order. As the Family Reunificaton Directive states, public policy can mean a conviction for committing a serious crime. The notion of public policy and public security also covers cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.

2.1 The Court in action

The first case in connection with family reunification was *European Parliament v. Council of the European Union*[21], where the Parliament asked for the annulment of some provisions of the Family

12 BASCHERINI, G. Immigrants' Family Life in the Rulings of the European Supranational Courts. In Repetto (ed.): The Constitutional relevance of the ECHR in domestic and European Law. Cambridge-Antwerp-Poland: Intersentia, 2013, p. 189 [online]. Available at <http://www.academia.edu/9853311/Immigrants_Family_Life_in_the_Rulings_of_the_European_Supranational_Courts> [q. 2019-02-20].

13 CJEU, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para 64.

14 CJEU, Cases C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v L.*, 6 December 2012, para 81.

15 Article 17, Family Reunification Directive.

16 CJEU, C-554/13, ZH. and O., para. 48 and 54.

17 Cases 36/75 Rutili (para 27), 30/77 Bouchereau (para 33) and C-33/07 Jipa (para 23).

18 CJEU, C-554/13, ZH. and O., para. 30.

19 CJEU, C-554/13, ZH. and O., para. 41.

20 Cases C-423/98 Albore (para 18 et seq.) and C-285/98 Kreil (para 15).

21 CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006.

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Reunification Directive on the basis of their incompatibility with fundamental rights. The European Parliament contested Art. 4(1), Art. 4(6) and Art. 8. According to Art. 4(1), a child over 12 years arriving to a Member State independently might be asked to meet integration conditions, Art. 4(6) declares that a Member State might decide to issue permits for family reasons only to children above 15 years and Art. 8 states that the sponsor may be required to wait for a period of up to three years before s/he can apply for family reunification.[22]

The CJEU rejected the claim as its provisions preserve only a limited margin of appreciation for the Member States and the Directive does not confer on Member States a greater discretion than other international instruments to weigh, in each situation, the different interests at stake, particularly the effective integration of the immigrants, the right to family life, and the best interest of the child.[23] It is important to mention that this was the first case when the Court officially referred to the Charter of Fundamental Rights of the EU.

The Family Reunification Directive applies only to third-country national sponsors: a person who is not a citizen of the Union within the meaning of Art. 20 (1) of the Treaty on the Functioning of the EU, who is residing lawfully in a Member State, and who applies or whose family members apply for family reunification ('the sponsor'), and to their third-country national family members who join the sponsor to preserve the family unit, whether the family relationship arose before or after the resident's entry.[24]

As already mentioned, the Directive does not apply to EU citizens who seek family reunion with their third-country national family members, as confirmed by the CJEU in *Dereci*. The Directive requires Member States to take due account of inter alia the nature and solidity of the person's family relationships, as well as the best interests of the child.[25]

The connection between the right of Union citizens to family life under the Charter and the right of third-country nationals to family reunification under the Directive were explored in the joined cases O, S and L. The reference for a preliminary ruling concerned the interpretation of Article 20 TFEU. Article 20 TFEU relates to citizenship of the Union and the rights and duties a citizen has. The Court held that EU law does not prevent, in principle, a Member State from refusing to grant a residence permit for family reunification, provided that the refusal does not entail, for the Union citizen concerned, the denial of the enjoyment of the right of family life.[26]

2.2 Family

From the point of view, family members belong to the narrow conception of the nuclear or 'core' family, which can include the spouse or partner and minor, unmarried (including adopted) children, and in such cases Member States have a positive obligation to authorise family reunification, with no margin of appreciation.[27] The case law requires that the limitations on the definition of family

[22] Family Reunification of TCNs in the EU: National Practices. Common Template of EMN Focussed Study 2016 Final version: 16th September 2016.

[23] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 98, 104.

[24] Art. 2, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[25] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 56, 58 and 64.

[26] Joined Cases C-356/11 and C-357/11 O, S v Maahanmuuttovirasto (C356/11), and Maahanmuuttovirasto v L (C357/11).

[27] CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 60.

members are to be interpreted in a strict manner,[28] given that they are an exception to the general rule that family reunification should be authorised,[29] and in accordance with fundamental rights[30]. Thus, the CJEU held that certain family members cannot be categorically excluded from family reunification, but an individual assessment of the circumstances of the sponsor and applicant is required in every case. EU law draws no distinction between whether the family relationship arose before or after the sponsor entered the territory of the host member State.[31]

An interesting question surrounded the *kafala* guardianship system well-known in Algerian law, on which Advocate-General Campos Sánchez-Bordona gave an opinion. As stated in the concerned case, this form of guardianship does not create a relationship of filiation and does not equate to adoption, which is expressly forbidden in Algeria. Athough *kafala* and adoption are among the forms of protective measures under Article 20 of the Convention on the rights of the Child but a separate mention of adoption in Article 21 means that those measures are not at the same. Moreover, the ECtHR and the 1993 Hague Convention on Adoption point to the same conclusion that *kafala* is not equivalent to adoption. Directives 2003/86 and 2011/95, refer to children and underlined that adoptive children are always included in that concept. As the texts of those instruments indicate, the parent-child relationship is always a key element and cannot support the idea that the concept of direct descendant could be extended to also include legal custody of guardians. Moreover, the *kafala* system is neither permanent nor comparable to a parent-child relationship and can actually coexist with a biological parent-child relationship. Consequently, a child under *kafala* cannot be considered as a direct descendant for the purposes of that Directive. However, the principle of best interests of the child and the protection of family life under, a child placed under the *kafala* system could fall under the broader notion of 'other family members' under Article 3 (2) of Directive 2004/28. Thus, the host Member State must facilitate the child's entry and residence in accordance with national legislation, taking into account the aforementioned safeguards, and authorities would be entitled to refer to Art. 35 of the latter in case of fraudulent or abusive adoptions, as well as to examine whether sufficient regard was had, in the procedure for awarding guardianship or custody, to the best interests of the child.[32]

Another concept, namely the "dependency" was also analysed by the CJEU, and has been held to have an autonomous meaning under EU law.[33] The criteria used by the CJEU to examine "dependency" offer guidance to the States to establish their criteria to define the nature and duration of the dependency. In this regard, the CJEU has held that the status of "dependent" family member is the result of a factual situation characterised by the fact that legal, financial, emotional or material support for that family member is provided by the sponsor or by his/her spouse/partner.[34]

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28 CJEU, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 43.

29 CJEU, Joint Cases C-356/11 and C-357/11, *O and S v Maahanmuuttovirasto* and *Maahanmuuttovirasto v L.*, 6 December 2012, para. 74, 79–82.

30 CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, paras 62, 105.

31 CJEU, Joint Cases C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L.*, 6 December 2012, paras 59–61, 66.

32 OPINION OF ADVOCATE GENERAL CAMPOS SÁNCHEZ-BORDONA delivered on 26 February 2019(1) Case C129/18 SM v Entry Clearance Officer, UK Visa Section.

33 See CJEU Case 327/82, *Ekro*, 18 January 1984, para 11; Case C-316/85, *Lebon*, 18 June 1987, para 21; Case C-98/07, N*ordania Finans and BG Factoring*, 6 March 2008, para 17; Case C-83/11, *Rahman and Others*, 5 September 2012, para 24.

34 CJEU, Case C-316/85, *Lebon*, 18 June 1987, para 21–22; Case C-200/02, *Zhu and Chen*, 9 October 2004, para 43; C-1/05, *Jia*, 9 January 2007, paras 36–37; and Case C-83/11, *Rahman and Others*, 5 September 2012, paras 18–45; Cases C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v L.*, 6 December 2012, para 56.

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Any particular requirements as to the nature or duration of dependence introduced in national legislation must be consistent with the normal meaning of the words relating to the dependence and cannot deprive it of its effectiveness.[35]

It shall be pointed out that the Court has recently reiterated principles from its previous case-law that such dependency is the result of a factual situation characterised by the sponsor regularly paying the applicant a sum of money as such applicants are not required to show that they have tried without success to find employment, obtain subsistence support and/or otherwise tried to support themselves, which could make the right of residence excessively difficult. This could be applied by analogy to other forms of dependency, meaning that applicants should not be required to show they are unable to rely on other forms of support to establish dependency on the sponsor.[36]

Interestingly, in *Noorzia* the Court gave a restrictive and questionable ruling: the case concerned the minimum age condition that the spouse and the sponsor may be required to satisfy before applying for family reunification. The CJEU ruled that Member States that have implemented this condition, may equally decide to require the sponsor or the family member to meet it at the time the application is lodged or when the decision (on the application) is taken.[37] It should be noted that in this case the Advocate General has given an opposite opinion and that this judgment goes against the Commission's Guidance and the CJEU's prior case-law on the need for an individualised assessment.

2.3 The best interests of the child

It is well-established that the principle of the best interest of the child is a generally recognised principle in international law. This principle is laid down in several legally binding and soft law documents and constitutes the basic standard for guiding decisions and actions taken to help children, whether by national or international organizations, courts of law, administrative authorities, or legislative bodies.[38]

The Convention on the Rights of the Child was adopted in 1989, and it is the most widely accepted human rights treaty. Among the four general principles – all the rights guaranteed by the UNCRC must be available to all children without discrimination of any kind (Article 2); the best interests of the child must be a primary consideration in all actions concerning children (Article 3); every child has the right to life, survival and development (Article 6); and the child's view must be considered and taken into account in all matters affecting him or her (Article 12) – on which the Convention is based, and must be taken into consideration when interpreting the additional rights, the principle of the best interest of the child incorporates the main message of the Convention. Thus, the best interests of children shall be a primary consideration in all actions concerning

35 See CJEU, Case C-83/11, *Rahman and Others*, 5 September 2012, paras 36–40.

36 See BERNERI, C. When is the family member of an EU Citizen 'dependent' on that citizen? EU Law Analysis Blog, 19 January 2014. [online]. Available at <http://eulawanalysis.blogspot.com/2014/01/when-is-family-member-of-eu-citizen.html> [q. 2019-02-20].

37 CJEU, Case C 338/13, *Marjan Noorzia v. Bundesministerin für Inneres*.

38 International Committee of the Red Cross Central Tracing Agency and Protection Division: Inter-Agency Guiding Principles on unaccompanied and separated children, (2004), 13. [online]. Available at <http://www.unicef.org/violencestudy/pdf/IAG_UASCs.pdf>.

children,[39] in the search of short and long-term solutions,[40] acting as an "umbrella provision" with prescription of the approach to be followed in cases concerning children.[41]

Parts of the EU Charter of Fundamental Rights is based on the the European Convention on Human Rights, and states that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Although the European Convention on Human Rights[42] does not contain explicitly the best interest of the child principle (nor does it make any reference to the rights of children or vulnerable groups) references are made to the equality between spouses and their right to see the child (Article 5),[43] to the right of respect for private life and family life (Article 8)[44] and to the right of education (Article 2)[45] thus their treatment is considered under these provisions.

The best interest of the child principle has been given greater status in the CJEU jurisdiction, too. In all cases concerning families with children the Court underlined the primacy of the child's best interests. The CJEU has already underlined in case *European Parliament v. Council of the European Union* that Member States must apply the rules of the Family Reunification Directive in a manner

39 See CRC Art. 3(1), ECRE (Children) para. 4, ICCPR Art. 24(1), ICESCR Art. 10(3), UNHCR Guidelines para.1.5.

40 19. Article 3 (1) states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.

20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite of this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

21. Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serve as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

22. Respect for best interests also requires that, where competent authorities have placed an unaccompanied or separated child "for the purposes of care, protection or treatment of his or her physical or mental health", the State recognizes the right of that child to a "periodic review" of their treatment and "all other circumstances relevant to his or her placement" (article 25 of the Convention). See Committee on the Rights of the Child: General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 9. [online]. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>.

41 ALSTON, P, GILMOUR-WALSH. B. The Best Interest of the Child. Towards a Synthesis of Children's Rights and Cultural Values. Innocenti Studies, UNICEF, 1996. 1. [online]. Available at <https://www.unicef-irc.org/publications/108-the-best-interests-of-the-child-towards-a-synthesis-of-childrens-rights-and-cultural.html>.

42 http://echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer.

43 Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

44 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

45 No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

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consistent with the protection of fundamental rights, notably regarding the respect for family life and the principle of the best interests of the child.[46] In *Parliament v. Council* the Court declared for the first time that the Convention on the Rights of the Child has to be taken into account when applying the general principles of Community law and, therefore, equally when applying the Family Reunification Directive. In cases where a Member State administration examines an application, in particular when determining whether the conditions of Art. 7(1) are satisfied, the Directive must be interpreted and applied in the light of respect for private and family life and the rights of the child of the Charter.[47] The Court has also recognised the fact that family reunification plays in children's full and harmonious development of their personality.[48] Furthermore, the CJEU has recognised that the right to respect for private or family life laid down in the Charter must be read in conjunction with the other obligations laid down in the Charter, thus the obligation to have regard for the child's best interests, taking account of the need for a child to maintain a personal relationship with both his or her parents on a regular basis.[49]

Regarding unaccompanied children, the CJEU found that in the absence of a family member legally present in a Member State, the state in which the child is physically present is responsible for examining such a claim and cited Art. 24(2) of the Charter, whereby in all actions relating to children, the child's best interests are to bear primary consideration in reaching its conclusion.[50]

2.4 The surroundings of the application

As for the application procedure, the Court gave in several cases clearance about the elements of the procedure. About the standard of proof required upon assessment of family ties the Court concluded that Article 11(2) does not leave a margin of appreciation to the domestic authorities and clearly states that the absence of documentary evidence cannot be the sole reason for rejecting an application in a context such as the one under examination. Conversely, it obliges Member States to take into account other evidence of the existence of the family relationship.[51]

The Court's stance on the income requirement and on the integration requirement is apparent as it ruled that optional clauses should be interpreted strictly and not in a manner that would undermine the objective of the Directive. Instead of applying a condition rigidly, Member States are required to examine each application individually, taking into account the interests of the family members and their circumstances in order to take a decision which is in compliance with Art. 17 of the Directive and the Charter, is proportional and does not undermine the effectiveness of the Directive.[52] That can be seen in the *Chakroun* case, where it was found, that Member States "margin for manoeuvre" must not be used in a manner which would undermine the objective of the Directive, to promote family reunification, and its effectiveness.[53] Namely, in this case next to the

46 CJEU Case 540/03, *European Parliament v. Council of the EuropeanUnion*, 27 June 2006.

47 CJEU, Cases C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L.*, 6 December 2012, 6 December 2012, para 80.

48 CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para 57.

49 CJEU, Case C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para 58.

50 CJEU, C-648-11, *MA, BT and DA v. Secretary of State Department*, 6 June 2013.

51 C 635/17, E.

52 EMN Synthesis Report for the EMN Focussed Study 2016 Family Reunification of Third -Country Nationals in the EU plus Norway: National Practices, Migrapol EMN [Doc 382] April 2017, 19.

53 CJEU, Case C578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para 43.

income requirement set out in Article 7(1)(c) other criteria such as the nature and solidity of the person's family relationships, the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin shall be taken into account when deciding on an application.

In the *Khachab* case, the CJEU stated that verifying the evidence of stable and regular resources required analysing the past pattern and future perspectives of such resources, and it was not limited to the resources available at the time of the application. Furthermore, considering a period of 6 months to 1 year, before and after the application, to assess the past and perspective resources of the sponsor is compatible with EU law.[54] Another case, the *K and A* case[55] involved a request for exemption submitted by a third country national who was asked to sit a civic integration exam in the country of origin with a cost of €350. Although the Court recognised that States could impose integration measures however, but these measures should be in proportion to serving their objective, i.e. integration of third country nationals, and should not undermine the possibility of family reunification itself. In particular, passing integration tests may be required as a condition to grant a residence permit, provided that the conditions to comply with it do not make compliance excessively difficult. The Court pointed out again to consider the individual circumstances of the applicant which can lead to dispensing with the integration exam where family reunification would otherwise be excessively difficult.[56] Although the Court unfortunately doesn't mention, that right nonetheless suffuses this judgment, as the Court identifies a public interest reason to restrict the right to family life and then subjects this restriction to the principle of proportionality. The Court even suggests that those who are genuinely willing to pass the test and made the effort to do so ought not to be denied family reunion, presumably even if they have not actually passed it.[57]

In *Naime Dogan v Bundesrepublik Deutschland*, the CJEU ruled that although the requirement to demonstrate basic German language skills in the country of origin for family members constituted a violation of the standstill clause included in the 1963 Association Agreement between the European Community and Turkey, a new restriction to family reunification could be introduced but only on compelling grounds of public interest, if it is suitable for achieving a legitimate goal and does not exceed what is necessary for this goal.[58]

With regard to DNA testing to provide evidence of family links, any costs involved should not obstruct the possibility for family reunification, by making the exercise of the right to family reunification impossible or excessively difficult.[59] Similarly, the general principle of legal certainty requires administrative authorities to exercise their powers within the given period to protect the legitimate expectations of the relevant subjects.[60] Furthermore in order to give effect to the principle of the right to be heard, applicants should have the opportunity to explain any alleged discrepancies prior to a decision being taken.[61]

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54 CJEU – Case C-558/14, *Khachab v. Subdelegación del Gobierno en* Álava, 21 April 2016.

55 CJEU – C153/14, *Minister van Buitenlandse Zaken v. K and A*, 19 March 2015.

56 http://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%9115314-minister-van-buitenlandse-zaken-v-k-and-#content.

57 PEERS, S. Integration Requirements for family reunion: the CJEU limits Member States' discretion. [online]. Available at <http://eulawanalysis.blogspot.hu/2015/07/integration-requirements-for-family.html>.

58 CJEU, C-138/13, N*aime Dogan v. Bundesrepublik Deutschland*, 10 July 2014.

59 CJEU, Case C-153/14, *Minister van Buitenlandse Zaken v K and A*, 19 March 2015, para. 71.

60 CJEU, Joint cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira v. the Commission*, 13 January 2005, para. 165.

61 CJEU, Case C-277/11. *M.M. v. Minister for Justice, Equality and Law Reform, Ireland*, 22 November 2012.

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The Court emphasised the personal characteristics of the applicant and the disadvantaged position of certain groups stating that time limits need to be reasonable and proportionate. It is not only applicable to the time limits as such, but also to the application of the time limit to an individual case.[62] Thus in *Diouf* it ruled, that the time limit for lodging an appeal against a negative (asylum) decision must be sufficient in practical terms to enable an applicant to prepare and bring an effective action. It is, however, for the national court to determine – should that timelimit prove, in a given situation, to be insufficient in view of the circumstances.[63]

3 CONCLUSION

States have an obligation to protect the family under international and European law. However, their discretional power creates an environment where it is harder to achieve a more consistent policy and practice across the EU, because they decide the concrete content of the right to family reunification. The Court also made some contradictory decisions which do not help to offer a clear guide for States policy's. As for in all cases concerning families with children, the Court of Justice is underlining the primacy of the child's best interests. The European Court of Justice emphasized in its first family reunification-case, fundamental rights are binding on Member States when they implement Community rules, and that they must apply the Directive's rules in a manner consistent with the requirements governing protection of fundamental rights, notably regarding family life and the principle of the best interests of minor children.

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[62] CJEU, Case C-327/00, *Santex SpA v. Unità Socio Sanitaria Locale*, and *Sca Mölnlycke SpA, Artsana SpA and Fater SpA*, 27 February 2003, para. 57.

[63] CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* http://www.asylumlawdatabase.eu/en/content/cjeu-c-6910-brahim-samba-diouf-v-ministre-du-travail-de-l%E2%80%99emploi-et-de-l%E2%80%99immigration.

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SANCTION MECHANISM OF THE REGISTER OF PUBLIC SECTOR PARTNERS IN CONTEXT OF PUBLIC PROCUREMENT[1]

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Abstract: This paper is dedicated to the comprehensive regulation of obligations related to the registration in the Register of Public Sector Partners which can be identified in a variety of legal provisions. The paper deals with all sanctions related to meeting these obligations. The introduction defines what the Register of Public Sector Partners is and with what purpose it has been established. Afterwards, the paper focuses on the identification of individual regulations which include the obligations related to the Register of Public Sector Partners, as well as the individual sanctions for not meeting them. The last part of the paper shifts attention to the private law aspects of violations of obligations related to the Register of Public Sector Partners.

Key words: Register of Public Sector Partners, public procurement, violation of obligation, sanction, contract withdrawal, offense, Public Procurement, Slovak law

1 INTRODUCTION

The Register of Public Sector Partners is a register in which registration is a pre-requisition for business opportunities in the so-called public sector, i.e. with the state, legal persons established by the state, municipalities, higher territorial units, and so on. The aim of the Register of Public Sector Partners, also called the anti-box register, is to prevent companies with unclear ownership structure or even unclear property background from forming business relationships with the public sector. The Register of Public Sector Partners is a successor of the End Benefit User Register. The administration and carrying out of individual entries into the End Benefit User Register was in the competence of the Office for Public Procurement.

The scope of competences of the Office for Public Procurement in the End Benefit User Register followed from the very goal of this register, i.e. to identify the persons making business with the state, resp. forming contractual relationships with the state. The aim of the new legislation is, in particular, to publish correct and complete data on end users of benefits of the registered entities.

Besides the new obligations, the Register of Public Sector Partners has also introduced the non-compliance sanctions for violating these obligations as well. These are regulated at several levels. This article aims to discuss individual sanctions connected to a violation of obligations following from registration into the Register of Public Sector Partners, as well as other options within the

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contractual relationships themselves which are established between the "public sector partners" and the state.

2 REGISTER OF PUBLIC SECTOR PARTNERS AND INDIVIDUAL SANCTIONS

The Register of Public Sector Partners was introduced into the Slovak legislation with Act No. 315/2016 Coll. of Laws on Register of Public Sector Partners (hereinafter referred to as **"Register of Public Sector Partners Act"**). As already mentioned in the introduction, the Register of Public Sector Partners is a successor of the End Benefit User Register which was administrated by the Office for Public Procurement and by which the obligation to register followed from the Act on Public Procurement. The Register of Public Sector Partners should cover a more complex area of legal relationships compared to the End Benefit User Register.

The End Benefit User Register was dealt with contractual relationships concluded pursuant to Act No. 343/2015 Coll. of Laws on public procurement (hereinafter referred to as **"Public Procurement Act"**) and thus dealt with contractual relationships which resulted from public procurement. The Register of Public Sector Partners deals with a wider scope of social relations, not only those related to Public Procurement Act.

Regardless of this, however, the aim of both registers was the identification of the end user of benefits in a concrete legal person. At the same time, there is a difference in the definition of the end user benefits, as well as how to identify the end user of benefits. The Register of Public Sector Partners uses for the purpose of identification Act No. 297/2008 Coll. of Laws on protection from legalisation of income from criminal activities and on protection from financing of terrorism. This Act includes wide identification criteria for identification of the end user of benefits. In short, pursuant to this Act, the end user of benefits is each natural person which actually manages or controls a legal person, a natural person – an entrepreneur or association of property, and each natural person to benefit of whom these entities carry out their activities or business.[2]

In accordance with this, the aim of the Register of Public Sector Partners is to identify the end users of benefits and to publicize them in a wider measure of legal relationships into which enters the state and its individual entities. From the comparison between the Register of Public Sector Partners and the End Benefit User Register follows that to register in the Register of Public Sector Partners are obliged not only the economic operators concluding a contract as the result of public procurement, but also other entities which receive funds from the state, the European Union, as well as from other legal persons established by law, from public enterprises, from public healthcare insurance, eventually from state aid, entities which receive certain licences or have financial claims to the public sector.

To register in the Register of Public Sector Partners are obliged natural or legal persons which might be, pursuant to Register of Public Sector Partners Act, divided into 6 groups. The Register of Public Sector Partners Act includes a broad definition who is considered a public sector partner, as well as negative definition who is not a public sector. To simplify this, the individual entities are ordered into the below listed groups.

[2] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/297/#

2.1 Public Sector Partners and Responsibility Relationships which Might Arise in Connection with Registration

The first group, which pursuant to the Public Sector Partners Act can be identified as public sector partners, are recipients of public funds if the value of the one-time received fulfilment exceeds the amount of € 100,000 or the value of a repeatedly received fulfilment cumulatively exceeds the amount of € 250,000.

This includes, in particular, legal persons, entrepreneurs participating in public tenders, whether in position of a contractor or sub-contractor, as well recipients of various kinds of subsidies and contributions (e.g. from state funds, budgets of municipalities, regions, public organisations or European Structural Funds). The significant sign for assessment whether an individual entity is a public sector partner in this group of entities is the fact that it entered or should enter into a contractual relationship in which it would receive one-time or repeated financial fulfilment of defined value.

The second groups are the recipients of non-financial fulfilment (property or rights) which value exceeds the amount of € 100.000. This group can include recipients of property or rights for property owned by the state, public institution, municipality, higher territorial unit, legal person established by law, or public company.

The third group of public sector partners consist of healthcare providers which have concluded a contract with health insurance companies on provision of healthcare. On the basis of this contract these public sector partners will be provided with one-time financial fulfilment exceeding the amount of € 100,000 or repeated financial fulfilment which value cumulatively exceeds the amount of € 250,000. The contract for provision of healthcare is concluded between health insurance companies and various healthcare providers, both state as well as private healthcare providers. Pursuant to Public Sector Partner Act, as public sector partners which are obliged to register in the Register of Public Sector Partners are considered private providers whose performance is reimbursed by a health insurance company. This applies only in the case if they reach the financial limits mentioned above, however.

As the fourth group of public sector partners we identify the persons which are obliged to register in the register established by the Health Insurance Companies Act regardless of the fact whether they do business or otherwise cooperate with the public sector, as well as regardless of the value of financial or non-financial fulfilment.

A specific group of public sector partners are the sub-contractors (and their representatives) of the public sector partners identified in the previous groups if they are provided with one-time financial fulfilment exceeding the amount of € 100.000 or repeatedly received fulfilment which value cumulatively exceeds the amount of € 250.000, as well as the sub-contractors which directly or indirectly deliver goods and services to persons within the groups from 1 to 4, or which receive property or rights from these persons in the above listed values.

The last group are persons which have financial claims to the state, state fund, public institution, municipality, higher territorial unit, or legal person established by law with the exception of a chamber established by law one-time in the value over € 100,000 or repeatedly cumulatively in the value over € 250,000.

Outside of the above mentioned persons, the Register of Public Sector Partners includes automatically registered entities which had been previously registered in the End Benefit User Register.

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If a legal or natural person concludes that they are a public sector partner, they are obliged to register in the Register of Public Sector Partners. The registration in the Register of Public Sector Partners is carried out by the so called authorized entities. The public sector partner itself cannot issue a registration proposal and such registration proposal ought to be denied by the registration body. If the entity meets the criteria and thus is obliged to register in the Register of Public Sector Partners, it has to task an authorized entity to do so. Pursuant to law, as an authorized entity is only understood a lawyer, notary, bank, auditor or tax consultant with residence or base of entrepreneurship in the territory of the Slovak Republic and, at the same time, a foreign entity authorized to carry out in the territory of the Slovak Republic the same activity as an authorized entity pursuant to the previous sentence, under the condition that it has its business or organisational unit situated in the territory of the Slovak Republic.[3] This entity becomes an authorized entity on the basis of a concluded contract with a public sector partner. Afterwards, the authorized entity carries out the registration the public sector partner. Within this act, it is identified who is the end user of benefits of the partner. The identification of the end user of entrepreneurship benefits is the point of the Public Sector Partners Registration.

The provisions on the Public Sector Partners are provisions of public law and mandatory. They present a significant impact on contractual relationships between business partners if one of them is the state, resp. an entity established by the state. Of course, the Register of Public Sector Partners aims to meet important goals. Its existence is justified, however, it is not usual for the state to be forced to take such significant steps in order to provide transparent usage of public funds. This intervention into contractual relationship and limitation of economic operators itself is, however, justified by the interest of the state to identify the persons with which the state enters into contractual relationships and which receive public funds. Another significant reason is the interest to establish conditions for public control. However, the expert public holds a variety of views on the Register of Public Sector Partners.

The Register of Public Sector Partners is administrated by the District Court in Žilina which carries out the registration entries, amendments, erasures, as well as conducts infringement proceedings by a violation of obligations pursuant to Register of Public Sector Partners Act.

Pursuant to the information mentioned above, by the act of registration in the Register of Public Sector Partners arise obligations on the side of the public sector partner, as well as on the side of the authorized entity. In addition to these two groups of entities, which may constitute a basic prerequisite for non-compliance, there is another group of entities that enter into contractual relationships with public sector partners that are not complying with their obligations under the Register of Public Sector Partners Act. In accordance with this, the sanction mechanisms for the cases of non-compliance with the obligation introduced by Public Sector Partners Registry Act for the public sector partners and for the authorized entities are introduced directly by Public Sector Partners Registry Act.

In addition to the sanction mechanism in the Register of Public Sector Partners Act, separate obligation along its penalisation is regulated by Public Procurement Act. Obligations in the sector of Register of Public Sector Partners regulated in Public Procurement Act are imposed for contracting authorities and contracting entities and, at the same time, sanctions are imposed on contracting authorities and contracting entities as well.

[3] https://www.justice.gov.sk/Stranky/Registre/Dalsie-uzitocne-zoznamy-a-registre/RPVS/FAQ.aspx

The last group for which a sanction mechanism has been introduced to ensure compliance is the statutory bodies of the public sector partners. The sanction for a violation of their obligation is defined in Act No. 372/1990 Coll. of Laws on offenses (hereinafter referred to as **"Offense Act"**).

2.2 Sanctions and Responsibility pursuant to Register of Public Sector Partners Act

The authorized entities are by registering the public sectors partner in the Register of Public Sector Partners obliged to act with professional care. Register of Public Sector Partners Act defines precisely the situations when they cannot carry out duties of the authorized entity. The authorized entity cannot carry out their duties if they are in the very same case the public sector partner or end user of benefits of the public sector partner for whom they should carry out duties of the authorized entity, the end user of benefits of the public sector partner and the authorized entity are the same natural person, or if they share any relationship with the public sector partner or if they are a member of their bodies which might call into question their impartiality, in particular, if they are connected with the public sector partner on the personal or property level.

According to this, the authorized entity is obliged to carry out their activities independently and impartially. They should not, while carrying out other activities, get into conflict of interests with the activities of the authorized entity for specific public sector partners or other specific end users of benefits.

The registrant – the court – can on the basis of its own initiative or a proposal from other entities verify whether the data on the end user of benefits saved in the Register of Public Sector Partners are true and complete. If the public sector partner cannot reliably demonstrate that the data on the end user of benefits in the register are true and complete, the registrant makes a decision on the erasure of the public sector partner from the register. This does not apply if, given the manner in which the obligation is violated, its consequences, the circumstances in which the obligation was breached and the degree of fault, the gravity of the infringement is negligible.

After the erasure decision has become final because the data on the end user of benefits were not entered in the register, resp. if they are not true and complete, the court will remove the public sector partner from the register and initiate a fine procedure. No legal remedies shall be admissible against the court's decision on erasure.

The sanctions imposed pursuant to Register of Public Sector Partners Act can be imposed on the authorized entities, public sector partners, end users of benefits, and statutory bodies of the public sector partner. Register of Public Sector Partners Act enables to impose two different types of sanctions for other administrative offences. These are financial fines and erasure from the Register of Public Sector Partners.

The first other administrative offense in the sector of the Register of Public Sector Partners is the inclusion of false or incomplete data on the end user of benefits or public officials in the application for registration, which can be sanctioned for both the public sector partner and its statutory body. The public sector partner shall be fined for misrepresentation or incomplete data in the amount of atypical amount of economic benefit received by the public sector partner and, if this cannot be ascertained, between € 10,000 and € 1,000,000.

Outside of this, for this offense is also sanctioned the statutory body, resp. the person who is the statutory body or which is collectively a member of the statutory body in the time of a violation of the above mentioned obligation with a fine between € 10,000 and € 100,000. The fine imposed on

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the statutory body is also guaranteed by the authorized entity which was registered as the authorized entity in the time of a violation of the obligation. The difference compared to the fine imposed on the public sector partner or the statutory body by this offense is that the authorized entity is not obliged to pay the fine for which they guarantee if it is demonstrated that the authorized entity acted with professional care.

The same fines shall also be imposed by the court if the obligation to submit a proposal to amend the registered data related to the end user of benefits within the set time limit is not met, as well as if the ban to carry out the activities of the authorized entity is violated. In addition to these two offenses, the court also shall erase the public sector partner from the Register of Public Sector Partners if the fine was legally imposed but not paid within the set time limit.

Another sanction for public sector partners if the registrant carries out the erasure of a public sector partner due to the above mentioned reasons is that the public sector partner cannot be registered in the Public Sector Partner Registry again 2 years since the erasure. Outside of the register entry ban, resp.

Another sanction for the public sector partner in case of the registrant erases the public sector partner due to the above mentioned reasons is that the public sector partner cannot be registered again two years since their erasure. In addition to registration ban, the decision on erasure, respectively on erasure of the public sector partner from the Register of Public Sector Partners due to a violation of obligations, is at the same time the decision on exclusion pursuant to paragraph 13a of Act No. 513/1991 Coll. of Commercial Code (hereinafter referred to as **"Commercial Code"**). As the excluded entity is understood the statutory body or the members of the statutory body of a legal person registered in the Commerce Register who is a public sector partner and who has been erased from the Register as described above. The decision on exclusion means that these entities cannot, in any commercial company or cooperative, carry out the function of a statutory organ member or a supervision body member within three years since the day this decision has come into force.

As already stated, in addition to sanctioning the public sector partner and the statutory body the court also imposed a fine to the end user of benefits if they do not meet their obligations imposed by the law. A fine up to € 10,000 is imposed on the end user of benefits if they, within 15 days since they learned that they have become the end user of benefits of the public sector partner, do not inform the public sector partner that as the registered authorized entity they have become their end user of benefits.

As the last entity which can violate the obligations arising from Public Sector Partner Act is the authorized entity. The authorized entity will be fined by court the amount ranging from € 10,000 up to € 100,000 if the authorized entity violates the ban mentioned above, i.e. if they carry out duties of the authorized entity if they are, in the very same case, the public sector partner or the end user of benefits of public sector partner for whom they should carry out the obligations of the authorized entity, if the end user of benefits of a public sector partner and the authorized entity are the same natural person, or if they have any relationship with the public sector partner or if they are a member of their bodies which might call into question their impartiality, in particular, if they are connected with the public sector partner on the personal or property level.

The authorized entity, at the same time, as the only obliged entity provides with possibility of legal remedy, but only in the case of a decision on a fine imposed on the statutory body for paying which the authorized entity guarantees. Outside of the case of optional legal remedy application,

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in other cases of imposing of fines Register of Public Sector Partners Act does not allow any other legal remedies.

In addition to not being able to use legal remedies, another specific item by imposition of fines pursuant to Register of Public Sector Partners Act is the amount of the imposed fine on the public sector partner. Register of Public Sector Partners Act introduces a sanction, a fine in the amount of economic benefit the public sector partner has achieved.

In this case the primary goal of the sanction imposed on the public sector partner pursuant to paragraph 13 Section 1 (a) is to take away economic benefit the public sector partner gained in case of a violation of their obligations pursuant to Register of Public Sector Partners Act. Under the term "economic benefit" is to be understood any financial income or financially quantified increase of property or its value following form a contract or an agreement which does not correspond with direct, demonstrable and valid costs of the public sector partner used for fulfilling the contract or the agreement (authorized costs). The method for economic benefit calculation depends on the contract subject. One method presents the difference between the price the public sector entity paid to the public sector partner for delivery of goods or services and the funds the public sector partner used to procure, resp. produce/provide the goods or services which are the contract subject and have been delivered. Therefore, it analogically follows that if the public sector partner has obtained property, rights to property or property rights, economic benefit presents the difference between the funds used for these rights and the market value the public sector partner has obtained. The aim of the lawmaker is to take away from the sanctioned public sector partner any profit from this transaction. For this purpose, it is necessary to carefully review the legitimacy of used costs of the obliged entity. A fine starting from € 10,000 up to € 1,000,000 is only imposed if economic value is not possible to evaluate. By imposing the fine the court takes into consideration the nature, severity, method, and consequences of a violation of obligation.

3 SANCTIONS PURSUANT TO OTHER LEGAL PROVISIONS

As already follows from Register of Public Sector Partners Act mentioned above, there are other legal provisions dealing with other groups of responsibility relationships, particularly on the part of the state. These are the Public Procurement Act, as well as Offense Act. The responsibility due to Act 300/2005 Coll. of Laws on Criminal Code (hereinafter referred to as **"Criminal Code"**).

The general obligation of each entity is to obey the law. A violation of law obligations is bound to a variety of responsibilities. If the unlawful conduct fulfils the constituent elements of the public-law offense, the public authorities incur criminal or administrative liability.[4]

3.1 Public Procurement Act

Prior to Register of Public Sector Partners Act, Public Procurement Act involved complex legislation related to definition of end user of benefits in by successful candidates in public procurement. The aim of this original legislation was to uncover the property structure of the successful candidate.[5]

[4] MACHAJOVÁ, J. General Administrative Law. Žilina: EUROKÓDEX, s. r. o., 2014, p. 249.
[5] GRIGA, M., TKÁČ, J. Public Procurement Law. Commentary. Bratislava. Wolters Kluver, s. r. o. 2016, p. 64

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Public Procurement Act deals with obligations of contracting authority – the Slovak Republic represented by its bodies, municipalities, higher territorial units, legal persons established for a specific reason of meeting needs of common interest, all of which do not have industrial or commercial nature, and they are, either entirely or for the most part, funded by the contracting authority, is controlled by the contracting authority or the contracting authority appoints or elects more than a half of the managing body members or control body, an association of legal persons which members are exclusively contracting authorities. Furthermore, the obligations pursuant to Public Procurement Act in the section of the Register of Public Sector Partners are also applied on a contracting entity as well. A contracting entity is a legal person on which the contracting entity has direct or indirect controlling influence on the basis of property right, financial share or rules through which there is managed or carried out at least one of the activities defined by Public Procurement Act such as activities in power engineering, gas industry, thermal energy, water industry, logistics, post services, i.e. natural state monopolies. At the same time, this can be a legal person who carries out these activities on the basis of specific and exclusive rights. As controlling influence is understood that the contracting authority owns directly or indirectly majority of the shares or a majority holding, controls a majority share in voting rights or appoints more than a half of the managing body members or another executive body or control body.[6]

Considering the new Register of Public Sector Partners came into force, as well the differentiation of social relations which are mandatory to be reported and which reveal the end users of benefits, Public Procurement Act only includes the obligation defined in paragraph 11, as well as the non-compliance sanction. Public Procurement Act and the introduced obligation follow the interest to reveal end users of benefits on the part of the state. The contracting authorities and contracting entities, i.e. a huge group of state entities which enters into contractual relationships with the public sector partners cannot conclude a contract, concession contract or framework contract pursuant to Public Procurement Act with an entity which is obliged to be registered in the Register of Public Sector Partners and is, in fact, not. For completeness it is necessary to note that the contract conclusion ban is not related to a framework agreement which is concluded with contracting authorities or contracting entities by two or more candidates who are natural persons and which deals with provision of services.

The practical aspect of this ban is the mandatory control carried out by the contracting authority and contracting entity, so that they verify before the contract conclusion whether their contractual partner along all their sub-contractors are registered in the Register of Public Sector Partners if this obligation pursuant to Register of Public Sector Partners Act applies to them.

By violating this obligation on the part of the contracting authority or contracting entity the Office for Public Procurement imposes on the contracting authority or contracting entity a fine in the amount of 5% of the contract price of contract which has been concluded in a violation with the ban. Public Procurement Act is in the section of administrative punishment framed on the principle of objective liability which is based on the fact that by meeting the merits of administrative offense the managing body does not review the subjective part of law violation, intention or negligence, but only the conflict between the legal status and the actual one. Next, it is important to stress that this sanction has not been introduced as an option. It is a sanction the Office for Public Procurement shall impose regardless of the severity of taken actions, amount of negotiated price, length of a violation of obligation on the part of the contracting authority or contracting entity.

[6] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/343/20160418.html

In this case, the sanction is determined by exact rate and does not allow for considerations where would it be possible to take into account the kind of a law violation of contract conclusion, as well as the impact on the protected law interest – the state interest to uncover and identify the end users of benefits and funds provided from the state budget. The sanction, in some cases, can appear to be as inappropriately strict, however, the end decision is possible after exhaustion of legal remedies to review by the court which has the option to change the type or value of the sanction, even if the public administration body has not stepped out of the legal framework of the consideration, should this sanction not be appropriate to the nature of the act or if it would liquidate the applicant, or to refrain from imposing a sanction if the purpose of the administrative punishment can also be achieved by the actual hearing of the case.

Administrative punishment is one form of deducing administrative liability. The managing body by administrative punishment also has other power resources which are, by law, to be used to enforce meeting law liabilities by the obliged entity, renew the original state, prevent a further law violation in public administration etc.[7] If the contractual relationship concluded despite the contract conclusion ban has been concluded, the concession contract or framework agreement with the entity which (or whose sub-contractors) is not registered in the Register of Public Sector Partners despite this obligation the Office for Public Procurement has active legitimacy to submit a proposal to nullify this contract. The proposal is to be submitted within one year since contract conclusion.

3.2 Offense Act and Other Legislation

Public Procurement Act pursues the obligation of the public sector to also meet the obligations of public sector partners in relation to the Register of Public Sector Partners. Public Procurement Act establishes obligations directly for legal persons, contracting authorities and contracting entities, while the lawmaker also imposed obligations to the statutory body of the contracting authorities and contracting entities and pursues their fulfilment through the option to impose sanctions.

Offense Act has introduced a new type of offenses – offense by registration of the public sector partners. This offense has only been committed by an entity which has concluded a contract with the public sector partner if the public sector partner was not, on the day of contract conclusion, registered in the Register of Public Sector Partners.[8]

Offenses are the most often occurring and, in theory, most detailed type of administrative delicts. An offense is characterized as one of the kinds of administrative delicts by natural persons and offense proceeding is a proceeding dealing only with this kind of administrative delicts. The law defines an offense as a guilty act which violates or endangers the public interest and is explicitly labelled in Offense Act or in another law if it is not another administrative delict or criminal act.[9]

The legal consequence of committing an offense is, in this case, the sanction in the form of a fine. Offense Act pursues in this particular instance adherence to the obligation on the part of a natural person, statutory body which directly concludes a contract with the public sector partner. The sanction for a violation of obligation is the option to impose a fine starting at € 1,000 up to € 100,000. The essence of the sanction is the cost that arises to the offender, eventually their moral condemnation

7 MACHAJOVÁ, J. General Administrative Law. Žilin a: EUROKÓDEX, s. r. o., 2014, p. 251.

8 https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1990/372/

9 ŠEVČÍK, M. Administrative Procedural Law. Bratislava : EURONION, spol. s r. o. 2007, p. 12.

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as well. Often, it interferes with their constitutional rights. It is, however, intended to be educational and deter the offender from committing illegal acts. The sanction is not an obligatory legal consequence of an offense. It is possible to refrain from imposing a sanction if hearing on the offense is deemed as sufficient to correct the offender. Refrain from imposing the sanction for an offense assumes that the administrative body makes a decision on whether the offender is guilty or not. The law pre-condition, therefore, in this case is not that the offense presents less severe harm on the society, state of sanity, demonstrated regret etc. The managing body is obliged to review whether the hearing on the offense on its own is sufficient to correct the offender.[10]

The introduction of liability and sanctions on the part of a natural person who by contract conclusion acts directly with the public sector partner which violated the obligations can be considered as a comprehensive regulation of relations in the sector of the public sector register and achieving its purpose.

The complexity of the regulation can be also noted by the introduction of new obligations in other legal provisions, such as in case of Act No. 92/1991 Coll. of Laws on Conditions for Transfer of State Property where the condition for obtaining privatized property is registering in the Register of Public Sector Partners, or in case of Act No. 138/1991 Coll. on Municipality Property the condition for registering in the Public Sector Partners Registry if by obtaining the municipality property are met the conditions. Further example is Act No. 278/1993 Coll. of Laws on State Property Management where the condition for obtaining state property which is registering in the Register of Public Sector Partners. The conditions for registering in the Register of Public Sector Partners are also present in Act No. 446/2001 Coll. of Laws on Higher Territorial Units Property, Act No. 527/2002 Coll. of Laws on Voluntary Auctions, Act No. 176/2004 Coll. of Laws on Public Institutions Property Management, Act No. 523/2004 on Budget Rules for Public Administration, Act No. 581/2004 Coll. of Laws on Health Insurance Companies, Act No. 561/2007 Coll. of Laws on Investment Aid, Act No. 292/2014 Coll. of Laws on Contributions Provided by the European Structural and Investment Funds.

All of the above mentioned legal provisions include the obligation to register in the Register of Public Sector Partners pursuant to Register of Public Sector Partners Act. Although these legal provisions do not include the sanction itself, for this purpose it is necessary to use sanction mechanisms on the level of other provisions. However, if legal acts are carried out in contradiction with these legal provisions, it is justified to deal with possible validity of performed legal acts.

Pursuant to the provision of paragraph 39 of Act No. 40/1964 Coll. of Civil Code (hereinafter referred to as **"Civil Code"**) as invalid counts only such a legal act which nature or purpose contradicts the law or evades it or violates good morals. In the mentioned case it would absolutely mean that the legal act were invalid.

3.3 Liability pursuant to Criminal Code

The above mentioned legal provisions deal with administrative liability for a violation of obligations related to registration of the public sector partners in the Register of Public Sector Partners. In addition to administrative liability is also not excluded the possibility that a violation of obligations in the sector of the public sector partners will also establish criminal obligation and that by violating one of the obligations one of the crimes regulated by Criminal Code will be committed. First of all, it is necessary to note that Register of Public Sector Partners Act has introduced a new condition

[10] MACHAJOVÁ, J. General Administrative Law. Žilina : EUROKÓDEX, s. r. o., 2014, p. 269.

for access to public funds. This is condition is registration in the Register of Public Sector Partners. It is without a doubt that only this registration is considered as the complete and true registration in the Register. A violation of this obligation can lead not only to administrative punishment, but also to criminal punishment as well. Into consideration also comes, in particular, the crime of fraud pursuant to paragraph 221 of Criminal Code, crime of subsidy fraud pursuant to paragraph 225 of Criminal Code, and crime of distortion of economic and commercial data pursuant to paragraphs 259 and 260 of Criminal Code.[11]

The crime of fraud is committed by someone who, at the expense of someone else's property, enriches themselves or someone else by misleading someone or takes advantage of someone else's mistake and thus causes a minor damage on someone else's property. Within the qualified merits by this crime it is possible to commit this crime and cause serious damage, commit crime by more serious kind of acts, from a specific motive, or against a protected person. Even more serious can be committing a crime and thus causing damage of significant scope, committing a crime as a member of a dangerous group or within a crisis situation.

The object of the crime of fraud is the right of ownership or possession. The subject can be any criminally liable person, i.e. there are required no specific attributes related to the subject. The subjective nature of the merits of the crime requires deliberate action.

For instance, inserting incorrect data by registration of the end user of benefits in the Register of Public Sector Partners can meet the merits of a crime.

The crime of subsidy fraud is perpetrated by someone who lures out of others a donation, subsidy, grant or other fulfilling of state budget, from budget of a public institution, state fund budget, higher territorial unit budget or municipal budget which provision or usage is, pursuant to generally binding regulation, bound to conditions which are not met by misleading in the matter of meeting these conditions.[12] Furthermore, a subsidy fraud is perpetrated by someone who the obtained donation, subsidy, grant or other fulfilling of state budget, from budget of a public institution, state fund, higher territorial unit budget or municipal budget uses for other than the intended purpose, or by someone who as an employee, member, representative or another person authorized to act on behalf of someone who provides a donation, subsidy, grant or other fulfilling of state budget, from budge of a public institution, state fund budget, higher territorial unit budget or municipal budget allows someone to obtain others a donation, subsidy, grant or other fulfilling of state budget, from budget of a public institution, state fund budget, higher territorial unit budget or municipal budget while they know that the recipient does not meet the conditions for obtaining it.[13]

A subsidy fraud is a deliberate crime which aims on property rights and deliberate usage of received funds, subsidies or other contributions from public resources. This crime can be committed by the public sector partner as well as the authorized entity, particularly in one of the types of accounting. We can speak of a subsidy fraud, for instance, when the violation of obligation to register in the Register of Public Sector Partners has also led to obtaining finances from public funds.

The crime of misrepresentation of economic and commercial records is perpetrated by someone who lists incorrect or significantly misrepresenting data or withholds mandatory data on critical information in a statement, report, introductory data inserted in a computer or in other documents used for statistical examination in order to ensure for themselves or someone else illegitimate advan-

[11] Explanatory Report to draft Register of Public Sector Partners Act.
[12] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/
[13] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/

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tages, employee evidence in order to ensure for themselves or someone else illegitimate advantages, accounting control, control over usage of donations, subsidies or other fulfilling from state budget, from budget of a public institution, from state budget, from higher territorial unit budget or from municipal budget, definition of property price, or exchange rate of security by its transfer or change to another currency, bankruptcy, settlement, restructuring or debt relief, or registration in Commercial Code or Land Register, Motor Vehicle Register, or any other register pursuant to a specific regulation. Equally, this crime is perpetrated by someone who, with the intention to provide incorrect or significantly misrepresenting data on critical information, interferes with technical or program capacities of a computer or destroys or damages the listed documents or otherwise depreciates them.[14]

This crime can be committed by a deliberate act, but also by negligence, though by negligence the meeting of the merits of the crime of misrepresentation of economic and commercial records is condition for causing damage of a large scope only in the defined part of the act.

This crime can be, for instance, perpetrated in the sector of Register of Public Sector Partners in relation to verification documentation.

From the nature of the topic follows that the probably most often committed crime is the crime of fraud under which we can find a great amount of violations of obligation by registration of the public sector partners. In addition to the above mentioned crimes to which points the Explanatory Statement to the draft Register of Public Sector Partners Act, we can also consider possible meeting of the merits of the crime pursuant to provision paragraph 261 of Criminal Code, i.e. damaging the financial interests of the European Union, crime of abuse of authority of a public official pursuant to provision of paragraph 326 of Criminal Code, some of the crimes of corruption, eventually the crime of legalisation of income from criminal activities pursuant to paragraph 233 of Criminal Code.

In case of misconduct or a violation of obligation, this needs to have a certain degree of social relevance for criminal liability to occur, the so called material corrective.

4 CONTRACT WITHDRAWAL AND CONTRACTUAL CONSEQUENCES

A violation of obligations following from the above mentioned legal provisions cause the incurrence of the above mentioned administrative and criminal liability in the sector of public law. Considering that meeting of obligations related to the Register of Public Sector Partners also has an impact on private law, it is necessary to deal with consequences within the incurred contractual relationship. It is necessary it divide these into two areas, i.e. the incurrence of the contract withdrawal right (directly defined by private law regulations) and the area of contractual obligations agreed upon for the case of a violation of obligation directly by the contract itself.

4.1 Contract Withdrawal on the Basis of Register of Public Sector Partners Act and on the basis of Public Procurement Act

The impact of the Register of Public Sector Partners on private law relations can be observed especially by private law consequences of a violation of selected obligations regulated by Register of Public Sector Partners Act.

[14] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/

Specifically, it is the option to withdraw from a contract for the public sector in case the public sector partner has been imposed a fine for a violation of obligation to amend in data about the end user of benefits in the defined time limit or if by the public sector partner has been found violating the ban preventing the authorized entity to perform its function if they are at the same time a public sector partner or end user of benefits of the public sector partner for whom they should function as the authorized entity, the end user of benefits of the public sector partner and the authorized entity are the same natural person or if they have any relationship with the public sector partner or if they are a member their bodies which could call into question their impartiality, particularly if they are connected with the public sector partner on a personal or property level and the public sector partner has been erased from the Register.

Furthermore, the contract withdrawal right also arises to the public sector on the day of validity of the decision on erasure of the public sector partner from the Register of Public Sector Partners on the basis of the finding that the end user of benefits data in the Register of Public Sector Partners are not complete and correct.

The specific withdrawal right arises for an entity which provides finances, property, rights to property or other property rights. The contract withdrawal also arises for a contract participant if the public sector partner is delayed by more than 30 days to meet their obligation to select and register a new authorized entity in the Register of Public Sector Partners after the previous authorized entity had been erased.

The contract withdrawal right which arises as a consequence of a violation of obligation is also included in Public Procurement Act. The contracting authority and contracting entity can withdraw from a contract, framework agreement or a concession contract concluded with a candidate who, in the time of conclusion of contract, framework agreement or concession contract, has not registered the end users of benefits in the End Users of Benefits Register, or if it has been finally decided to erase this candidate from the End Users of Benefits Register.

This contract withdrawal right does not correspond with obligation for the contracting authority and contracting entity by conclusion of contract with the successful candidate as the obligation to register in the Register of Public Sector Partners is not only related to the candidate, but also to each one of their sub-contractors if they meet the conditions for mandatory registration in the Register of Public Sector Partners. Equally, the sanction for a violation of ban to conclude a contract, concession contracts or framework contracts with the entity which is not registered in the Register of Public Sector Partners is also imposed on the entity whose sub-contractors are not registered in the Register of Public Sector Partners. The authorization to withdraw from contract is only granted to the contracting authority or contracting entity only in the case of the contractor themselves and a violation of their obligation, not in the case of their sub-contractors. This is substantiated only in the private law nature of the contractual relationship, as well as the contractual relationship termination through the legal act of withdrawal. A violation of obligation of the third person cannot establish the right to carry out the private law act between other entities which have not directly violated this obligation. This can only be arranged within contractual freedom by conclusion of the contract itself.

In both cases of the contract withdrawal rights which are established by public regulation there is a question whether the public sector is obliged to use this right. As only the contract withdrawal right follows from Register of Public Sector Partners Act and from Public Procurement Act, the public sector is not forced to withdraw from the contract. On the other hand, there is the liability of the statutory representative of the public sector, as well as the assessment whether the

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not used contract withdrawal right and maintaining the contract concluded in a violation with regulations, resp. which has become a contract in a violation with regulations is not a violation of their obligation.

The provisions of Commercial Code which deal with the liabilities of the executive manager of a limited liability company impose the obligation to perform their actions with professional care and in accordance with interests of the company and all its partners. The executive managers are, in particular, obliged to gather and by decision-making consider all available information related to the subject of decision-making, keep confidential on sensitive information and facts which disclosure to third persons could damage the company or endanger its interests or the interests of its partners, and by carrying out their actions they must not prioritize their own interests, interests solely of a few partners or interests of third persons at the expense of the interests of the company.[15] Equally, in case of joint stock companies Commercial Code in paragraph 194 imposes on the joint stock company members the obligation to carry out their actions with proper care which involves the obligation to carry it out with professional care and in accordance with the interests of the company and all its shareholders.

Contract withdrawal thus remains a right, however, the statutory body is obliged to deal with not using this right if it does not make the decision to withdraw from the contract. The statutory body thus needs to examine all required information and thoroughly analyse what is the best course of action to take for the company on which behalf it acts.

For completeness it is necessary to point to other provisions of Commercial Code, specifically paragraph 135 (a) (3) pursuant to which the executive manager is not liable for damage if it is demonstrated that they acted with professional care and in good faith that they acted for the interests of the company, as well as paragraph 194 (7) of Commercial Code which similarly deals with the possibility of clear the board of directors of guilt.

By assessment of advantage, resp. suitability of the contract withdrawal right usage it is necessary to consider the impact of the contract termination on the society and its functioning. For the executive manager or member of the board of directors it should be more important to protect the interests of the commercial company before the interests of the entire society to identify and publish the end users of benefits arising from making business with the state. It is necessary to consider whether the termination of a contract which is irreplaceably necessary for the society to function is not itself in contradiction with the interests of the society and whether it will not cause damage for which the statutory body will be held accountable.

4.2 Contractual Fines by Violation of Obligations Following from Register of Public Sector Partners Act

Taking into account the contract withdrawal right following from Public Procurement Act and Register of Public Sector Partners Act which, however, does not cover all the possible violations of obligations arising in the connection with the Register of Public Sector Partners. In the context of preservation of contractual freedom, it is therefore good to consider the control over meeting the listed obligations, sanctions for their violation, as well as the possibilities to terminate a contractual relationship.

[15] https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1991/513/20160701?ucinnost=17. 11. 2019

To evade the incurrence of liability for a violation of obligations related to the Register of Public Sector Partners it is optimal to demonstrate meeting them in relation to the other contracting party as well. This is practical and appropriate particularly by the control over obligation meeting on the part of individual sub-contractors over which the public sector does not exercise any direct influence and thus, in particular, by extensive contracts with a large group of sub-contractors represent a heavy burden on the public sector's administrative capacities. In this case it is appropriate to move the liability on the contractor themselves who as a contract party answers directly to the public sector. Considering that the majority of contracts shall be concluded pursuant to Commercial Code in order to ensure meeting the listed obligations, it is appropriate to use an ensuring institute.

In connection with this it seems appropriate that the public sector partner who, at the same time, is a contract party shall accept contractual obligation to meet obligations of their sub-contractors. In case of a violation of obligations of the public sector partner it is appropriate to agree upon a contractual ensuring institute like a contractual fine. At the same time, to ensure the settlement of the arranged contractual fine it is also appropriate to arrange the guarantee deposit and the subsequent possibility of offsetting the contractual fine.

In addition to this, it is also possible to agree to other reasons for contract withdrawal than those following from Register of Public Sector Partners Act or Public Procurement Act, as well as from Commercial Code. One of such reasons can also be a violation of obligation to register in the Register of Public Sector Partners.

5 CONCLUSION

The Register of Public Sector Partners is a unique concept to improve transparency for used public funds. Publicity of individual relationship is one of the best tools for public control over management of state property.

By the Register of Public Sector Partners, we can see the aim to provide a complex legal provision which should cover the widest area of social relations possible. From this complex legal provision follows a variety of bilateral liability relationships. At the same time, for different entities there is a variety of sanctions for a violation of individual liabilities.

In spite of the effort to provide complex legislation there are still some areas left uncovered. One of these can be, for example, withdrawal from contract, which is left at the level of possibility, whereas the termination of the contract directly by law would seem to be more effective. Of course, this would have immediate consequences on the public sector, however, it could ensure more consistent adhering to obligations of the Register of Public Sector Partners.

As another problematic area can be seen withdrawal from contract if obligations following from Register of Public Sector Partners Act are violated by a sub-contractor. If the option to withdraw from the contract is not agreed upon before the violation by the contractual partners in the contract, the public sector partner shall need to review whether this violation is a case of a significant violation pursuant to Commercial Code. With taking this into account, as well as to simplify the process on the part of the public sector it would be perhaps optimal to amend as a reason for withdrawal from contract the violation of liabilities following from Register of Public Sector Partners on the part of the sub-contractor as well.

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In conclusion, it needs to be said that individual responsible bodies should consistently impose sanctions as the legislation in cases of a violation of obligations entitles them to.

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CORPORATE CRIMINAL LIABILITY IN TERMS OF ATTRIBUTABILITY CONCEPT[1]

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Abstract: In this paper the authors analyse the introduced model of genuine corporate criminal liability in the Slovak Republic. Genuine corporate criminal liability is described in a more simplified way through the obligatory elements of corporate criminal liability. The authors also focus and conclude on practical reflections about potential excesses in the enforcement of the corporate criminal liability.

Key words: crime, corporate criminal liability, substantial aspects, attributability concept, criminal law, Slovak jurisdiction

1 INTRODUCTION

Corporate criminal liability represents a specific issue in the area of criminal law within the Slovak legal system. Previously, this issue was especially subject to differences in opinions presented in this respect by professional public and these were also reflected in the initial and unsuccessful attempts to introduce the so-called genuine corporate criminal liability during the criminal code's recodification period from 2004 to 2007. Failure to introduce genuine corporate criminal liability resulted in an "experiment" resulting in the introduction of the so-called non-genuine or pseudo-corporate criminal liability. The given legal regulation was refused by the application practice and this has most accurately been evidenced by "zero application" of related legal institutes of non-genuine corporate criminal liability in practice.

As of 1 July 2016, special Act No. 91/2016 Coll. on Corporate Criminal Liability and on Amendments and Supplements to Certain Acts (hereinafter only referred to as "ACCL") came into effect. The given legal regulation derogated the legal institutes of the non-genuine corporate criminal liability stipulated in the Criminal Code and at the same time introduced the model of genuine corporate criminal liability which is based mainly on the basis of "attributability concept".

Dissatisfaction resulting from the disputable and obsolete legal regulation of non-genuine corporate criminal liability was also noticed at a supranational level. The Slovak Republic is a party to OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and being regularly evaluated. In the report prepared in the third phase of Slovak Republic evaluation, it was stated that there is an absence of an effective regulation of corporate

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responsibility vis-à-vis the sanctioning of bribing foreign public officials in international business transactions. According to the evaluation report, the legal regulation of corporate criminal liability contained in the Criminal Code may not be considered as effective and one satisfying the conditions arising out of this Convention of OECD. In fact, the evaluation report referred to the former Slovak legal regulation as the regulation of confiscations in respect of legal entities which is a sanction liability rather than a corporate criminal liability.

With the aim of fulfilling the recommendations pronounced in the evaluation report, it is inevitable to take into account the criteria contained in the evaluation report in the process of drafting new legal regulation thereof. These criteria are described in detail in a material entitled "*Measures Proposed to Ensure the Satisfaction of Recommendations Adopted by OECD Working Group on Bribery in International Business Transactions for the Slovak Republic in Phase 3 of Its Assessment*". The government of the Slovak Republic debated this material and approved it through its resolution No. 137 on 20 March 2013. One of the obligations arising out of the above-mentioned resolution issued by the government was an obligation to submit a Corporate Criminal Liability Bill for a government debate. On 28 August 2015, the Ministry of Justice of the Slovak Republic really submitted Government Bill No. 1751 on Corporate Criminal Liability and on Amendments and Supplements to Certain Acts (hereinafter only referred to the "CCL Bill") for a debate held in the National Council of the Slovak Republic.

The process of drafting the wording of this CCL Bill was not easy and the wording changed several times (e.g. change of corporate criminal liability for all criminal offences set out in the Criminal Code to an exhaustive list of criminal offences). There were divided opinions presented by the professional public during the commenting procedure. Nowadays, we can state that the legislative process was completed on 13 November 2015 and ACCL was published in the Collection of Laws of the Slovak Republic on 25 February and it came into effect on 1 July 2016. After more than a decade, a special Act introducing the so-called genuine corporate criminal liability was adopted and incorporated in the Slovak law. While drafting this Act, the lawmaker was primarily inspired by the Czech legal regulation[2]. Within the article we will focus on its basic aspects and legal institutes in detail further in the text.

2 SELECTED SUBSTANTIAL ASPECTS OF CORPORATE CRIMINAL LIABILITY IN THE SLOVAK REPUBLIC

Act No. 91/2016 Coll. on Corporate Criminal Liability and on Amendments and Supplements to Certain Acts represents a special Act which was incorporated into the basic body of laws regulating substantive and procedural criminal law. In terms of the mutual relationship between this Act and general laws regulating criminal law, i.e. Criminal Code and Act No. 301/2005 Coll. Code of Criminal Procedure as subsequently amended (hereinafter only referred to as "Code of Criminal Procedure"), the ACCL is a *lex specialis* nature. Under Section 1(2) of ACCL, the application of the Criminal Code and Code of Criminal Procedure is subsidiary whereas this Section reads as follows "*…unless provided by this Act otherwise and unless it is excluded due to the nature of a matter, the Criminal Code shall be applicable to corporate criminal liability and to penalties imposed on a legal*

[2] Act No. 418/2011 Coll. on Corporate Criminal Liability and on Procedure against Corporations as amended.

entity and the Code of Criminal Procedure shall be applicable to criminal procedure conducted against a legal entity." General provisions of the Criminal Code and Code of Criminal Procedure which represent *lex generalis* shall apply only where there is no special regulation on the given matter and, at the same time, unless it is excluded due to the nature of a matter. An example of a situation where the provisions of the Criminal Code shall be applied is e.g. the definition of a criminal offence, which is not set out in the ACCL. On the other hand, the provisions of the Criminal Code regulating the prison sentence are not applicable since their application vis-à-vis a legal entity is excluded primarily due to its nature. The subsidiary application of the provisions contained in the Code of Criminal Procedure shall be used e.g. in bringing charges or filing an indictment. However, the provisions of the Code of Criminal Procedure regulating custody shall not be applied since this legal institute may not be applied vis-à-vis the legal entity.

The subject matter of the ACCL includes both substantive as well as procedural aspects of corporate criminal liability and its scope is defined in Section 1(1) which may be divided into three basic areas:

a) introductory provisions and the basics of corporate criminal liability (subject matter of the Act and its relationship to other laws, applicability of the Act, criminal offences committed by legal entities, corporate criminal liability – based on the attributability model, exclusion of criminal liability of some legal entities, defining a legal entity as an offender, accomplice, abettor, criminal liability of a legal successor to a legal entity, effective regret and expungement of criminal record),
b) criminal sanctions (principles applied in sentencing and individual types of penalties) and
c) criminal procedure conducted against legal entities (relation to the procedure conducted for commission of an administrative delict, territorial jurisdiction, notification about the commencement and termination of the criminal procedure, change, winding-up and termination of a legal entity, restrictive and securing measures, acting on behalf of a legal entity in the criminal procedure, defence counsel, examination, closing arguments, final word and provisions on the execution of certain penalties).

Some authors[3] criticize the regulation contained in ACCL for lacking the definition of the purpose of the Act. However, the very source for its inspiration, the Czech legal regulation thereof, does not encompass an explicit definition of the purpose of the Act either. We, though, have to agree with the above-mentioned authors stating that the Czech legal regulation does not expressly contain the definition of the purpose of the Act but this may be implied from its Explanatory Memorandum. However, the Explanatory Memorandum to ACCL does not state, why solely the criminal sanctions imposed on individuals are no longer enough. This Explanatory Memorandum, in its General Part, deals especially with international commitments of the Slovak Republic which call on effective sanctioning of legal entities or it deals with various concepts of corporate criminal or administrative liability. This eventually creates an impression that the purpose of ACCL is not the need to hold legal entities criminally liable and sanction them for committing grave criminal activities but rather to keep the international commitments binding on the Slovak Republic.

There is even no definition of a legal entity contained in the provisions of ACCL. Neither the Criminal Code, nor the Code of Criminal Procedure, nor any other criminal regulations actually

[3] MENCEROVÁ, I., TOBIÁŠOVÁ, L. Možnosti trestnej zodpovednosti právnických osôb pri eliminovaní ekonomickej kriminality v kontexte naplnenia účelu a funkcií trestného práva. In: Bratislavské právnické fórum 2015 [elektronic source], Bratislava: Comenius University, Faculty of Law, 2015., p. 1276 – 285 [CD-ROM].

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contain the definition of a legal entity. A part of the professional public[4] states that the term "legal entity is defined by civil law, commercial law or even administrative law regulations. However, these "non-criminal" regulations do not contain such definition. Pursuant to the provisions of Section 18(2) of Act No. 40/1964 Coll. Civil Code as subsequently amended (hereinafter referred to as the "Civil Code"), the following entities shall be considered as legal entities: associations of individuals or legal entities, purpose-made associations of property, territorial self-governing units or other entities defined as legal entities by an Act. According to the Civil Code, the basic elements of a legal entity are: its name, registered office, the way it was established and the way in which the legal entity acts[5]. These facts can subsequently lead to the determination of the main features of a legal entity, i.e. its organisation, personnel or property base, purpose and own legal personality[6], but the Civil Code does not provide its very definition. According to Lazar[7], the Slovak legal regulation of legal entities represents "*a compromise between the theory of fiction and theory of reality*". Pursuant to the Explanatory Memorandum to ACCL, legal entities represent a legal subject which is different from a natural person and these subjects are created artificially by law which confers on them a capacity to have rights and obligations, to perform legal and unlawful acts and which can be held liable in legal relationships.

3 CONDITIONS GIVING RISE TO CORPORATE CRIMINAL LIABILITY

The introduced model of genuine corporate criminal liability in the Slovak Republic may be described in a more simplified way through the obligatory elements of corporate criminal liability. A criminal offence is committed by a legal entity provided that the following conditions are met cumulatively:

a) a criminal offence set out in an exhaustive list of criminal offences
b) was committed by a natural person in a particular relation to a legal entity
c) for its benefit or on its behalf, as part of or through its activities and it
d) was attributed to a legal entity.

3.1 Criminal offences

Generally, the basic prerequisite for a criminal liability is the commission of a criminal offence. A criminal offence is defined in Section 8 of the Criminal Code as "*any unlawful act that meets the elements set out in this Act, unless this Act provides otherwise.*" Apart from the definition of a criminal offence itself, the Criminal Code further refers to and describes the obligatory elements of a criminal offence and at the same time it establishes a catalogue of criminal offences for the commission of which a subject shall be held criminally liable. One of the obligatory elements of the criminal offence is a subject which also encompass a criminally liable legal entity in addition to a criminally

4 POLÁK, P., BEZÁK, M. Definícia právnickej osoby, ako jeden z predpokladov jej trestnej zodpovednosti. In: Trestná zodpovednosť právnických osôb. Proceedings from an international academic conference held on 12 November 2009, 1st edition. Bratislava: EUROKÓDEX, 2009, p. 141.

5 PATAKYOVÁ, M. et al. Obchodný zákonník. Komentár. Prague: C. H. Beck, 2010, p. 156.

6 LAZAR, J. et al. Občianske právo hmotné, Všeobecná časť. Bratislava: Iuris Libri, 2014, p. 155.

7 Ibid. p. 155.

liable natural person. However, a legal entity is held criminally liable only for those criminal offences which are expressly set out in Section 3 of ACCL. The Slovak Republic has fallen within the group of countries which favour the criminal liability of a legal entity for a closed number (*numerus clausus)* of criminal offences. We believe that the decision made by the legislator to clearly specify the group of criminal offences for the commission of which a legal entity may be held criminally liable was a positive one as far as the foreseeability of law and legal certainty is concerned and it also corresponds to the principle of *nullum crimen sine lege certa* (no crime without specific law). On the other hand, certain criticism has been made by the professional public[8], which considers this exhaustive list of criminal offences to be insufficient and not corresponding to the effort to establish an effective tool to combat the corporate criminality. The given closed number (*numerus clausus*) is a shorter version of a list containing almost 250 criminal offences set out in 12 chapters in the Special Part of the Criminal Code.

The extent of the exhaustive list of criminal offences for the commission of which a legal entity may be held criminally liable was changing during the legislative process and it was narrowed down to the final number (as of 1 July 2016 ACCL has come into effect) of 75 criminal offences stipulated in Section 3 of ACCL from the originally proposed number of 107 criminal offences. The Explanatory Memorandum explains the definition of the catalogue of criminal offences for which legal entities is held criminally liable. Such selection of criminal offences was determined by international commitments of the Slovak Republic arising out of international treaties to which the Slovak Republic is a party and which are binding on it and also by the commitments of the Slovak Republic arising out its membership in the European Union. The Explanatory Memorandum states that individual interests of the Slovak Republic (besides the interests in performing international and EU membership commitments) are represented solely by a narrow group of so-called tax criminal offences, which were added to this exhaustive list due to their nature and experience gained in application practice. Moreover, the Explanatory Memorandum predicts another modification of the catalogue of criminal offences but only with respect to a continuous development of international matters and not as an expression of an interest of the Slovak Republic to combat corporate criminality. As of October 2019, ACCL has been amended three times, with each amendment expanding the range of offenses (35 crimes were added) for which a legal entity can be held criminally liable.

As far as the gravity, forms of causation and types of consequences of criminal offences are concerned, the nature of the catalogue of an exhaustive list of criminal offences is various. This exhaustive list of criminal offences under Section 3 of ACCL for the commission of which a legal entity may be held criminally liable has the following current form:

– illicit manufacturing of narcotics or psychotropic substances, poisons or precursors, their possession and trafficking in them under Sections 172 and 173, spreading drug addiction under Section 174 (Criminal Offences against Life and Limb – Chapter 1 of the Special Part of the Criminal Code);
– human trafficking under Section 179, sexual violence under Section 200, sexual abuse under Sections 201 and 202 (Criminal Offences against Freedom and Human Dignity – Chapter 2 of the Special Part of the Criminal Code);

[8] See also: FEDOROVIČOVÁ, I. *Zamyslenie sa nad redukciou taxatívneho výpočtu majetkových* a *hospodárskych trestných* činov v *návrhu zákona* o *trestnej zodpovednosti právnických osôb*. In: Bratislavské právnické fórum 2015 [electronic source], Bratislava : Comenius University, Faculty of Law, 2015. – p. 1190–1194 [CD-ROM] and PROKEINOVÁ, M. *Ekonomická kriminalita ako jeden* z *dôvodov zavádzania trestnej zodpovednosti právnických osôb*. In: Bratislavské právnické fórum 2015 [electronic source], Bratislava : Comenius University, Faculty of Law, 2015. – p. 1309-1315 [CD-ROM].

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- endangering moral education of youth under Section 211 (Criminal Offences against Family and Youth – Chapter 3 of the Special Part of the Criminal Code);
- embezzlement under Section 213, fraud under Section 221, credit fraud under Section 222, insurance fraud under Section 223, capital fraud under Section 224, subsidy fraud under Section 225, fraudulent bankruptcy under Section 227, induced bankruptcy under Section 228, illegal gambling and wagers under Section 229, illegal lotteries and similar games under Section 229, sharing under Section 231 and 232, money laundering under Section 233 and 234, usury under Section 235, breach of trust by maladministration of estates of another under Section 237, harm done to a creditor under Section 239, preferential treatment of a creditor under Section 240, unauthorised access to computer system under Section 247, unauthorised interference with computer system under Section 247a, unauthorised interference with computer data under Section 247 b, unauthorised interception of computer data under Section 247c, production and possession of an access device, computer system password or similar data under Section 247d (Criminal Offences against Property – Chapter 4 of the Special Part of the Criminal Code);
- unlawful business activity under Section 251, unlawful employment under Section 251a, illegal alcohol, tobacco and tobacco products production under Section 253, breach of regulations governing imports and exports of goods under Section 254, distortion of data in financial and commercial records under Section 259 and 260,damaging the financial interests of the European Union under Sections 261 to 263, insider trading under Section 265, market manipulation under Section 265a, deceitful practices in public procurement and public auction under Section 266 and 267, causing harm to consumers under Section 269, unfair commercial practices against consumers under Section 269a, forgery, fraudulent alteration and illicit manufacturing of money and securities under Section 270, uttering counterfeit, fraudulently altered and illicitly manufactured money and securities under Section 271, manufacturing and possession of instruments for counterfeiting and forgery under Section 272, tax and insurance evasion under Section 276, payroll tax and insurance evasion under Section 277, tax fraud under Section 277a, failure to pay tax and insurance under Section 278, obstruction of tax administration under Section 278a, breach of regulations governing state technical measures for labelling goods under Section 279, (Economic Criminal Offences – Chapter 5 of the Special Part of the Criminal Code);
- endangering public safety under Sections 284 and 285, illegal arming and arms trafficking under Section 294 and 295, establishing, organising and supporting a criminal group under Section 296, establishing, organising and supporting a terrorist group under Section 297, illicit manufacturing and possession of nuclear materials, radioactive substances, highly hazardous biological agents and toxins under Section 298 and 299, endangering and damaging the environment under Sections 300 and 301, unauthorised handling of waste under Section 302, unauthorised discharge of pollutants under Section 302a, breach of water and air protection regulations under Section 303 and 304, breach of plant and animal species protection regulations under Section 305, breach of tree and shrubbery protection regulations under Section 306 (Criminal Offences against Public Safety and Criminal Offences against the Environment – Chapter 6 of the Special Part of the Criminal Code);
- terror under Sections 313 and 314 (Criminal Offences against the Republic – Chapter 7 of the Special Part of the Criminal Code);
- passive bribery under Sections 328 to 330, active bribery under Sections 332 to 334, trading in influence under Section 336, obstructing the execution of an official decision under Section 348

and 349, counterfeiting and altering a public Instrument, official seal, official seal-off, official emblem and official mark under Section 352, smuggling of migrants under Section 355 and 356, (Criminal Offences against Public Order – Chapter 8 of the Special Part of the Criminal Code);
- violence against a group of citizens and against an individual under Section 359, serious threats under Section 360, pandering under Section 367, production of child pornography under Section 368, dissemination of child pornography under Section 369, possession of child pornography and participation in child pornographic performance under Section 370, endangering morality under Sections 371 and 372 (Criminal Offences against Other Rights and Freedoms – Chapter 9 of the Special Part of the Criminal Code);
- terrorist attack under section 419, some forms of participation in terrorism under section 419b, financing of terrorism under section 419c, traveling for the purpose of terrorism under section 419d, establishing, supporting and promoting a movement aimed at suppression of fundamental rights and freedoms under Sections 421, sympathizing with a movement aimed at suppression of fundamental rights and freedoms under Sections 421, production of extremist materials under Section 422a, dissemination of extremist materials under Section 422 b, possession of extremist materials under Section 422c, denial or approval of the Holocaust and crimes of political regimes denial and crimes against humanity under Section 422d, defamation of a nation, race or conviction under Section 423, incitement to national, racial or ethnic hatred under Section 424, apartheid and discrimination against a group of persons under Section 424a of the Criminal Code and inhumanity under Section 425 of the Criminal Code (Criminal Offences against Peace, Humanity, Criminal Offences of Terrorism, Extremism and War Criminal Offences – Chapter 12 of the Special Part of the Criminal Code).

3.2 Natural persons in a particular relation to a legal entity

Defining the range of natural persons who are in a certain relationship to a legal entity (the criminal offences of which are attributed to a legal entity) only represents a formal condition of a corporate criminal liability defining the essence of unlawful conduct of a legal entity through natural persons[9]. The Explanatory Memorandum emphasizes the fact that the formation and existence of legal entities represents a certain legal construction. Therefore, even the way in which legal entities act shall also be constructed by law since the legal entities are legal subjects who do not have any will and are thus not able to act in accordance with such own will and express it externally. Due to the aforementioned reasons, the law stipulates that the action of a legal entity is represented by those expressions of will which are, on behalf of a legal entity, presented by bodies which the legal entity designates or the representatives of a legal entity who are natural persons. According to the nature of a relationship to a legal entity, natural persons may be divided into two groups: (i) natural persons with a certain type of decision-making or supervisory power; and (ii) natural persons with an "ordinary employees" status.

The first group of natural persons stipulated in the provisions of Section 4(1)(a) to (c) of ACCL includes:

a) statutory body or a member of a statutory body;
b) any person who performs supervisory activities or inspection in the legal entity, or
c) another person who is authorised to represent a legal entity or make decisions on its behalf.

[9] ŠÁMAL, P. et al. Trestní odpovědnost právnických osob. Komentář. 1st edition. Prague: C. H. Beck, 2012, p. 173.

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The second group of natural persons is set out in Section 4(2) of ACCL. These natural persons acted as part of authorisations which they were granted by a legal entity. The Bill on CCL in the past contained the definition of this group of people in Section 4(1)(d) stating that they represent any other employee or a person who holds a similar function in performing its work tasks. We believe that such definition could be held and considered as more suitable because we opine that the term "person who acted as part of the authorisation granted to such person by a legal entity" fails to be sufficiently definite and it is currently rather difficult to estimate the extent of the definition of this term in a rather broad range of natural persons who are in a particular relationship to a legal entity.

Naturally, the division of natural persons who are in a particular relationship to a legal entity into two groups is not autotelic. The essence of such division lies in different criteria of possibilities of a legal entity to release itself from criminal liability. Under Section 4(3) of ACCL, a legal entity may be released from criminal liability (by showing that it has a compliance programme in place)[10] only where criminal offences are attributed to natural persons who are employees or persons stipulated in Section 4(1) of ACCL who do not have any governing or supervisory power.

From the practical viewpoint, the legal entity (most of the times we talk about the business corporation) is most often represented by its statutory body.

In terms of Slovak Republic and the representation of the legal entity, the institute of "procuration" is also used very often by the corporations[11]. By means of a procuration, an entrepreneur entitles the proxy to perform all legal acts involved in operating the enterprise, even though a special power of attorney might otherwise be required to perform such acts. Procuration may only be granted to a natural person. The procuration does not authorise the proxy to alienate real estates or encumber them, unless such authorisation is expressly granted by the procuration.

Apart from procuration, Slovak Commercial Code enables the entrepreneur to establish the branch of an enterprise. Pursuant to section 13/5 of the Commercial Code the head of a branch of an enterprise or the head of a foreign person's enterprise who is entered in the commercial register is entitled to undertake any legal acts relating to such branch or enterprise on the entrepreneur's behalf. In these abovementioned situations, we talk about the natural persons that are enlisted and registered within the respective commercial register. Such registration within the commercial register gives them the authorization to act on behalf of the company.

Private law in Slovakia is not based on the concept of "ultra vires" doctrine. This means that event though the statutory body exceeds the scope of the subject of entrepreneurial activity, entrepreneur shall be bound by the conduct of persons exercising the authority of the statutory body.

Apart from this, the Slovak law enables also other natural persons (mostly employees) to act on behalf of the legal entity without the necessity of the written authorization. The Commercial Code stipulates[12] that any person entrusted with performance of a certain activity in the operation of an enterprise is entitled to undertake all acts usually involved in the course of such activity. If a person exceeds the powers conferred on him/her under the previous sentence, the legal entity shall only be bound by such conduct if a third party was not aware that such person had exceeded his/her powers and, in the light of all the circumstances of the case, could not have been aware that such person had exceeded his/her powers.

[10] For further information see KURILOVSKÁ, L., KORDÍK, M. Intragroup compliance agreement as a tool to manage the risks in the daughter company. In: Enterpreneurship and sustainability issues č. 4 (2018), p. 1008 – 1020.

[11] Section 14 of an Act No. 513/1991 Coll. Commercial Code as amended.

[12] Section 15 of an Act No. 513/1991 Coll. Commercial Code as amended.

As we can see from the abovementioned section 15, the Slovak law is very wide when it comes to the possibility of the representation of the legal entity by the persons not being registered in the commercial register, potentially being the employees or other persons empowered to act on behalf of the entrepreneur. The person shall also be empowered to act and perform the activities that are the activities related to the operation of an enterprise.[13] The Supreme Court of Czech Republic[14] stipulates that the authorization is not unlimited though, it entails usually involved activities in the course of such activity and such "usualness" shall be determined objectively, irrespectively and independently from its definition in the intragroup documents and regulations.

Furthermore, such rule entailed in the Section 15 of the Commercial Code is strict and the entrepreneur cannot exclude its general applicability.[15] Slovak Supreme Court stipulated that the internal directives are not eligible to limit the capacity of such empowered persons to act on behalf of the entrepreneur.[16]

Finally, the Slovak Commercial Code goes even beyond the abovementioned and stipulates that the entrepreneur is also bound by the conduct of other persons in the entrepreneur's business premises, provided that a third party involved could not have been aware that the said person was not entitled to conduct him/herself in such a manner.[17]

3.3 Criminal offence committed by a legal entity for its benefit or on its behalf, as part of or through its activities

According to the Explanatory Memorandum, another prerequisite giving rise to criminal liability is the existence of a causal link between the interest of a legal entity, acting on its behalf, activities carried on by a legal entity (irrespective of the fact whether it carries on an activity for which it has been granted permission or which is registered in a respective register as its official business activity) or the fact that a legal entity only acts as a tool utilised for committing criminal offences and the unlawful conducted of a natural person who is in a particular relationship to a legal entity. However, the legislator does not further specify the assessment of such criteria and we believe that the assessment of cases of holding a legal entity criminally liable is especially disputable in connection with criminal offences committed in its interest when a criminal offence will be committed by its employee acting primarily in his/her interest. The Czech specialist literature defines these alternatively set out conditions as a corrective which shall prevent a legal entity from being held criminally liable for excesses of natural persons who are in a particular relationship to a legal entity. On the other hand, the definition of given conditions or objective elements is broad enough also in ACCL to enable the sanctioning of a legal entity without a broad interpretation.[18]

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13 See the decisions of the Supreme Court of the Czech Republic, case no. 32 Odo 766/2003, 32 Odo 1352/2005, 23 Cdo 3568/2009, 32 Odo 1455/2005 available at www.nsoud.cz.

14 Decision of the the Supreme Court of the Czech Republic, case no 29 Odo 569/2002 available at www.nsoud.cz.

15 Decision of the the Supreme Court of the Czech Republic, case no 32 Cdo 1161/2008 available at www.nsoud.cz.

16 Decision of the the Supreme Court of the Slovak Republic, case no. 5 Obo 17/2000.

17 Section 16 of the Slovak Commercial Code.

18 KALVODOVÁ, V.: Vybrané aspekty sankcionování právnických osob. In JELÍNEK, J. et al. Trestní odpovědnost právnických osob v České republice: Bilance a perspektivy. 1st edition. Prague : Leges, 2013, p. 231.

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3.4 Attributability

Attributability is a basic aspect of one of the ways how corporate criminal liability may be understood. According to Heine's classification, this way of understanding corporate criminal liability means that the liability for criminal offences is attributed to a legal entity. *Activities* (but not only activities or unlawful activities, but a criminal offence, i.e. all of its obligatory elements, are attributed to a legal entity – authors' note) *of a certain group of people who are in a required relationship to a legal entity* (master and servant) *shall thus be attributed to a legal entity*. Such legal provision defeats the argument that a legal entity cannot carry on culpable activities since it does not have its own will. Culpable activities are attributed to a legal entity (among other things) from a natural person who is in a particular relationship to such legal entity (both in case of natural persons having certain decision-making or supervisory powers or in case of "ordinary employees").[19] There is no express definition of attributability in ACCL (the Bill on CCL contained such definition in Section 4(2), but such provision was left out at the end of the legislative process). However, the Explanatory Memorandum states that the genuine corporate criminal liability model is based in our legal system on the concept of attributability. Attributability, likewise a natural person, is artificially created by law and represents a primary and essential element of genuine corporate criminal liability in the Slovak Republic. Furthermore, it represents one of the obligatory conditions giving rise to corporate criminal liability.

An important difference between the legal regulation contained in ACCL and the Czech legal regulation lies in an institute contained in Section 4(3) of ACCL which established a corrective element in respect of corporate criminal liability. According to the Explanatory Memorandum, the given subsection regulates a material corrective in respect of holding a legal entity criminally liable for unlawful conduct of a person having an "ordinary employee" status which was caused solely by the fact that a legal entity did not satisfy its statutory obligations in supervising and inspecting its employees.

Such criminal offence will not be attributed to a legal entity if the significance of not complying with these obligations is minor given the business activities carried on by a legal entity, the form of committing the crime, its consequences and circumstances under which it was committed. We believe that such change is very positive and may help legal entities release themselves from criminal liability in cases when a legal entity would be held criminally liable for a criminal offence committed by an employee in a very strict way.

The last circumstance which is not referred to as an individual condition giving rise to corporate criminal liability is the issue of a subject of a criminal offence where such subject is a criminally liable legal entity. As we have already mentioned earlier, ACCL does not contain any definition of a legal entity. However, in its Section 5, ACCL regulates its personal applicability and defines the range of legal entities which are exempted from its applicability (a so-called exemption based on substantial law). The given range of legal entities is completely unpunishable and includes the following: a) the Slovak Republic and its authorities, b) other states and their authorities, c) international organisations established under international public law and their authorities, d) municipali-

[19] According to *Heine's classification*, other ways of understanding corporate criminal liability are: (i) *original liability of a legal entity for criminal offences*; (ii) *liability of a legal entity* (taking the form of *strict liability* or *absolute liability*) a (iii) *mixed models*. See: HEINE, G. Unternehmen, Straftrecht und Europäische Entwicklung. Österreichische Juristen-Zeitung, 2000, No. 23-24, p. 817.

ties and self-governing regions, e) legal entities which, at the time of commission of the criminal offence, were established by operation of law, f) other legal entities in a debt whose financial affairs cannot be settled pursuant to the special law governing bankruptcy proceedings[20]. The Explanatory Memorandum explains this exemption by stating that these subjects directly carry out of perform the duties of the State or state administration or they were established by operation of law. Such group also encompasses foreign states and international organisations which arises out of and corresponds to international commitments of the Slovak Republic.

As for the fact that the ACCL has been effective for more than three years, we also analysed the decisions of the courts adopting the relevant measures against the legal entities and imposing the sanctions against the legal entities. We tried to focus on the concept of attributability that should be entailed within the respective court decisions[21]. However, our research showed that the judges did not expressly stipulate the aspects of attributability of the acts of natural person to the legal entity. In most of the decisions, it was solely mentioned that such person is for instance the statutory body of the company and no other test of attributability was made by the judges.[22]

4 CONCLUSION – PRACTICAL REFLECTIONS ABOUT POTENTIAL EXCESSES IN THE ENFORCEMENT OF THE CORPORATE CRIMINAL LIABILITY

Finally, in the last chapter of the article we try to analyse the potential practical situations and pitfalls occurring during the business operation of the company that might result into the criminal responsibility of the company.

First pitfall occurs in the situation when the company is run by two executive directors that are entitled to act on behalf of the company independently. One of the executive directors is the executive director responsible for the tax and financial operations, the other one handles the day-to-day operations of the company. In such set-up the pitfall occurs when the executive director responsible for taxes himself (or by binding instruction given to the employee) orders not to pay the company's due taxes. Such his motivation is enhanced by the fact that he will use such money (that were supposed to be used for tax payment) for his own personal interest and leaves the country to the Caribbean country not cooperating in the process of extradition.[23]

In such situation the executive director committed the crime named as failure to pay tax and insurance under Section 278 of the Criminal Code. However, in such situation the crime is com-

[20] The only exception within the meaning of section 5(2) of ACCL are those legal entities in which these subjects hold a share. These legal entities may be held criminally liable for a criminal offence committed. These legal entities represent namely business organisations in which the State or its self-governing units hold a share.

[21] For the specifics of application of ultima ratio principle in the courts decisions see HAMRANOVÁ, D.: Aplikácia princípu ultima ratio v rozhodovacej praxi. In: Justičná revue. Roč. 69, č. 6-7 (2017), p. 823 – 832.

[22] Decision of the Specialized criminal court in Banská Bystrica, case no. 4 T/28/2018, dated 19. 09. 2018, and the Decision of the Specialized criminal court in Pezinok, case no. 2 T/33/2018, dated 23. 10. 2018, and the Decision of the Supreme court of Slovak Republic, case no. 6Asan/1/2017, dated 21. 02. 2018, and the Decision of the Supreme court of Slovak Republic, case no. 6To/7/2017, dated 30. 01. 2019, and the Decision of the Supreme court of Slovak Republic, case no. 1TdoV/1/2017, dated 29. 05. 2018 m and the Decision of District Court Žiar nad Hronom, case no. 1 T/44/2019, dated 25. 04. 2019, and the Decision of District Court Trebišov, case no. 7 T/122/2018, dated 30. 11. 2018

[23] See STRÉMY, T. Tax crimes committed in the Slovak Republic in context of the European Union. In: Cross Border Colloqium in Bratislava "Criminogenic, Criminal, and Criminalized Movements Across Borders.

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mitted by a natural person in a relation to a legal entity (executive director), and for its benefit or on its behalf, as part of or through its activities and it is attributable to a legal entity. This means that such crime is attributable to the company and that company will be punished for such crime even though it is evident that the company does not profit from such situation and that such situation occurred due to the excesses of the executive director.

Even though there is a stipulation in the Section 4/3 of ACCL that says that the criminal offence will not be attributed to a legal entity if the significance of not complying with the obligations is minor given the business activities carried on by a legal entity, the form of committing the crime, its consequences and circumstances under which it was committed; such "whitewash procedure" is not applicable for the executive directors of the companies. This results into the fact that the company will be punished even though it does not benefit from such committed crime, moreover the company is hurt financially by such crime attributable to the company.[24]

Such situation is seen as rather severe from our opinion.

Another question arises in the situations when the so-called "shadow director"[25] instructs the company to act and perform such activities that result into committing the crime. One the one hand, the law[26] stipulates that such a person is particularly obliged to act with professional care in accordance with the interests of the company and all shareholders/members thereof and when breaching such obligations, they shall hold the same liability as the statutory body or a member of the statutory body. On the other hand, such stipulation is not applicable for the "shadow directors" in the terms when committing the crime by the company when instructed to do so by the shadow director. If the company does not reveal the identity of the shadow director (for example due to the fact that such shadow director has important contacts in the business sphere) and the criminal authorities do not reveal his impact on the company's acts, then he will not be punished for the crimes that he instructed the company to commit. Only the company will be responsible for such crimes. Moreover, if we imagine that the crime committed by the company (instructed by the shadow director as stipulated hereinabove) causes the bankruptcy of this company and maybe also the bankruptcy of other companies that are the creditors of the company, the shadow director should have been persecuted for the crime of induced bankruptcy that has really bad impact on the economic environment.

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[24] For the specifics of court decisions related to the position of executive directors before insolvency courts and courts, see MIKUŠ, Š., BARTALSKÁ, K. Konateľ v spleti insolvenčného konania v právnej teórii obchodného práva a aplikačnej praxi konkurzných súdov. In: Policajná teória a prax. 2018.

[25] The person who exercises the powers of the statutory body or member of the statutory body in actual fact without having been appointed or designated to perform such function also has the obligations of a mandatary.

[26] Section 66/7 of the Commercial Code.

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THE INTERESTS OF DEVELOPING COUNTRIES IN THE CONTEXT OF THE OECD/ G20 LED INTERNATIONAL INCOME TAX INITIATIVES

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Abstract: There has been growing concern about the erosion of sovereign country tax bases internationally.[1] This concern has been particularly prominent since the Global Financial Crisis (GFC). The below paper contextualises the OECD/ G20 tax initiatives and considers the issues that developing countries need to carefully consider in weighing up their commitment and support for these initiatives.[2]

Key words: International tax, tax and development, tax competition, legal complexity

1 FOCUS ON MULTINATIONALS AND THEIR STRUCTURES

The key area of concern that has attracted attention in respect of international taxation is the tax paid by corporate groups or multinational enterprises. It is thought that the use of complex structures and related transactions by these taxpayers allows them to avoid paying a fair amount of taxation in the countries in which they are actually carrying out their activities.[3] At the heart of this issue are problems in relation to transfer pricing on transactions between individual members of the corporate groups and their associates.

It has long been an issue that the different national tax laws of countries may allow opportunities for taxpayers to arbitrage and achieve beneficial outcomes. This issue actually has several dimensions. First, there are unintended gaps in the system created by the combination of the myriad substantive tax laws of sovereign nations together with the network of international treaties. These gaps can be exploited by taxpayers. Second, there can be a lack of information on what is happening in other countries that may allow taxpayers to mislead revenue authorities as to what has occurred overseas. Third, there are genuine differences in tax rates and tax treatment in different countries that are not unintended gaps but may still be arbitraged by taxpayers. Finally, there are genuine differences in tax treatment that have been specifically designed to attract business and investment to the specific country.

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1 US concern was originally shown in 2007 when a Report to the US Congress entitled "Earnings Stripping, Transfer Pricing and US Income Tax Treaties".

2 An early version of this paper formed an unpublished private report to the United Nations.

3 For a government response in Australia: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance.

2 IT IS NOT JUST ABOUT TAXPAYERS – STATES HAVE DIFFERENT INTERESTS

In addition to the above, it is not the case that transfer pricing and allocation of income issues are only about taxpayer arbitrage. Another issue of major significance is the allocation of income between countries even when the taxpayer has nothing to gain or lose in the allocation.[4]

For example, assume two countries have a comprehensive tax base and a rate of 30% and a subsidiary in one country is paying a royalty to its parent in the other country. In these circumstances, it makes no difference to the taxpayer group if the country where the subsidiary is based taxes the royalty as the parent country will tax any amount not taxed by the subsidiary country. The total tax between the two countries will be the same. However, it makes a difference to the countries as the subsidiary country gets the tax to the extent that it imposes it.[5] Therefore the two countries have an interest in the transfer price of the royalty. They also have an interest in whether the subsidiary country is able to tax the royalty under a Double Tax Agreement (DTA).

This later concern is reflected in the differences between the OECD Model Tax Convention and the UN Model Tax Convention.[6] The former seeks to prevent source country taxation of royalties paid while the latter allows such taxation. This issue is an example of the tensions between states that underpin international tax debates as states compete for tax revenue in relation to international transactions. This tension is not always acknowledged in the current debate.

3 FOCUS OF CURRENT DEBATE

Much of the focus in the current debate has been on the taxing rights of consumer countries as these have been seen to be reduced.[7] It is argued that technology allows the sale of products to consumers without triggering a tax liability in the consumer country.[8] This may be because the use of technology means that a permanent establishment can be avoidable. There is also the concern that artificial arrangements are avoiding a permanent establishment in consumer countries and thereby avoiding tax there.

3.1 OECD and G20 response and its origin

The OECD has reacted to the concern about international tax avoidance. Concern was originally heightened in 2007 when a Report to the US Congress entitled "Earnings Stripping, Transfer Pricing and US Income Tax Treaties". This report has been added to by further US initiatives and studies in

4 Thus the double tax agreement between the United States and Australia was subject to lengthy negotiation despite both countries having high tax rates and comprehensive tax bases. This common situation shows that state to state economic interests are as much a part of Transfer pricing and Double Tax Agreements as the interests of taxpayers versus states.

5 The less tax paid in the originating country, the more paid in the destination country.

6 See introduction in: United Nations (2011) *United Nations Model Double Taxation Convention between Developed and Developing Countries* United Nations.

7 An example of numerous media reports on Starbucks: LAUERMAN, J. Starbucks Paid 2.8% Effective U.K. Tax Last Year, FT Reports [online]. Available at <https://www.bloomberg.com/news/articles/2018-09-19/starbucks-paid-2-8-effective-u-k-tax-last-year-ft-reports>. [q. 2019-11-10].

8 Google has attracted a lot of media attention in this respect: https://www.theguardian.com/technology/2019/jan/03/google-tax-haven-bermuda-netherlands.

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2010 and 2012 showing the tax incidence of multinationals and its relationship to transfer pricing and other strategies.

In 2014, the European Commission entered the debate by commencing investigations into the tax affairs of Apple, Starbucks, Fiat and Amazon. The Commission's work is ultimately limited to seeing whether the tax practices of certain countries constitute unjustifiable State Aid. However, the investigations themselves have added to the international concern. The publicised investigations and actions of the UK HMRC in relation to Amazon, Google and Starbucks since 2012 have also attracted significant international attention and concern. It has been strongly argued that they have not paid sufficient taxation in the UK.[9]

3.2 The OECD and worldwide tax generally

The OECD has had significant involvement in international tax co-ordination for decades. Most notably, it publishes a widely adopted model tax treaty with accompanying commentary which is being referred to more and more internationally.[10] There is no doubt that the OECD work has had worldwide influence in both developed and developing countries and it has increasingly been seen as a source of authority in international tax matters generally.[11]

At the same time, it is clear that OECD initiatives may place the interests of its developed member states first if these conflict with other states. The primary example of this is the preference given to residence state rights over source state rights in the OECD Model Tax Convention. Residence state rights will traditionally favour capital exporting countries.[12] The United Nation's Model Tax Convention explicitly counters this aspect of the OECD Model by increasing source state rights. Other than this, the UN Model is structurally very similar to the OECD Model.

3.3 The BEPS Project

In the context of the concerns about international taxation, the Los Cabos G20 Leaders' Summit tasked the OECD with working to tackle the problem in 2012. The problem was now named Base Erosion and Profit Shifting or BEPS. The 2013 OECD Ministerial Council Meeting adopted the Declaration on BEPS. Following this and a request of the G20 Finance Ministers, the BEPS action plan was launched and fully endorsed in September 2013.[13]

The action plan sets out to tackle a number of areas or actions as noted below:

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9 Example of typical media attention: VERRENDER, I. Document reveals tax multinationals should pay [online]. Available at <http://www.abc.net.au/news/2015-05-04/verrender-document-reveals-tax-multinationals-should-pay/6441558>. [q. 2019-11-10], also BARFORD, V., HOLT, G. Google, Amazon, Starbucks: The rise of 'tax shaming' [online]. Available at <https://www.bbc.com/news/magazine-20560359>. [q. 2019-11-10].

10 OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*. OECD Publishing, Paris, available at < https://doi.org/10.1787/mtc_cond-2017-en>. [q. 2019-11-10].

11 COCKFIELD, A., J. The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges. In 8 Yale J.L. & Tech, 2006.

12 For an early review of this issue see: IRISH, C., R. International Double Taxation Agreements and Income Taxation at Source. In The International and Comparative Law Quarterly, Vol. 23, No. 2 (Apr., 1974), pp. 292-316.

13 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.

- Addressing the challenges of the digital economy. This action is based upon the idea that the digital economy allows taxpayers to escape taxation in the countries in which they do business.[14]
- Neutralise the effect of hybrid mismatch.[15] The issue with this is that the different definitions of taxpayer and related issues can allow double non-taxation or multiple deductions for a single outlay due to the fact that different tax systems are not well reconciled with one another.
- Strengthen Controlled Foreign Company (CFC) rules.[16] CFC regimes return income to the parent company on an accruals basis prior to it being paid as a dividend. This allows it to be fully taxed in the home country.
- Limit base erosion via interest deductions and financial payments.[17] Payments of interest and related amounts can strip profits from a source country as the payments are usually fully deductible but only subject to a lower withholding tax in the hands of the recipient.
- Counter harmful tax practices taking into account transparency and substance.[18] This action point is premised on the idea that certain countries' tax regimes are harmful to others. The basis for this argument is that the incentive regimes in these countries are designed to facilitate the base erosion of other countries for the financial benefit of the first country. This action point looks at countering these practices, particularly when there is a lack of economic substance in what they encourage. The action point also seeks to generate information about the regimes to allow other countries to take counter measures.
- Prevent treaty abuse.[19] Treaty shopping is the idea that certain countries are used in international tax arrangements to simply take advantage of their treaties. Such treaty shopping is thought to be undesirable.
- Prevent artificial avoidance of permanent establishment status.[20] The PE rule is a well-established principle that does not allow a source country to tax business profits unless there is a PE in the country. The idea being that without a substantive presence in the country, taxation is undesirable. It is however thought that certain taxpayers who do effectively have a substantive presence have avoided having a PE in the country through particular practices.
- Assure transfer pricing outcomes are in line with value creation.[21] These three action points seek to tackle the use of intangibles to shift value to low tax jurisdictions. They plan to do this by assuring that the value associated with an intangible is located where it was created and not where the property is simply registered. The action points also deal with other aspects of the complex area of transfer pricing.
- Establish methodologies to collect and analyse data on BEPS and actions to address it.[22] This point is all about information gathering between countries and ways to analyse it.
- Require taxpayer disclosure of aggressive tax planning arrangements.[23] This point seeks to force disclosure of more information by taxpayers.

14 This is Action 1 see page 14, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
15 This is Action 2 see page 15, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
16 This is Action 3 see page 16, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
17 This is Action 4 see page 17, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
18 This is Action 5 see page 18, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
19 This is Action 6 see page 19, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
20 This is Action 7 see page 19, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
21 Transfer pricing is the subject of Actions 8, 9 and 10 see page 20, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
22 This is Action 11 see page 21, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
23 This is Action 12 see page 22, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.

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- Re-examine transfer pricing documentation.[24] This action will involve significantly more documentation including country by country reporting that will allow revenue authorities to see what has been done internationally.
- Make dispute resolution mechanisms more effective.[25] This is a reference to disputes that may arise between tax authorities in relation to a taxpayer as much as it is about a dispute between a taxpayer and a tax authority.
- Develop multilateral instrument to deal BEPS initiatives and modify bilateral treaties.[26] This initiative has already triggered a multilateral instruments that has been supported by many jurisdictions to some extent.

Since the 2013 there have been a number of other developments in the project. Most notably there has been very significant progress with the multilateral instrument that has not only been developed but signed and implemented by many states. In addition, the detailed actions reviewed above were finalised in 2015 and the OECD/G20 Inclusive Framework on BEPS was established in 2016. This Framework met in May 2019 in Paris and included 289 delegates from 99 member jurisdictions and 10 observer organisations.[27]

4 THE OECD MEMBERS, DEVELOPING COUNTRIES AND BEPS

OECD members and BEPS Associates have been heavily involved in working toward a consensus on the various action points of the OECD plan. The BEPS Associates are non-OECD members who are high growth economies. They include only two non-G20 countries being Columbia and Latvia. A further 18 countries have been involved in the detailed discussions since January 2015 according to the Australian government report.[28] The OECD reports a higher involvement.[29]

There has been a significant degree of consensus in relation to the desirability of the solutions to the problems highlighted in the action points. These cover a number of areas of tax law mismatch that create unintended tax opportunities such as multiple deductions for the same economic outlay as well as harmful tax practices and anti-treaty shopping. There is also a significant focus on transfer pricing to ensure that profits are genuinely allocated to the place of value creation. There is also a focus on mechanisms for gathering and sharing of information and the settlement of disputes.

The OECD has been careful to show that the work it is doing is being done with the involvement of developing countries and is also for their benefit. Their summary in the FAQ about 'Developing Countries' on their site is a good indication of this.[30]

The project was clearly initiated by wealthy developed countries in relation to concerns that they have. This has been outlined above. Most of the substantive input and practical work has also been done by these same countries. However, it is clear that the input of developing countries has also

24 This is Action 13 see page 23, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
25 This is Action 14 see page 23, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
26 This is Action 15 see page 24, OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
27 OECD/G20 Inclusive Framework on BEPS Progress report July 2018 – May 2019.
28 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Report%20part%201/c04.
29 See: http://www.oecd.org/tax/developing-countries-and-beps.htm.
30 See from paragraph 101: http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm.

been sought and received. There has also been some attempt to articulate the particular concerns of developing countries.

The OECD has made it clear that BEPS is as much a problem for developing countries as it is for developed countries. This has been echoed by the contribution of developing countries to BEPS stating how they are impacted by BEPS. The OECD has also shown how its assistance with capacity building in developing countries has helped raise revenue and how it can assist revenue authorities in dealing with the challenges of the BEPS initiatives.[31]

5 ANALYSIS – WHAT'S AT STAKE FOR DEVELOPING COUNTRIES IN THE GREAT TAX DEBATE

5.1 The Common Ground

It is certainly true that developing countries can be significantly impacted in a negative manner by taxpayers who engage in BEPS. The concerns about the activities of multinational enterprises avoiding the payment of a reasonable amount of taxation in relation to their in substantive business activities in various countries is as real for developing as it is for OECD members.

Notably, countries in the Asia Pacific region that have attracted significant foreign investment in productive industries have long complained that they have been unable to ensure a sufficient taxation take in relation to the operations of foreign interests in their country.

This has been a notable concern in countries such as China and Vietnam where foreign operations continue to operate for extensive periods and yet have continued to report losses in relation to their operations in the country.[32]

Tax authorities in these countries have felt unable to ensure a reasonable amount of taxation is paid and have been unable to deal with the transfer pricing practices of foreign investors and foreign companies. Countries such as China have been investing significant efforts to help them deal with this form of base erosion with mixed results. Other countries may not have the resources even to make China's efforts.

It is for these reasons that transfer pricing has been highlighted as a major concern of developing countries in the context of BEPS.[33] At the same time it must be noted that these countries find that they are unable to deal with the administrative challenge of MNEs transfer pricing assertions. This is because they have limited resources.

5.2 Points of difference – the integrity of the base versus shifting the base

On the above basis, it is clear that the OECD assertion that developing countries are as much concerned about BEPS as developed countries is fair. However, there are some differences in the situation that are not necessarily clear on the face of this simple assertion.

31 See: https://www.oecd.org/ctp/tax-global/developing-capacity-in-beps-and-transfer-pricing.pdf.

32 LIN, B., LU, R., ZHANG, T. Tax-Induced Earnings Management in Emerging Markets: Evidence from China. In The Journal of the American Taxation Association, Vol. 34, No. 2, 2012), pp. 19 – 44.

33 See: https://www.oecd.org/ctp/tax-global/developing-capacity-in-beps-and-transfer-pricing.pdf.

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The first point is that much of the concern in relation to the now notorious cases of Google, Amazon and Starbucks is concern from the perspective of the consumer nation. The public outrage has been largely based on the idea that these companies make large profits in developed consumer nations but pay very little tax in them.

This concern is actually different to the concern outlined above in relation to countries such as China and Vietnam where the activity being carried out in the country is more likely to be a physical productive process.

Noting this difference is critical as it highlights that while in broad terms the concerns are both labelled BEPS and transfer pricing, they are in fact different. The problem in the case of the developing countries is about administering effectively a tax base that is well established in international tax. The place of production has long been a place that is accorded the right to tax. While transfer pricing principles support this claim, these countries have found that they simply do not have the resources and capacity to enforce their tax claim or deal with the transfer pricing contentions of relatively powerful taxpayers.

In addition, if the relevant transfer pricing dispute involves two different countries' authorities, the lack of resources and capacity of the less developed country will also be a significant disadvantage in this same debate.

The concerns of the developed consumer nations in this area are actually quite different. The location of the customer has never been the basis for a significant income tax claim in international taxation. The conducting of a substantial sales effort in a country has allowed a tax claim on the basis that this sales effort means you are conducting part of your business in that country. This is, of course, linked to the location of the customer but it is not the same thing as the customer. Even when substantial sales activity has occurred in a country, this has only allowed part of the international profit to be taxed in that country.

Modern technology and communications have allowed more products and services to be provided to consumers without conducting sales activities in the country of the consumer. This has given rise to the phenomenon where it can be argued that a large amount of money is being made from the consumer country but very little tax is being collected in that country. However this conclusion is not as outrageous as it appears in the context of the above discussion.[34]

There may be some debate as to what constitutes conducting a sales activity in a country in view of modern technology. For example, is an online advertisement in the consumer country where it is viewed or not? However, notwithstanding this debate, it is clear that the providers of certain goods are simply not conducting business in the country where there consumers are.

In this light, at least some of the motivation behind the push for change in the BEPS process is to increase the income taxing rights of countries with large and valuable consumer populations.

5.3 Evaluating the push towards the consumer state

A push to change income taxation principles and increase the rights of the country that holds the consumer must be carefully evaluated from the perspective of the developing states.

As noted above there is always competition for taxation by the different states touched by international transactions. In international tax the source taxing right is generally allowed first before

[34] SHARKEY, N. Taxing at the source is fair in law, so why not in practice? [online]. Available at <https://theconversation.com/taxing-at-the-source-is-fair-in-law-so-why-not-in-practice-46597>. [q. 2019-11-10].

the residual claim. The latter is often residence but it might be a residual source component. Thus a company resident in country A may manufacture in Country B and the goods may be sold to consumers in Country C or back in Country A. Tax taken by a consumer state on the basis of 'source' will be tax that cannot be collected in country of production.

In this light, a change to enhance the taxing right in the consumer state may come at the cost of the revenue take in the production state. Given this, those states that are the 'factories of the world' should be conscious of the risks inherent in the current BEPS debate. As these countries are often developing, their voices may not be heard as well as they should be.

It should be noted that taxation in a consumer state is likely to impact the economic success of enterprises in the productive state when such states are not seeking to tax. This is because the consumer state taxation will increase the cost of their products to consumers or reduce profits margins.

Of course, not all developing countries are in this position and those with valuable consumer markets may share the concerns of the developed countries. China, for example, has a growing middle class consumer market.

6 COMPLEXITY AS A CORE PROBLEM FOR THOSE WITH FEW RESOURCES

Returning to the BEPS related concerns of developing countries, the issue of tax complexity needs serious consideration.[35] Above it was noted that developing countries do have concerns over BEPS even though they are not identical to those of developed countries.

In the case of developing countries, the concerns around transfer pricing are significantly based upon their ability to technically deal with complex transfer pricing rules. This is because they do not have the technical expertise and wider capacity to enforce transfer pricing rules correctly.

In addition, by their nature, transfer pricing positions are open to argument and contesting. Which broad method is most appropriate depends on a number of factors. Which comparables are available and which are appropriate creates difficulty. The typification of the nature of the local enterprise is arguable and subject to available information and arguments.

While the challenges exist for all revenue authorities and taxpayers, there is no doubt that in areas of high complexity and specialist knowledge, the contest is always in favour of those with more expertise, more data and more resources generally. A small company in a transfer pricing argument with the IRS of the United States is in a much weaker position in arguing its case successfully than a multinational is against the revenue authority of a developing country.

While there is merit in the position that transfer pricing is neutral, it is actually something that is significantly and inherently open to argument and dispute. Disputes favour the well-resourced and, as noted above, disputes in the area may be effectively between states as much as between states and taxpayers.

In this context, the BEPS project led by the OECD also needs to be carefully evaluated by the developing world.

The initiatives being pursued to gather more information and have country by country reporting etc., promise much to lesser resourced tax authorities of the region. If these initiatives provide

[35] See James, Simon, Sawyer, Adrian, Budak, Tamer (Eds.) (2016) *The Complexity of Tax Simplification* Palgrave.

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valuable information on the true nature of multinational enterprises' international activities, it may assist in determining proper transfer pricing allocations to these countries. Similarly, if foreign tax authorities are obliged by these initiatives to work with the developing countries tax authorities, it will also have positive results.

However, there are also significant risks in the process for developing countries. Most notably, it has already been shown that the inherent complexity of transfer pricing rules fuel disputes due to the contestable positions stakeholders can take. A number of the refinements to transfer pricing and wider international tax concepts that are being pursued through the BEPS project are highly complex and will simply make the problem faced by those with fewer resources worse.

Essentially a core problem faced by developing countries at present is their lack of capacity to deal with the complexity of the current rules. A number of the initiatives being pursued to 'improve' the current rules are actually adding to their complexity. When the problem is encapsulated as one of complexity, more complexity cannot be a solution.

The OECD has noted the issue that developing countries have with the complexity of the current rules and administrative capacity. They acknowledge the issue but suggest that the solution is raising capacity. This solution seems far less realistic than an alternative which would be to simplify the rules to allow ease of administration.

As a wider part of this issue, the developing world has to be cautious that the OECD project does not raise unreasonable expectations of what might be administratively feasible for the countries of the region.

The core problem is however that the system may ultimately benefit the better resourced taxpayers and countries in the international contest for tax revenue. It may also institutionalise a system of taxation that disadvantages the developing world and impugns on its sovereignty to depart from the prescribed methods of taxation.

7 TAX COMPETITION AND LOW RATES

A number of the actions of the OECD BEPS project seek to challenge the attraction of business, income and investment to particular states through their tax regimes. This may be through generally low tax rates such as those in Hong Kong or Singapore for example. It may also be through specially designed incentives that seek to attract particular investment or business. This is a complex issue with significant consequences that should be considered very carefully by developing countries.

The debate around tax havens, low tax jurisdictions and incentives has never been clear cut.[36] On the one hand, it can be argued that countries that seek to be tax havens are bad and that the world should work towards neutralising their impact. The argument is that these countries or regimes simply exploit a weakness in other countries' tax laws in order that they may make some revenue out of fees, minor taxes or the creation of some local work.

Ways that the impact of these regimes is neutralised include: through CFC rules, more sophisticated transfer pricing rules, general anti-avoidance rules, anti-treaty shopping rules and similar methods.

[36] John Douglas Wilson, Theories of Tax Competition *National Tax Journal* Vol. 52, No. 2 (June, 1999), pp. 269 – 304 (36 pages).

On the other hand is the argument that it is perfectly reasonable that countries may seek to competitively attract international capital and business by offering the most desirable location and one key factor is a good tax environment with low rates.

The argument is that if a state like Singapore can attract international business and capital through its excellent resources and low tax rates, then why should it not. In addition, if such a state seeks to give up higher amounts of taxation to make itself attractive, why should other states be allowed to take measures to neutralise the benefit of the competitive tax regime. Indeed, why should other states be allowed to pick up the tax foregone by a state such as Singapore in acting competitively, they would never have had this tax in the first place.

While certain practices of certain states may be more readily typified as negative or positive, the reality is that in most cases it is not clear and highly debatable. Regimes that rely upon deception and secrecy are readily typified in a negative manner. Those which allow the diversion of significant profits on next to no substance are also more easily typified in a negative sense. However, the vast majority of cases are hard to typify.

Ultimately, all countries operate tax systems that are designed to be competitive and attract desirable capital and investment. This is the case even with large developed states.

The nature of many new industries and financial factors means that it is significantly easier for many types of capital and investment to be moved to attractive tax locations. For example an online business may be able to be located anywhere in the world and have little need for a number of state infrastructure and other resource features. For this reason more and more business and capital may be located in states where it has been attracted by low tax features and special regimes. This factor has played a large part in the uproar that resulted in the BEPS initiative.

8 POTENTIAL IMPACTS DEVELOPING COUNTRIES SHOULD CONSIDER IN THE TAX COMPETITION CONTEXT

In the context of these debates and initiatives, developing countries should be careful of the risks and benefits possible. Clearly the OECD project has the potential to harm the economies of states that have an economic strategy that involves offering low tax rates and/ or incentives. If the BEPS project introduces wide ranging measures that neutralise these regimes or transfer the foregone tax to developed countries, they will be significantly impacted.

The discourse on the issue has tended to suggest that where there is economic substance to the activities etc. located in the low tax state, it will not be targeted by the measures. However, the extent that this is true and the manner in which it will be determined means that the project may never the less significantly impact these states.

This issue may impact not only countries such as Singapore that operate as financial centres but also other countries that offer notable incentives for particular capital and business.

The substance arguments may on the other hand favour certain low tax jurisdictions while damaging those that are less established. For example there may be a transfer of capital to Singapore from a state such as Mauritius. These outcomes will be difficult to determine and merit the utmost attention of developing countries.

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On the other hand it may be argued that many developing states have been disadvantaged by the regimes in place in low tax jurisdictions. For example, it may be asserted that China has suffered as much by low substance allocations of revenue to tax havens as the US has. In this respect this aspect of the BEPS project of the OECD should be seen as a positive development for these states.

Ultimately, it may be that few advantages result from this change in that income may still be allocated to low tax jurisdictions in a manner that complies with new norms such as the requirement for substance.

For example, the requirement that the income from intellectual property be allocated to where the value was developed rather than to where it is registered, may mean that the value creation business moves to a suitable low tax jurisdiction rather than the income reverts to a high tax jurisdiction.

In addition, low tax jurisdictions that do not comply may commence to comply and thus not lose business. It is already the case that professional advisers are developing strategies on how taxpayers can comply with BEPS. This does not involve the removal of low tax jurisdictions from their structures. Rather it involves using them in a manner that complies with anticipated BEPS requirements.

9 OTHER ASPECTS AND FINAL COMMENT

Other aspects of the OECD BEPS initiative involve states working more closely with one another and the reconciliation of unexpected 'gaps' in the international tax system. Such gaps being those associated with hybrids for example. The closing of these gaps is desirable for all states and should be supported. The working together of different states on tax matters is also something that is generally highly desirable and should be supported.

However, developing states need to be careful that working together does not involve the creation of international obligations that do not allow them to take care of their own specific interests in the competitive international tax environment.

These broad specific interests are:

The need to be able to tax in a simple manner that allows collection of tax revenue without significant contests over complying with international norms on issues such as transfer pricing.

The minimisation of administrative costs and capacity challenging expectations generally.

The allowance of sufficient value to be allocated to the productive processes that occur in the region rather than allowing it to be allocated to consumer states or residence states.

The ability to use low tax and incentive strategies to competitively attract investment and trade to the region as well as facilitate development and capacity building.

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ARTICLES

JUSTICE AND DIGITALIZATION AS MUTUALLY DETERMINING FACTORS OF CRIMINAL – JURISDICTIONAL ACTIVITY DEVELOPMENT

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Abstract: The introduction of digital technologies has an impact on various aspects of criminal-jurisdictional activity, optimizes the decision-making process based on data collection, coordination of actions of law enforcement officers, increases the effectiveness of their actions by minimizing the human factor in the process of legal decision-making through the use of the potential of artificial neural networks. On the basis of dialectical-materialist method and special legal research methods it is noted that the relationship between the concepts of "digital justice" and "justice" can be represented in the form of basic characteristics of the development of the same socially significant process, a key element of which is the use of robotic programs that simplify and accelerate human activities. It is pointed out that in the process of building in our society a fair legal basis of statehood, moral and legal culture as an integral attribute and a distinctive feature of the progressive development of the state is becoming increasingly important and of practical importance. The purpose of the article is to analyse the approaches and problems related to the Justice within the modern digital developments.

Key words: justice, digitalization, criminal law, procedure, criminal-jurisdictional activity.

1 INTRODUCTION

Order and justice, these universal values, along with law, determine the measure of freedom in our behaviour without prejudice to the interests and rights of those around us.[1]

Justice is the fundamental principle of "natural law", which belongs to man since birth. According to the French writer and philosopher Voltaire, even though nobody is born with clear notions of law and justice in mind, human dictates that at a certain age these truths come forth naturally.

The Roman lawyer Celsus believed that law was the science of good and justice. In concurrence with A.V. Saksonov's idea that it is not compulsoriness justice that defines the essence of law and builds basis for it, it should be noted that the ability of the law to express the idea of justice (law is

[1] ADILOV, Z. A. The role of law enforcement agencies in providing a favorable socio-psychological climate in the process of crime prevention. In The modern scientist, № 5, 2017, p. 404 – 407.

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statutory and materialized justice) is most closely associated with criminal and jurisdictional activity. A.F. Koni, famous Russian law scientist, had indicated that justice cannot be detached from law.

Being the result of the practical implementation of a certain part of state powers, which, together with the subjects of competence constitute the scope of competence of the executive and judicial powers, criminal jurisdictional activity is associated with the publication and application of criminal law and procedure.

At the same time, it is important to note that naturally religious principles are rooted in Russian criminal proceedings. For instance, the requirement of establishing the truth in criminal proceedings has been stipulated in the domestic legislation since pre-revolutionary times. Even though competitive trial proponents may point out that today the Criminal Code of Russia has not set forth any respective requirements, nevertheless numerous provisions indicate otherwise. It would suffice turning to the provisions of part 4, Art. 152; part 2, Art. 154; Art. 239.1 of the Russia's Criminal Procedure Code (Federal Law No. 174-FZ 18. 12. 2001) inter alia to find that, along with listing professional duties and regulations, these provisions guide law enforcement towards multifaceted, comprehensive, and objective review of case particularities.

Particular attention in this regard should be drawn to part 3 Art. 14 of the Russia's Criminal Procedure Code, which "… assumes that before recognizing any doubts irreparable, the court must try to eliminate them by all available means…".

In addition, judicial practice focuses the judge on comprehensiveness, completeness, and objective approach to reviewing a case. For instance, a conviction by the court of first instance as per part 4 Art. 15 of the Russia's Criminal Procedure Code may be reversed if unjust. Existing experience in application of this norm testifies that it is applied to excessively severe (cruel) sentences, making a reference for law enforcement to the orthodox notions of mercy applicable to any person.

It should be noted that such origins of the law build basis for Russian law application process to be guided by its spirit, i.e. by justice, rather than by the book.[2] After all, the phenomenon of law itself does not institute or define justice, but rather reflects it. The form, in which the law appears, on the one hand, and justice, on the other hand, may contradict each other in the process of unfair application of legal norms and in the issuance by public authorities of intrinsically unjust legal guidance.[3] The proponents of natural law contemplated this phenomenon by stating that a formally legally sound law may harm justice.

2 MATERIALS AND METHODS OF RESEARCH

The theoretical basis of the study is created by papers of Russian and foreign researchers on the problems of criminal procedure in the development of information technologies (IT). Moreover, there are some major scientific works which are devoted to problems of use of the latest technologies in justice. For example, formation of conditions for "electronic justice" in the Russian Federation is subject of collective monograph "Justice in modern world".[4]

[2] AGARKOV, A.F. Criminological review of crimes within the street. In The modern scientist, № 5, 2017, p. 442 – 446.

[3] KAMERGEROV, A.F. On some problems of increasing the legal culture of employees of law enforcement agencies. In The modern scientist, № 4, 2017, p. 209 – 213.

[4] Justice in modern world, edited by V.M. LEBEDEV and T.Y. KHABRIEVA. M., 2012.

There are a lot of international literature regarding to artificial intelligence[5], for example: Holder C., Khurana V., Harrison F., Jacobs L. "Robotics and law: Key legal and regulatory implications of the robotics age"; "Robotics, AI and the Future of Law", Editors: Corrales M., Fenwick M., Forgó N.[6]

Despite the importance of such papers and monograph, the constant development of digital technologies and the development of legislation actualize the research of digitalization[7] of criminal jurisdictional activity.

The methodological basis of the study is general scientific methods (system analysis, dialectical method, comparative method) and method of legal science (method of interpretation of legal norms).

As part of the general scientific methodology, a systematic approach allowed to comprehensively reveal the features of the introduction of digital technologies in the criminal procedure and identify some risks. Dialectical method of knowledge involves the study of any material or ideal object in the development and movement, taking into account the specific historical conditions of time and place. In every legal phenomenon, including criminal proceedings, it is possible to find the remains of the past, the basis of the present and the rudiments of the future. In this regard, the provisions of the Russia's Criminal Procedure Code relating to the introduction of IT are a bridge between the current criminal process and the future of digitalized and informatized justice. Thus, the considered experience of informatization of modern criminal proceedings can be useful in the further improvement of Russian legislation and increase the efficiency of its application, as well as in scientific comparative legal research on this topic.[8] Comparative method allowed comparing the trends, stages and results of digitalization of justice in Russia and in other countries. Method of interpretation of legal norms helps to understand the meaning and content of the rules and identify the will of the legislator.

3 COURSE OF JUSTICE: "MODERN" VERSUS "TRADITION"

The use of digital technologies that are currently capable of influencing various aspects of both public and criminal jurisdiction activities through optimization of the decision-making process based on data collection, coordination of law enforcement actions, raising efficiency of their actions and minimizing human error in the process of legal decision-making through the use of artificial neural networks may significantly reduce the chances for such contradictions. It should be noted, that artificial neural network is a type of machine learning loosely inspired by the structure of the human brain. A neural network is composed of simple processing nodes, or 'artificial neurons', which are connected to one another in layers. Each node will receive data from several nodes 'above' it, and give data to several nodes 'below' it. Nodes attach a 'weight' to the data they receive, and attribute a value to that data. If the data does not pass a certain threshold, it is not passed on to another node.

5 HOLDER C., KHURANA V., HARRISON F., JACOBS L. Robotics and law: Key legal and regulatory implications of the robotics age (Part I of II) // Computer law&security review. 32 (2016), p. 383 – 402.

6 CORALLES M., FENWICK M., FORGO N. Robotics, AI and the Future of Law // Perspectives in Law, Business and Innovation, 2018.

7 KHABRIEVA, T. Law Facing the Challenges of Digital Reality. In Journal of Russian Law, № 9, 2018, p. 5 – 16; KHABRIEVA, T., CHERNOGOR, N. The Law in the Conditions of Digital Reality. In Journal of Russian Law, № 1, 2018, p. 85 – 102.

8 NAGOEVA, A.V. Systematism in the Criminal Legislation of the Russian Federation. In The Modern Scientist, № 1, 2018, p. 113-117; TAYLOVA, A.G., ADZIEVA, S.M. The role of the prosecutor's office in the formation of legal consciousness. In The modern scientist, № 7, 2017, p. 261 – 265.

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The weights and thresholds of the nodes are adjusted when the algorithm is trained until similar data input results in consistent outputs.[9]

These networks are regarded as cognitive technologies where the machine performs work, which was previously considered the exclusive prerogative of humans as it uses its ability to simulate human mental activity and mimic the structure of the human nervous system. They can be self-learning and act on the basis of previous experience improving accuracy with time.

Still, such a self-learning system can track changes in the results of law enforcement activities, automatically assess the situation and send new relevant proposals that will improve criminal law and criminal procedure.

Moreover, in this case the technological nature of the law itself calls for no doubts as developed countries are taking long strides towards introducing elements of the so-called "electronic justice" while keeping in mind peculiarities of specific national justice system and the level of technological advancement. It is significant that on 4 December 2018 the European Commission on the efficiency of justice (CEPEJ) of the Council of Europe adopted the first European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, establishing ethical principles relating to the use of artificial intelligence (AI) in judicial systems, for example principle of respect for fundamental rights; principle of non-discrimination; principle of quality and security; principle of transparency, impartiality and fairness; principle "under user control".[10]

This shows that the potential of modern technologies and solutions will make it possible to implement the national model of digital justice in Russia in the foreseeable future, with the role of humans in deciding on a case minimized.

The term Digital Justice Model (Matrix) is well substantiated. Many recent legal studies have demonstrated increasingly frequent use of technical terms. The term Matrix has many meanings in various facets of human activity. But perhaps common to these definitions is the idea of the matrix as an image, a model, a projection.

The 10th international legal forum of the Asia-Pacific countries held in September 2018 in Russia has proposed key highlights for transformation of national justice systems to envisage many legally significant actions committed in the virtual space. This means expanding the scope of legal regulations gaining multifaceted contents due to digitalization driving the expansion of the scope of rights as forecasting of justice becomes a new trend.

The purpose of such forecasting is to provide scientific foresight of the changes in legal conditions such as shifting goals and levels of legal regulation, designed to ensure the conversion of justice into law.

However, as the virtual space begins to engulf more and more legal relations, the formation of an environment that will allow making fair judicial decisions at the national level based on the use of neural network technologies (robots) gains growing importance. The law itself is a domain of rules, which can be presented through code interpretable via artificial reasoning. However, as Kevin D. Ashley has mentioned, features such as vagueness and the open-texture of statutory provisions need to be addressed to create accurate legal reasoning.[11] This can be achieved by emulation of how courts

[9] HOUSE OF LORDS. Select Committee on Artificial Intelligence Report of Session 2017–19, HL Paper 100, AI in the UK: ready, willing and able? p. 13.

[10] European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment was adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3 – 4 December 2018).

[11] KEVIN D. A. Artificial intelligence and legal analytics. Cambridge University Press, 2017, p. 3.

provide their rulings: firstly, a theory based on previously existing cases is created; secondly, these created patterns are used to strengthen or weaken an argument; finally, example-based explanations illustrate why an argument can or cannot be applied.[12]

At the same time it should be understood how important the transparence and availability of a computer algorithm for making a legal decision. The study on topic of algorithmic decision systems (ADS), which has been written by Claude Castelluccia and Daniel Le Métayer, shows that algorithmic decision systems must meet a number of requirements, such as fairness, absence of bias or non-discrimination (for example the use of specific types of data such as ethnic origin, political opinions, gender, etc.).[13]

With this in mind, it is also important to note that the phrase "digital justice" is more in line with the future vector of development of the state and society, where the relationship between the concepts of "digital justice" and "justice" can be represented in the form of descriptors of the same process. As mentioned above, a key element of digital age justice will be the use of robot software that will facilitate and accelerate human activities, as well as artificial intelligence technologies, neural networks, through which the subjective role of man in decision-making as part of case reviews will be minimized.

As part of implementation of the Government program "Development of the Judicial System in Russia in 2013-2020", the Commission on the Use of Information Technologies to Improve the Quality of Life and Business Climate adopted on December 18, 2017, a roadmap towards integration of information available to various state bodies, building of a single information space encompassing the existing modular electronic platforms, and the use of digital technologies in decision-making.

Since the criminal process is a set of highly specific rules, standards and procedures governing the criminal proceedings, availability of necessary data enables prediction of specific outcomes of any action of a criminal proceedings participant.

This drives legislation towards allowing identification and authentication of subjects using any technically possible means, including electronic signature, biometric data, and personal number of an individual, all of which are designed to uniquely identify a person and establish his or her will to commit certain actions.

For instance, one of the latest draft laws developed by the Ministry of Justice of the Russian Federation provides the implementation into the work of the courts web conferencing, allowing the exchange of information between the court and other participants in real time without appearance in court. It is proposed to legislate the ability to remotely identify the participants of the procedure through their biometric data.

This circumstance brings forth technical simplification[14] and improvement of citizens' access to justice through court websites and electronic forms of appeals and presentation of evidence and aims to develop a platform for the creation of robotic judges based on artificial intelligence technologies (AI). Artificial intelligence can be viewed as 'general' or 'narrow' in scope. Artificial general intelligence refers to a machine with broad cognitive abilities, which is able to think, or at least

12 This algorithm is proposed by Kevin D. Ashley. Ibid. p. 1 – 168.

13 Understanding algorithmic decision-making: Opportunities and challenges, Study, Panel for the Future of Science and Technology. Brussels, 2019, p. 43 – 33.

14 WYSS, M. Öffentlichkeit von Gerichtsverfahren und Fernsehberichterstattung, Überlegungen zu einem grundrechtlichen Spannungsverhältniss unter besonderer Berücksichtigung der schweizerischen Rechtslage. In EuGRZ, № 23, 1996.

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simulate convincingly, all of the intellectual capacities of a human being, and potentially surpass them—it would essentially be intellectually indistinguishable from a human being.[15]

Robots or machines of this kind provide the most accurate predictions of outcomes for most cases reviewed in the European Court of Human Rights, where robot programs (machine programs) have access to evidence in a particular case, evaluate it in accordance with the specified parameters with the accuracy of the verdicts at the level of 79% in 584 reviewed cases.[16]

American researchers have developed dedicated "smart" software that was tasked to perform using dedicated algorithms a review of judicial decisions made by the Supreme Court of the United States during the period from 1816 to 2015. This software identified a connection between the circumstances of cases and respective court rulings and accurately predicted the outcome of more than 70% of the 28,000 of the examined cases.

In France, the possibility of using robot software in justice was included in the agenda of reforming the national judicial system and the first stage it will cover more than 2.5 million cases.

In the most ambitious project to date, the Estonian Ministry of Justice has asked Estonia's chief data officer Ott Velsberg and his team to design a "robot judge" that could adjudicate small claims disputes of less than € 7,000 (about $ 8,000). Officials hope the system can clear a backlog of cases for judges and court clerks. The project is in its early phases and will likely start later this year with a pilot focusing on contract disputes. In concept, the two parties will upload documents and other relevant information, and the AI will issue a decision that can be appealed to a human judge. Many details are still to be worked out.[17]

Nevertheless, important is the fact that the robot judge cannot be bribed, it does not get tired or sick and it is designed to maximize the positive human potential in the field of justice.

Since the operation of such a system will take place within neural networks or other so-called "smart platforms" based on AI, lawyers in the foreseeable future are called upon to build virtual networks of rules for such platforms and robot judges, taking into account emerging practices, new legislation, relevant explanations of higher courts, as well as doctrinal changes, both at the national and international level. Thus, they will have to mostly prescribe the logic and order of behaviour for robot judges in the process of reviewing a particular case, to coordinate the activities of these robots.

In this fashion, the lawyers together with technologists and operators will act as co-developers of these systems focusing on generation of the fairest model of relations, based on the ideas of a famous digest of justice as unwavering and permanent will to give each his right. The use of such systems will significantly reduce the burden on judges and free up time for them to review more complex cases. The combined efforts of judges and "smart platforms" integrated into a single information space will increase the efficiency of justice at large bringing it to a new level.

In this regard, the Director for the Acceleration of Legal Technologies at Skolkovo Foundation said, in April 2018 that the Center of Competencies for the regulation of digital economy, which is founded as part of the Foundation, was developing draft terms of reference for a study to determine the possibility of translating the law into machine-readable form, automating their execution,

15 HOUSE OF LORDS. Op. cit. p. 15.

16 ALETRAS, N., TSARAPATSANIS, D., PREOȚIUC-PIETRO, D., LAMPOS, V. Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. In PeerJ Computer Science 2: e93, 2016.

17 NIILER, E. Can AI Be a Fair Judge in Court? Estonia Thinks So. [online]. Available at <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/> [q. 2019-12-18].

developing a language and tools for describing self-executing contracts (an electronic algorithm focused on the fulfilment of obligations or monitoring their performance).

In the opinion of A. Ganser, legal expert from Dentons, artificial intelligence can be used to analyze the content of normative legal acts, to check their redundancy and consistency. "Machine-readable (semipalmata) provision is an algorithmic provision written in a programming language. Its main point is that it works automatically and always behaves the same with the same input data. Accordingly, variances in interpretation are not possible for those affected by self-executing rules as well as for those who control it"- Ganzer said.

However, as digital technologies are introduced, questions periodically arise about potential falsification of certain information during the investigation and trial of a criminal case. In case of bad faith of the investigator or judge it is necessary to exclude the possibility of making certain changes and additions to the electronic document both by prohibiting the modification of electronic information used in proving a criminal case, and by ensuring reliable protection of digital documents from possible modification. That's why it is important to make a scrupulous oversight and appropriate safeguards. It concerns not only the evidence but also the data on the basis of which artificial intelligence comes to conclusions. For example in Study on the human rights dimensions of automated data processing techniques and possible regulatory implications made by Council of Europe highlights that "depending on how crimes are recorded, which crimes are selected to be included within the analysis and which analytical tools are used, predictive algorithms may thus contribute to prejudicial decision-making and discriminatory outcomes".[18]

In this regard High-Level Expert Group on artificial intelligence set up by the European Commission formulated 33 concrete recommendations addressed to the European Institutions and Member States. These focus on four main areas where trustworthy artificial intelligence can help achieving a beneficial impact, starting with humans and society at large, and continuing then to focus on the private sector, the public sector and Europe's research and academia.[19]

4 CONCLUSION

In the process of building in our society a fair legal basis of statehood, moral and legal culture as an integral attribute and a distinctive feature of the progressive development of the state is becoming increasingly important and of practical importance. It opens huge ways to determine the truth as the main factor of justice. The relationship between the concepts of "digital justice" and "justice" can be represented in the form of basic characteristics of the development of the same socially significant process, a key element of which is the use of robot programs that simplify and accelerate human activities. It is really important for criminal jurisdictional activities to make it possible to find truth. The philosophy of ensuring a positive balance in terms of the introduction of the new technologies and the possible shortcomings of this process should be developed on the basis of minimizing the risk of electronic data substitution at the earliest. This will ensure that justice prevails in the sphere of criminal jurisdiction in Russia. The lawyers and law scientists are now able to decide whether the

[18] Algorithms and human rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications. DGI (2017) 12. p. 11.

[19] Policy and investment recommendations for trustworthy Artificial Intelligence. High-Level Expert Group on Artificial Intelligence. European Commission. B-1049 Brussels. p. 47 – 49.

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digitalization in criminal justice becomes just new bright colour, modern talking, candy wrapper (form) or a big chance to provide our cultural sense and legal spirit in it.

With attention to possible risks about using AI, mentioned above, some *de lege ferenda* conclusions should be proposed. The field of digital justice (AI as a Tool for Social Justice) today requires a deep procedural rethinking on the basis of an interdisciplinary approach, detailed legislative regulation and consideration of constantly developing digital technologies. It is also necessary to develop a platform today for the creation of robotic judges. But at the initial stage of construction of the matrix of digital justice, the corresponding robots-programmes can contribute to the detection of crimes (Predicting Justice), and first of all those that are committed online. Thus, modern currency surrogates (cryptocurrencies) have long been a tool of the digital economy of various countries and can increase the rate of capital turnover in a given country, which has a positive effect on the economy. Anyway possibility for objection such decisions of robot judges should be granted for everyone to exclude any obstacles and wrongs.

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INDEPENDENCE OF BIDS IN PUBLIC PROCUREMENT[1]

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Abstract: The article compares the different approach of two bodies of economic regulation – EU competition law and public procurement law – to the concept of undertaking reflecting diverse goals both regulations follow. It starts with general characteristics of competition law and public procurement law, especially as far as their mutual relationship is concerned. In spite of many common goals and important intersections, there are also conflicting issues between them. And concept of undertaking is a topic where the point of view of both blocks of regulation differs. This diversity and its reasons are analysed on the background of the CJ EU judgement in case C-531/16.

Key words: undertaking, parent company, subsidiary, economic unit, competition, links between tenderers, independence of bids, EU competition law, public procurement law, EU law.

1 INTRODUCTION

European Union competition law and public procurement law are traditionally perceived as two separate economic regulations of the internal market. But gradual development of internal market as a principal goal of economic integration has shown that there are many interesting intersections between competition law and public procurement law. Many of them remain until now underexplored.

2 COMPETITION LAW AND PUBLIC PROCUREMENT

The importance of public procurement in the European Union has grown gradually depending on the whole development of the internal market. It is undoubted now, that public contracts have to comply with the principles of the Treaty on Functioning of the European Union („TFEU") and first of all four freedoms of the internal market – free movement of goods, freedom of establishment and freedom to provide services and principles derived therefrom (equal treatment, non-discrimination, mutual recognition, proportionality and transparency).[2] Therefore „public procurement has to be opened up to competition".[3]

[1] This article was supported by grant APVV-17-0641: Zefektívnenie právnej úpravy verejného obstarávania a jej aplikácie v kontexte práva Európskej únie.

[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, recital, N.1.

[3] Ibid.

Competition belongs to the original main principles of the internal market functioning as the principal and decentralised self-regulator of the market due to the main economic functions it fulfils. Although traditionally treated separately, both public procurement and competition represent „sets of economic regulation directly related to the internal market…"[4] safeguarding of the principle of an open market economy with free competition.[5]

Indeed, development of the internal market together with constant evolution in field of competition and public procurement[6] have brought „clear trend of convergence between both sets of regulation".[7] As, based on OECD data, expenditures on public contracts represent 10 – 15 percent of gross domestic product, public procurement market is an important part of the internal market, it is necessary, also in opinion of European Court of Justice („ECJ") „to develop effective competition in the field of public contracts."[8]

Having in mind one of the principal goals of public procurement, „to determine…which tender is the most economically advantageous"[9], as far as „price-quality ratio"[10] is concerned, it is quite clear, that „effectiveness of public procurement… is conditional upon the existence of competition…"[11] and the framework of the public procurement has to be found in the competitive markets.[12] Thus, the aim is to establish „a market like mechanism"[13] in public procurement and to simulate competitive constraint in those relations, where goods, works or services are purchased by public sector.[14]

In the intersection of both branches of economic law the attention was drawn until now mostly on collusion of the participants of public procurement process artificially replacing competition between/among them and thus denying the sense of the whole public procurement. Equally important in those cases is sanctioning of the tender cartels comprising not only fines for the restrictive behaviour but also a risk of exclusion of offenders from another procurement process.

Although it is very important to detect potential anticompetitive behaviour taking form of collusive tendering or bid rigging, the potential of mutual relationship of both corpuses of economic regulation is, of course, greater and many aspects covered by this intersection stay until now underexplored and underdeveloped, both in theory and practice.[15] Both pieces of economic integration share undoubtedly common goals and principles and they rely on common economic theories[16], but on the other hand there are also cases where the interests of public procurement

4 SÁNCHEZ GRAELLS, A. Public Procurement and the EU Competition Rules, (2nd) Edition. Oxford: Hart Publishing, 2015, p. 3.

5 Art. 119 (1) TFEU, Protocol on Internal Market and Competition.

6 SÁNCHEZ GRAELLS, A. Public Procurement and the EU Competition Rules. op. cit., p. 5.

7 Ibid.

8 Case C – 138/08 Hochtief and Linde- Kca-Dresden [2009] ECR I 9889 47 with referencies in Case C- 27/98 Francesco and Leitschutz [1999] ECR I – 5697 26; Joined Cases C–285/99 and C- 286/99 Lombardini and Mantovani [2001] ECR I-9233 34; Case C-470/99 Universale Bau [2002 ECR I-11617 89; and Case C-247/02 Sintesi[2004] ECR I-921535. (In ibid. p. 6).

9 Directive 2014/24/EU…recital, N.90

10 Ibid.

11 SÁNCHEZ GRAELLS, A. Public Procurement and the EU Competition Rules. op. cit., p. 11.

12 Ibid.

13 Ibid., p. 12.

14 KALESNÁ, K. Tendrové kartely a ich špecifiká. In POVAŽANOVÁ, K. Aktuálne otázky súťažného práva v Európskej únii a na Slovensku. Bratislava: UK, Právnická fakulta, 2015, pp.23 – 39, p. 23 and literature there cited.

15 SÁNCHEZ GRAELLS, A. Public Procurement and the EU Competition Rules. op. cit., p. 7, 9.

16 Ibid., p. 5

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and competition law might be different. This is why „it is probably not an exaggeration to consider both competition law and public procurement law as substantially independent branches within EU economic law."[17]

3 CONCEPT OF UNDERTAKING IN EU COMPETITION LAW

One of the questions with a different point of view of public procurement and competition law can be concept of undertaking in both pieces of economic regulation.

From the competition law perspective there is no legal definition of the concept of undertaking. In order to achieve the widest possible application of the EU competition rules „the word undertaking has been interpreted in the widest possible sense to include any legal or natural person engaged in some form of economic or commercial activity, whether in the provision of goods or services, including cultural or sporting activities…, banking…, insurance… and transport."[18]

ECJ has offered in its case law a definition of undertaking as a „unit carrying on an economic activity regardless its legal form and way of financing."[19] Undertaking thus represents economic unit „comprising uniform organisation of personal, material and immaterial means following an economic objective on lasting basis and participating on abusive behaviour under Art. 81 TEC."[20] This notion of undertaking applies to undertakings in the public as well as the private sphere[21], to individual undertakings, corporations or even whole economic units comprising the parent company and its subsidiary acting on the market as a single economic unit, although legally independent.[22] That means that notion of an „economic unit" is not necessarily linked in the EU with a single natural or legal person."[23] Consequently agreements between/among members of the single economic unit are not caught by Art. 101 TFEU. On the other hand, in participation of the economic unit on cartel behaviour, it is usually a parent company who is considered to be liable for infringement of the competition rules. This applies to company who is 100 percent owner of the subsidiary or who has executed a decisive influence on performance of a subsidiary.[24]

4 ECONOMIC OPERATORS IN PUBLIC PROCUREMENT LAW

As already mentioned, goals of public procurement and EU competition law may differ and it may evoke conflicting situations. This is particularly apparent as far as subjects of both blocks of legal regulation are concerned. Whereas EU competition rules are addressed to undertakings understood

17 Ibid., p. 3.
18 STEINER,J., WOODS, L.: EU Law. Oxford University Press, 2009, p. 666.
19 ECJ judgement C-41/90 Klaus Höffner and Fritz Elser v. Macroton GmbH, SbSD 1992, I-1979.
20 Judgement T-11/89 Shell, SbSD 1992, II-757.
21 STEINER, J., WOODS, L.: EU Law, op. cit., p. 667.
22 KALESNÁ, K. Je podnik (stále) legislatívnou výzvou? AFI, Universitatis Comenianae, Tomus XXXVI, 2/2017, p. 127.
23 BLAŽO, O.: Twenty Years of Harmonisation and Still Divergent: Development of Slovak Competition Law. Yearbook of Antitrust and Regulatory Studies. Vol. 2014 7 (9), University of Warsaw, Faculty of Management Press, p. 115.
24 PETR, M. Přičítání odpovědnosti za porušení soutěžního práva. In ANTITRUST 3/2013, p. 81.

as whole economic units[25] comprising different companies, e. g. parent company and its subsidiaries, public procurement law works in principle with single persons.[26]

4.1 Judgement of the Court of 17 May 2018 in Case C-531/16

4.1.1 Facts of the case

This different approach of the EU competition law and public procurement law was confirmed in the recent ECJ judgement of 17 May 2018 in case C-531/16. The dispute in the main proceedings concerned a public call for tenders for the provision of services relating to the collection of communal waste of the municipal authority of Šiauliai and its transportation to the place of treatment announced by the centre for waste management for this region on 9 July 2015. Four tenderers submitted tenders: Specializuotas transportas UAB (tenderer B), Ekonovus UAB, Specialus autotransportas UAB (tenderer A) and the group of operators VSA Vilnius and Švarinta UAB. Tenderers A and B are subsidiaries of Ecoservice UAB, which holds 100 % and 98,2% respectively of the shares of those undertakings. The Boards of Directors of tenderers A and B are made up of the same persons.[27]

There was not an obligation to disclose links with other operators participating in the same tendering procedure under national legislation. In spite of that tenderer B submitted a declaration of its autonomous and independent participation in the tendering procedure and requested all other operators to be treated as competitors. The contract was awarded to tenderer B. VSA Vilnius complained, that offers where not properly evaluated and the principles of equal treatment and transparency had been infringed. In its opinion tenderers A and B had acted as an association of undertakings.[28]

After the rejection of complaint by the contracting authority VSA Vilnius brought an action before Regional Court, Šiauliai, Lithuania, that annulled the decisions of the contracting authority. Court of Appeal, Lithuania, confirmed that judgement. According to their opinion, tenderers A and B had to determine what was the influence of that link on the competition between them and they should have disclosed their links to the contracting authority. The declaration of the tenderer B was considered insufficient. In those circumstances The Supreme Court, Lithuania, decided to stay the proceedings and to request the preliminary ruling of the ECJ.[29]

4.1.2 Preliminary ruling of the ECJ

Several questions were submitted to the Court for preliminary ruling, first of all, whether related tenderers which submit separate tenders are in all cases obliged to disclose that relationship to the

[25] E. g. Blažo compares notion of undertaking in Slovak and EU competition law: „Unlike European competition law, the Slovak competition act contains a definition of the notion of an „undertaking" for the purposes of application of national competition rules. Under Article 3(2) APEC the term „undertaking" means an entrepreneur pursuant to Article 2 of the Commercial Code, as well as natural and legal persons, their associations, and associations of these associaciations, with respect to their activities and conduct that is or may be, related to competition, regardless of whether or not these activities or conduct is profit oriented. The Commercial Code recognises four types of entrepreneurs: a) a person recorded in the Commercial Register; b) a person engaged in business activity under a trade licence; c) a person engaged in business activity under specialised legislation, e.g. lawyers, auditors, pharmacists, human and veterinary physicians; d) a person engaged in agricultural production as a „sole farmer" and registered in a particular register." (BLAŽO, O. Twenty Yars of Harmonisation and Still Divergent: Development of Slovak Competition Law, op. cit., p. 114).

[26] PETR, M. „Obrácený" bid rigging – více nabídek z jedné ekonomické jednotky. In ANTITRUST 2/2018, p. 38.

[27] ECJ judgement of 17 May 2018 in case C-531/16.

[28] Ibid.

[29] Ibid.

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contracting authority. It is equally important to establish how the contracting authority has to proceed being aware of the existence of important links between certain tenderers.[30]

To answer the questions, the ECJ came to the conclusion that in absence of „express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority."[31] The ECJ derived this conclusion from several facts of the case and relevant legal regulation. In its opinion, Directive 2004/18 does not prohibit related undertakings to submit offers in public procurement procedure. As it is desirable to ensure widest possible participation in the tendering procedure, it would not be effective to exclude systematically related undertakings from the same public procurement procedure. [32] The ECJ pointed out that „groups of undertakings can have different forms and objectives, which do not necessary preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts."[33]

The ECJ has rejected the application of Article 101 TFEU, that does not apply in case of agreements or practices carried out by undertakings which constitute an economic unit.[34]

Concerning duties of the contracting authority, the ECJ stated, that the contracting authority „is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent. If the offers prove not to be autonomous and independent, Article 2 of Directive 2004/18 precludes the award of the contract to the tenderers having submitted those tenders."[35]

4.2 Opinion of Advocate General Campos Sánchez-Bordona

Opinion of the Advocate General was in substance consistent with the judgement of the Court. According to him under conditions mentioned in the case, „related tenderers which submit separate tenders are not under a duty to disclose their links to the contracting authority"[36] and the contracting authority has „to guarantee equal treatment of tenderers and the transparency of the procedure".[37] First of all, the contracting authority has to be in charge of undistorted competition between the tenderers.[38] But in his words, „in the area of tendering procedures, the aim is not so much to protect (general) competition between independent operators in the internal market as to protect (more specific) competition which must operate in procedures for the award of public contracts. From that perspective, what really matters is the separateness of and *genuine* difference between the respective tenders…whether the tenderers are independent or related economic operators."[39]

30 Opinion of Advocate General Campos Sánchez-Bordona delivered on 22 November 2017, case C -531/16.
31 ECJ judgement of 17 May 2018 in case C 531/16.
32 Ibid.
33 Ibid.
34 Ibid.
35 Ibid.
36 Opinion of Advocate General Campos Sánchez-Bordona delivered on 22 November 2017, case C-531/16, N. 63.
37 Ibid, N. 65.
38 Ibid.
39 Ibid, N. 71.

This opinion of the Advocate General deserves attention because it can be understood as making difference between (general) competition between independent operators in the internal market and (more specific) competition operating in procedures for the award of public contracts. In relation to that it should be stressed that there should not be a difference between competition principle generally in the internal market and specifically in public procurement procedures because „article 101 (1) TFEU requires parallel competition between undertakings not only when they respond to a call for tenders, but generally in any market situation."[40] Similarly, „the abuse of a dominant position will be proscribed and prosecuted exactly under the same circumstances in the public procurement arena as in any other type of market."[41] So, it is competition as an institution[42] to be protected by means of public procurement law, because „the competition principle embedded in the EU public procurement directives is no more and no less than a particularisation, or specific enunciation of the more general principle of competition in EU law."[43]

Obviously, there is a difference between competition law and public procurement law as far as addresses of the both legal regulations are concerned and in comparison with the notion of undertaking in competition law understood as a whole economic unit, the public procurement law including Directive N. 2014/24/EU defines tenderers as economic operators, in meaning of natural or legal persons and associations thereof.[44] As already mentioned, the situation of more bids coming from one economic unit is not caught by Article 101 TFEU, so there is no bid rigging in this case.[45]

5 CONCLUSION

To summarize conclusions derived from ECJ judgement it is to stress that fact that the bidders in public procurement procedure belong to the same economic unit does not prevent them in presenting separate bids, if these bids are really independent. On the contrary, coordination of bids should lead to exclusion from the bidding procedure.[46]

The approach of public procurement law, resembling more the concept of undertaking in the Slovak than EU competition law, is in favour of possible widest choice among presented bids and selection of a bid that is fully in harmony with the public interest. As there is no general obligation of the bidders to inform the public authority about links between/among them, the authority is fully liable for the correctness to the whole procedure.

Concerning the opinion of Advocate General it is to underline that competition principle in public procurement law has to be understood as a special expression of the general competition principle in the EU law.

40 SÁNCHEZ GRAELLS, A. Public Procurement and the EU Competition Rules. op. cit., p. 203.
41 Ibid, p. 204.
42 Ibid, p. 204.
43 Ibid.
44 PETR, M. „Obrácený" bid rigging-více nabídek z jedné ekonomické jednotky, op. cit., p. 39.
45 Ibid, p. 39.
46 Ibid, p. 41.

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FROM NUREMBERG TO THE HAGUE AND BEYOND: INTERNATIONAL CRIMINAL LAW IN COURTS: COURT OF BOSNIA AND HERZEGOVINA AS AN EXAMPLE

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DAUSTER, M. From Nuremberg to The Hague and Beyond: International Criminal Law in Courts: Court of Bosnia And Herzegovina as an Example. Bratislava Law Review, Vol. 3, No. 2 (2019), pp. 76 – 83. ISSN 2585-7088, eISSN: 2644-6359

Abstract: International criminal law in courts will seize our interest forever. Adjudication of international criminal law violations have to happen in and by courts. They may be national courts; they also may be international (permanent or ad hoc) courts. Not to forget: It is also proposed to prosecute internationally active terrorists by international courts. It is worthwhile to take a short look at the historical development of such discussions. The so-called International (Legal) Community has discussed all forms of international criminal jurisdiction and will keep on discussing. In Bosnia and Herzegovina once the so-called internationals started an experiment with the (national) Court of Bosnia and Herzegovina, which in its nutshell was an administrative court that then was turned into a hybrid court predominantly for war crimes (and other serious felonies). As such a hybrid institution the Court was successful. International judges have left and the court became a purely national institution again. The short hybrid history of this court in a corner of the Western Balkans is worthwhile to be studied shortly.

Key words: genesis of humanitarian law, international criminal law, failures in institutionalizing the adjudication, genocide in Former Yugoslavia, UN-ad hoc Tribunal, making of a national War Crimes Court, Bosnia and Herzegovina.

1 HISTORICAL RESPECTIVE

International Criminal Law is a very young legal plant when we compare it to International Public Law, which came into existence in Europe in the 17th century.[1] For a long period of time, it was simply unthinkable to prosecute people based upon international law. Even public international law knew interactions between States only, as they were natural subjects to universal public international law, and their interactions were its source. International institutions including international courts, as we know them today were completely unknown.[2] International institutions came into existence not earlier than midst 19th century, e. g. Central Commission on Rhine Revised Shipping Traffic of

1 VERDROSS, A., SIMMA, B. Universelles Völkerrecht, 3. Auflage, Berlin, 1994, § 25 – 30.

2 However, KANT, I. Zum Ewigen Frieden. Ein philosophischer Entwurf, Königsberg 1795, Werkausgabe Band XI, herausgegeben von Wilhelm Weischedel. Frankfurt, 1964, p. 195 – 251.

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17 October 1868.[3] The Central Rhine Commission (and Danube Commission) remained the only international institutions for a long time.

Henri Dunant's experiences in the battle of Solferino on 24 June 1859, which he published in his book "Remembrance of Solferino" (1862), resulted in the foundation of the International Committee of the Red Cross in February 1863.[4] This was the background of the (First) Geneva Convention, which was signed on 22 August 1864. The First Geneva Convention marked the beginning of Humanitarian International Law,[5] which is still developing up to our days. Again, existence and refining developments of Humanitarian International Law did not mandatorily include international prosecution of violations of Humanitarian International Law by in particular international institutions. When the International Committee of the Red Cross proposed international prosecution of breaches of the Geneva Convention of 1864 after the German-French War of 1870/1871 such proposals were premature and too early. They were doomed to fail. It needed further developments in substance Humanitarian International Law[6] and new deterrent experiences during World War I. Article 227 to 231 of the Versailles Peace Accord[7] established Germany's responsibility for World War I and urged the last German Emperor's prosecution.[8] However, Emperor Wilhelm II when he was dethroned by the 1918 November Revolution in Germany had found asylum in the Netherlands where he died on 4 June 1941 and the Dutch Government did not grant his extradition. With view on other suspects falling under Article 227 to 231, the Government of the young first German Republic of Weimar was factually not in the position to comply with the Peace Agreement's demands.[9] Germany's ruling class was opposed to such prosecutions and called it the "Winners' Justice". International Criminal Justice then came to a hold. The view of International Community then changed when the world experienced the atrocities of Nazi-Germany and her allies during World War II and of Japan in East Asia. By the Moscow Declaration of 31 October 1943 published on 1 November 1943 the Allies (Soviet Union, United Kingdom and United States of America) agreed on prosecuting the major war criminals of the so-called Axe-Powers by military courts. The legal foundation of such prosecution was laid down in the London Statute of 8 August 1945 and later than in the Law No. 10 of the Allied Control Council for Germany. Both instruments established the Nuremberg Military Court, fixed the rules of proceeding and established the substance law of crimes, which that Court had to adjudicate. Those instruments gave birth to modern International Criminal Law[10] and

3 BGBl 1969 II p. 597. See also the European Danube Shipping Commission (Danube Shipping Act of 7 November 1857, Wien Hof- und Staatsdruckerei 1858).

4 VERDROSS, A., SIMMA, B. Universelles Völkerrecht, op. cit., § 418 – 421.

5 AMBOSS K. Internationales Strafrecht, 5. Auflage. München, 2018, § 6 recital 6.

6 E. g. The Hague Conventions of 1899 and of 1907 (AMBOSS K. Internationales Strafrecht, op. cit., § 6 recital 9.

7 RGBl. 1919, p. 687 and p. 1336.

8 STERN, K. Das Staatsrecht der Bundesrepublik Deutschland, Band V. München, 2000, pp. 465; MÜLLER, K. Oktroyierte Verliererjustiz nach dem Ersten Weltkrieg. In: Archiv des Völkerrechts, 39 (2001), p. 202–222; MÜLLER, K. Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg. In: Bernd-Rüdiger Kern, Adrian Schmidt-Recla (Hrsg.): 125 Jahre Reichsgericht. Berlin, 2006, p. 249–264; WIGGENHORN, H. Leipziger Verliererjustiz: Die Kriegsverbrecherprozesse nach dem Ersten Weltkrieg (Studien zur Geschichte des Völkerrechts, Band 10), Baden-Baden, 2005.

9 The so-called Leipzig Trials tried in first and final instance by the Reichsgericht, Germany's Supreme Court of Justice, were based upon the Law on Prosecution of War Crimes of 18 December 1919 (RGBl. I 1919, 2125) and its amendments. The case management by Reichsgericht was dilatory on purpose and even the then Reichs Minister of Justice Gustav Radbruch admitted the dilatory and obstructive case treatment in his later autobiography. AMBOSS K. Internationales Strafrecht, op. cit., § 6 recital 1; MATTHÄUS, J. The Lessons of Leipzig. In: Atrocities on Trial. Hrsg.: Heberer und Matthäus, University of Nebraska, 2008.

10 WERLE, G. Völkerstrafrecht, 3. Auflage. Tübingen, 2012, recital 15.

International Penal Justice. Nuremberg and her courtroom 600 in the court building wrote history, which affects us even today.[11]

Further developments towards international criminal law codifications and international criminal institutions came to a standstill when so-called Cold War broke out. Among academics and within legal institutions including those of United Nations discussions went on but did not result in feasible legal texts. All elaborations on international criminal justice, e. g. the codification of the so-called "Nuremberg Principles" remained a United Nations *internum* as well as a Draft Statute of an International Criminal Tribunal. New and unexpected atrocities against humanity and human beings finally caused the change. In course of the communism falling apart Socialist Federal Republic of Yugoslavia dissolved, Member Republics like Slovenia and Croatia declared their independence at the beginning of the 90ies of last century. War broke out and resulted in mass murder, genocide and other cruelties, which the World and Europe thought of having become final part of human history. Unfortunately, International Community was rather hesitant in getting involved in the conflict, in which Serb troops fought against Bosnian troops, they fought against Croat troops and all of them somehow turned against civilians. Those fights had a lot of culminations but they reached their zenith when in July of 1995 Serb troops led by their military mastermind Ratko Mladić attacked the UN-protected zone of Srebrenica and extinguished the male population there: The genocide of Srebrenica was committed. Almost at the same time in Africa, Tutsis and Hutus in Rwanda went after each other and slaughtered thousands of human beings. The cruelties grew up to such dimensions that the Security Council of United Nations had to act. Security Council Resolution no 827 of 25 May 1993created the (Ad-hoc) International Criminal Tribunal for the Former Yugoslavia (seated in The Hague in the Netherlands) and then by Resolution no 955 of 8 November 1994 the International Criminal Tribunal for Rwanda (seated in Arusha/Rwanda). Both international judicial institutions have ceased to function. Security Council by instituting those ad-hoc tribunals entered "new territories" in legal fields. Finally, a diplomatic conference in Rome accepted the so-called Rome Statute of 1 December 1998, which entered into force on 1 July 2002. This Statute created the (permanent) International Criminal Court with its seat in The Hague/Netherlands.

2 BOSNIA AND HERZEGOVINA: A HYBRID COURT

The International Criminal Tribunal for the Former Yugoslavia in its operations was an expensive undertaking. The annual budget in the heydays of its existence was more than 100 million US-Dollars.[12] The jurisdiction was limited to severe violations of the Geneva Conventions by war criminals on the territory of former Yugoslavia.[13] Thus, the Tribunal was legally not in the position to adjudicate all war crimes, which had been committed in Yugoslavia since 1991. At the beginning of the new millennium it became apparent that the institution had to last longer than originally ex-

[11] E. g The Nuremberg Principles Academy describes their challenge as follows: The International Nuremberg Principles Academy (Nuremberg Academy) is dedicated to the promotion of international criminal law and human rights. It is located in Nuremberg, the birthplace of modern international criminal law. Conscious of this historic heritage, the Nuremberg Academy supports the fight against impunity for universally recognized international core crimes: genocide, crimes against humanity, war crimes and the crime of aggression.

[12] ICTY-website „199Costs of Justice".

[13] Report ICTY 1993 paras. 32 in: Human Rights Law Review 1996, pp. 211.

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pected. UN Security Council Resolution 1503 established a so-called "completion strategy", which set up deadlines for investigations, first instance and last instance trials to be completed before the institution ceases its functions.[14] In the context of discussing and drafting that "completion strategy" the question was discussed, what to do with all the other felonies having been committed in the Yugoslavian wars, which the Tribunal was not able to tackle. In order to prevent impunity, national institutions were then focused in Bosnia and Herzegovina as well as in other States, which succeeded Yugoslavia.

2.1 In particular: The situation of Bosnia and Herzegovina

Bosnia and Herzegovina is a small and in particular very poor country in the Western Balkans with a population of around 3.4 million people, an unemployment rate of almost 50 % at the beginning of the millennium and a total gross national product of 4.6 billion US-Dollars in 1999 – a smaller product than that of a major German city. The average income of a Bosnian employee in 2000 was about 300.00 €/month. Along with Kosovo and Macedonia Bosnia and Herzegovina had always been one of the weak regions of Yugoslavia depending on resources from Belgrade and better doing republics like Slovenia and Croatia. The weakness did not cease by end of the war in 1995.

Since independence and in particular since the end of the war by the so-called Dayton Peace Accord in December 1995, Bosnia and Herzegovina relied on international financial aid. At the end of the 1990ies, the economic and social situation in Bosnia and Herzegovina was deplorable. The country's former socialist economy in the particular Yugoslavian form of workers' self-management on paper turned into a Western market economy. However, in bitter reality an uncontrolled black market system had been established with all negative consequences. Privatization of self-managed industry badly progressed if so, people having made fortune during the wars or having assumed political power often benefitted from such transfer from public ownership to private property.

Moreover, the Dayton Peace Accord maintained Bosnia and Herzegovina as a forth existing legal entity of Public International Law but brought to Bosnia and Herzegovina a new constitution. In terms of bringing the armed conflict within Bosnia and Herzegovina to an end this constitution is the result of compromising with every war party and therefore created a monster of institutions, authorities and jurisdictions all over the country that is unseen in Europe or on this globe elsewhere. The Dayton Constitution gave birth to two entities almost completely independent from each other and a central State, which is not disposing of any real competence or jurisdiction except defense and foreign affairs. The centralized entity of Republika Srpska with almost 48 % of the territory and in population and her policy might be characterized by jealously safeguarding their jurisdiction and not having much interest in entity-to-State- and inter-entity-cooperation. This often obstructive attitude is an obstacle to national improvements. The second entity is Federation of Bosnia and Herzegovina, which is constituted by Bosniak (Muslim) and Croat components. The Federation is governed by a Federal Government and Parliament but on a sub-level by 10 cantons, again with governments and cantonal assemblies. Cooperation between the Federal level and the sub-entities is not running smoothly because Croat minorities within those cantons felt and are still feeling not to be appropriately represented within the Federal bodies.

[14] AMBOSS K. Internationales Strafrecht, op. cit., par. 6 recital 15.

When looking at the overall system, observers from abroad are struck by the fact that they have to deal about 150 ministers in 13 governments and with 13 parliamentary assemblies.[15]

The 1995 Dayton Constitution established a (national) Constitutional Court of Bosnia and Herzegovina but is silent about the judicial power in general. Up to now, judiciary and its power is mainly subject to Entities legislation.

2.2 The move to the Court of Bosnia and Herzegovina

At the end of the 1990ies and in the dawn of the "Completion Strategy" of the UN-Security Council talks among ICTY and countries concerned, inter al. with Bosnia and Herzegovina started. Along those talks ICTY already transferred pending cases from The Hague to Sarajevo (so-called 11bis-cases).[16] The 11bis-methodology did not work because not only Bosnia and Herzegovina but all countries concerned were not prepared for war crime prosecution in the dimension that ICTY expected them to be. When Yugoslavia fell apart, so did the criminal legal system in the region. Necessity of reforming the criminal legal system became obvious. However, in Bosnia and Herzegovina national authorities did not take the challenge serious. And again, there were unresolvable frictions: Judicial power was enshrined to the two Entities and they had to organize efficient prosecution and adjudication of war criminals as well as of other bad people, and at the end of the avenue there was the question: Could a Bosniak (Muslim) court try a Serb perpetrator, and vice versa? Anyway, among members of the International Community persuasion was growing that the country needed fundamental changes in the criminal law system not only because of imminent war crime prosecution but also in order to create an environment of legal security for foreign investments and against fraud, corruption and organized crime.

National elections in Bosnia and Herzegovina were observed by OSCE since the war had ended. As the Constitutional Court of Bosnia and Herzegovina has not the jurisdiction on deciding election complaints, OSCE requested the Office of the High Representative whose mandate was to implement the civilian aspects of the Dayton Peace Accord to provide for a judicial remedy in such and other (administrative) matters, which lied in the constitutional jurisdiction of the State of Bosnia and Herzegovina. So, the High Representative of Bosnia and Herzegovina in exercising his exceptional powers ordered on 12 November 2000 the establishment of the Court of Bosnia and Herzegovina (Decision no 50/2000).[17] In 2000/2001 there was therefore a State level judicial body installed, which had the potential to become the necessary war crime adjudication institution of Bosnia and Herzegovina.

In May 2002, Lord Paddy Ashdown succeeded Wolfgang Petritsch in the office of High Representative in Sarajevo, and he was convinced that his primary challenge had to get rid of rampant organized crime. It needed many talks between him and then ICTY-Prosecutor Carla Del Ponte to convince him that war crime prosecution was equally a national and imminent challenge. Ashdown, who had a much more robust approach than his predecessor Petritsch rushed up the process of reforming the penal system of Bosnia and he simultaneously secured the (international) funding of new, more efficient judicial and prosecutorial institutions. After only six month in office, he, by uni-

15 DAUSTER, M. The Suffering Constitution of 1995: One of the Main Obstacles to the Improvement of Bosnia and Herzegovina. In: ELSA Passau: 1989 – 2009. 20 Years of ELSA-Passau e. V. Passau, 2009, pp. 71.

16 See STEINER, Ch., ADEMOVIĆ, N. Verfassung für Bosnien und Herzegowina. Kommentar, Sarajewo, 2012, pp. 425/443.

17 Official Gazette of Bosnia and Herzegovina no 29/00.

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lateral decision, enacted the Criminal Code of Bosnia and Herzegovina,[18] the Criminal Procedure Code of Bosnia and Herzegovina[19] and amended the Law on the Court of Bosnia and Herzegovina,[20] so that this court could open a War Crime and an Organized Crime Department beside the existing Administrative Department and an Appeal Division. The Court (and the Prosecutor's Office of Bosnia and Herzegovina which was established in parallel) was operational in summer 2003.[21]

The 2002/2003 criminal legal reforms represented the biggest achievement in years.[22] The legislation of 2002/2003 was then even used as a model in other Western Balkan countries when they reformed their criminal legal system.

The Court, which is not a supreme court[23] was conceptualized as a so-called hybrid court composed of national and international judges. The background of such national/international composition was that within International Community there were serious concerns whether national judges of Bosnia and Herzegovina could exercise the new State Court jurisdiction on criminal matters, in particular on war crimes. Foreign countries were invited to second qualified judges to Bosnia and Herzegovina[24] where High Representative appointed them.[25] They became Bosnian judges with all rights and duties and were sworn in by the High Judicial Council of Bosnia and Herzegovina, however the Council was not permitted to oversee the work of international judges in terms of disciplinary aspects. The appointment of High Representative exempted international judges from local disciplinary authority by diplomatic immunity and left it to the seconding countries to exercise their disciplinary jurisdiction on seconded nationals.

Organized Crime Division of the Court started operation first, then in 2004 the War Crime Division became effective. Respective first instance panels were composed

- Organized Crime: one international Presiding Judge and two national judges.
- War Crimes: one national Presiding Judge and two international judges
- Appellate panels were composed in same way.

Although one could expect a clash of legal cultures, the panels found their ways in applying national Bosnian criminal law not only on war crimes. The court did that smoothly and more efficiently than ever expected.[26] In the meantime, the last international judge has left the court

18 Official Gazette of Bosnia and Herzegovina no 3/03

19 Official Gazette of Bosnia and Herzegovina no 3/03

20 Official Gazette of Bosnia and Herzegovina no 3/03. The amendments to the Law on the Court of Bosnia and Herzegovina were challenged constitutionally in front of the Constitutional Court of Bosnia and Herzegovina but then upheld by the court.

21 For the entire reform process, which also reshaped the Entities system see DAUSTER, M. The State Court of Bosnia and Herzegovina as Criminal Court. StrafverteidigerForum, 2006, pp. 316.

22 See DAUSTER, M. Tallying the Balance of Effects of the International Community in Bosnia and Herzegovina, December 1995 – March 2007 (Bilans djelovanja zajednice u Bosni I Hercegovini – od decembra 1995 do marta 2007). In: Fondacija Heinrich Böll, Examples of Bosnia and Herzegovina: Sustainable Concepts or Los Ways of the International Community? (Primjer Bosne I Hercegovine: Ordzivi koncepti ili stranpuice meduranodne zajednice?). Sarajevo, 2007, pp. 85 – 107, 241 – 262, with a critical view on the International Communities achievements in the first 12 years after Dayton.

23 DAUSTER, M. A Supreme Court for Bosnian and Herzegovina: Some Thoughts on Its Necessity (Vrhovni sud za Bosnu i Herzegovinu: razmisljanja o njegovoj neophodnosti). In: Sveske za javno pravo, 2011, pp. 4

24 Seconding countries continued to pay the international judges‘ salaries or they allocated funding to the International Court Registry so that this body paid salaries.

25 In 2007, the appointment jurisdiction was transferred to the High Judicial Council of Bosnia and Herzegovina.

26 IVANIŠEVIĆ, B. The War Crime Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court. International Center for Transitional Justice, 2008; Court of Bosnia and Herzegovina (by the Court President Meddzida Kreso, 10th Anniversary of Section I for War Crimes at the Court of Bosnia and Herzegovina. Sarajevo, 2015.

by end of 2012.[27] The institution turned from a hybrid to a domestic institution and keeps on producing justice.

3 OUTLOOK

The Court of Bosnia and Herzegovina is still in a fragile position. So far, the court shares the fate of many other State institutions in Bosnia and Herzegovina. International funds were allocated in the court's commencement but that has become history. As of the court's efficiency it found many critics among those who dream about returning to the *status quo ante*. International community, in particular the Office of the High Representative, is working on an "exit strategy" for years now and does not represent real support anymore. Access to European Union is still pending so that European institutions are hindered to support this unique State institution of Bosnia and Herzegovina in case serious attacks, which the Court had experienced in the past. Those who still like the Court to vanish do not ask the question what the contribution of the Court to the country's history was about when it adjudicated war crimes in the most professional way.

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[27] TAUSAN, M. Bosnia Calls Time for Foreign Judges. In: Balkan Transitional Justice of 26 March 2012.

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THE RIGHT TO PHYSICAL AND MENTAL IMMUNITY IN THE LIGHT OF THE NEW CONSTITUTION OF THE REPUBLIC OF ARMENIA AND MODERN CHALLENGES IN THIS FIELD IN ARMENIA

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TONOYAN, N. The Right to Physical and Mental Immunity in the Light of the New Constitution of the Republic of Armenia and Modern Challenges in This Field in Armenia. Bratislava Law Review, Vol. 3, No. 2 (2019), pp. 84 – 90. ISSN 2585-7088, eISSN: 2644-6359

Abstract: The Constitution of the Republic of Armenia (RA) for the first time envisaged the right to physical and mental immunity (in the former edition of personal immunity) in 2015. According to Article 25(1) of the RA Constitution, everyone shall have the right to physical and mental integrity. That right may be restricted only by law, for the purpose of state security, preventing or disclosing crimes, protecting public order, health and morals or the basic rights and freedoms of others. The bodily rights of the person, including the right to physical and mental immunity, are recognized in professional literature as somatic rights that have become a subject of vigorous debates as a new generation of human rights. In general, human somatic (bodily) rights constitute a wholeness, which includes: the right to life; the right to die or the right to choose a way of giving up one's life (right to suicide, right to use euthanasia), etc. Current report in the light of the RA Constitution report discuss some of important issues in this field: eugenic experiments, medical intervention, organs and tissues transplantation, etc.

Key words: constitution, human right, a person is the highest value, human somatic rights constitute, Armenian law, human rights.

1 INTRODUCTION

The Armenian Constitution (RA Constitution) for the first time envisaged the right to physical and mental immunity (in the former edition of personal immunity) in 2015. According to Part 1 Article 25 of the RA Constitution, everyone shall have the right to physical and mental integrity. That right may be restricted only by law, for the purpose of state security, preventing or disclosing crimes, protecting public order, health and morals or the basic rights and freedoms of others. Part 3 of Article 25 of the RA Constitution especially underlines: in the fields of medicine and biology, eugenic practices, making the human organs and tissues a source of financial gain, the reproductive cloning of a human being shall be particularly prohibited, and part 4 said: no one may be subjected to scientific, medical or other experiments without his or her freely and clearly expressed consent. The person shall be priorly informed about the potential consequences of such experiments.

The bodily rights of the person, including the right to physical and mental immunity, are recognized in professional literature as somatic rights that have become a subject of vigorous debates as

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a new generation of human rights. In general, human somatic (bodily) rights constitute a wholeness, which includes: the right to life (to live); the right to die (right to peaceful and dignified death) or the right to choose a way of giving up one's life (right to suicide, right to use euthanasia); the right to transplant and clot the parts of human body, organs, tissues (medical cloning); the right to medical intervention; the right to Sexuality, etc.

The constitutional guarantee of the right to physical and mental immunity in the RA will give a new impetus to the protection of this right, however there should be cautious and balanced approach to innovations, their application and their legal regulations, avoiding the mistakes that have already been known to mankind. Some manifestations of physical and mental immunity, assault and other forms of violence, torture, etc. have long been known both by national practice and specialized literature, but some manifestations, in particular, violations of the transplantation, eugenic experiments, need serious study.

Everyone should feel safe and secure in the legal state, and no one can directly or indirectly violate his or her physical and mental integrity, for example, by taking advantage out of the lack of knowledge, low legal awareness, vulnerability or other circumstances that have a significant impact on the person's weighted and comprehensive expression of will.

2 RECOGNATION OF PHYSICAL AND MENTAL IMMUNITY OF PERSON

The fact that a person is the highest value and must be protected in all situations is indisputable. The Constitution of the Republic of Armenia (further – the RA Constitution) for the first time envisaged the right to physical and mental immunity (in the former edition of personal immunity) in 2015, thus establishing the separation of the physical and mental immunity of the person and the creation of constitutional guarantees.

In general, as a matter of law, a human is a person, a subject of legal relations. For example, we call the conceived creature embryo up to 12 weeks (0-12 weeks), after which the fetus (12 weeks – maximum 9 months), and from the moment of the birth becomes a newborn, human. Therefore, for the category of "human" is important that the subject to be in the material world, to live, which starts from the moment of the birth, coming out of the light and ends with the death of a human brain. However, a man is primarily a biological creature, which is expressed by his physiology, and only afterwards a social being, which is expressed by humanmentality, communication, and worldview.

According to Part 1 Article 25 of the RA Constitution, everyone shall have the right to physical and mental integrity. That right may be restricted only by law, for the purpose of state security, preventing or disclosing crimes, protecting public order, health and morals or the basic rights and freedoms of others.

Part 3 of Article 25 of the RA Constitution especially underlines: in the fields of medicine and biology, eugenic practices, making the human organs and tissues a source of financial gain, the reproductive cloning of a human being shall be particularly prohibited, and part 4 said: no one may be subjected to scientific, medical or other experiments without his or her freely and clearly expressed consent. The person shall be priorly informed about the potential consequences of such experiments.

The bodily rights of the person, including the right to physical and mental immunity, are recognized in professional literature as somatic rights that have become a subject of vigorous debates

as a new generation of human rights. V.I. Kruss fairly mentions that somatic rights in the existing classification system of human rights and freedoms, due to their peculiarities, cannot be viewed positive in the same line with social rights. Somatic rights are called to protect the physical and spiritual integrity of a person.[1]

These rights are the result of the development of the rights-making and are presented as human rights for the fourth generation.[2]

In general, human somatic (bodily) rights constitute a wholeness, which includes:

1. The right to life (to live)
2. The right to die (right to peaceful and dignified death) or the right to choose a way of giving up one's life (right to suicide, right to use euthanasia);
3. The right to transplant and clot the parts of human body, organs, tissues (medical cloning);
4. The right to gene change;
5. The right to change the appearance (including the right to aesthetic surgery);
6. The right to use narcotic drugs and psychotropic substances,
7. The right to medical intervention;
8. The right to Sexuality,
9. The reproductive right (artificial insemination, right to fertilization, extragenital, test-fertilization and embryo), including abortion,
10. The right of sterilization (stamping, sterilization, correction)
11. Other somatic rights.[3]

3 THE PROBLEM OF MENDICAL INTERFERENCE IN PHYSICAL AND MENTAL INTEGRITY

As it is noted in the RA Constitution, two modes of interference in physical and mental integrity should be separated:

1. by the consent of the person,
2. in the cases prescribed by law, proceeding from public interest or excessive necessity.

Having examined the essence of the person's agreement in the field of medical intervention, it should be noted that a part of this agreement also includes the right of the patient to refuse interference, but in this case the latter should be informed of the possible negative consequences of non-use of the intervention. This is the situation when a person, having a necessity for medical intervention, refuses it as his or her subjective right. As the lawyer M. Marchenko, the subjective rights of a human being are the possibilities within the immediate possession of a human being, which can be used or ignored as the means of achieving their own goals.[4]

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1 KRUSS, V. Personal ("somatic") rights of a person in the constitutional and philosophical-juridical measure: to the problem's set. In State and law, 2000, № 10, p. 43 (in Russian).

2 In juridical literature there are different systems of classifying human rights, f.e. classical (State negative obligation) and social rights (State positive obligation), collective and individual rights, rights and freedoms, civil and political (first generation) rights, social, economical and cultural rights (second generation), people, collective rights (third generation), (MOROZOVA, L. Theory of the state and law. 4th edition. Moscow, 2012, p. 146 (in Russian)).

3 This report will only discuss some rights based on the time restrictions.

4 MARCHENKO, M. Tendencies of law development in the modern world. In Moscow, 2015, p. 40 – 41 (in Russian).

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The physician is obliged to inform the patient about his/her health condition, objectives and results of the medical examination, as well as possible risks.[5]

In the light of the RA Constitution it is obvious that if a person on his death refuses the medical intervention while realizing all the results of its absence or he/she utters his/her wish to die, thus no one, including doctors, can force him to be cured. In this regard, no exceptions should be done, however, the cases if the person is unable to express his will, then the intervention will be implemented as the main guarantee of health and life.

However, it should be stated that the consent of a person within the scope of medical intervention may also not be the starting point, that is, the autonomy of a person does not imply that he/she can receive any treatment that he/ she requires. Here, the physician may limit that desire based on the medical ethics, the available treatment modalities, and the patient's best interests within a reasonable balance.

The regulation on the immunity of organs and tissues are also notable. Nowadays, many countries prohibit buying and selling organs, moreover, there is a criminal liability for it, consequently in a situation where a person has sold his kidney and the other has bought it, there is a crime.

Transplantation is the replacement of tissues or organs that are missing or damaged by tissues or organs taken from their own or other organism.

In the context of the legal relationships of transplantion, we may occasionally encounter such issues that are not the problems deriving from the nature of transplantion, but the issues that may arise from the sale of transplant rights, such as racial collision. As an example there is the case when a white man has been transplanted into a black man heart, and the man's life could be saved, but the man complained because he preferred to die rather than a black man heart transplant. We believe that in such situations, priority should be given to the patient's wishes, if any, and whether there is no wish or that wish exists but is not clear or realistic, the priority should be given to the general principles of the transplantion.

Decision No. 913 of 14. 09. 2010 of the RA Constitutional Court is interesting on this matter: according to which Article 7 of the RA Law "Human Organs and/ or Tissue Transplantation" is called contrary to the RA Constitution on the bases that is to apply the law a number of sublegislative acts are required that have not been adopted yet. Moreover, the removal of the donor material from the dead body can be performed in two ways: either accordingly to his lifetime agreement or to his/her close relatives' agreement posthumously, as well as to the mute agreement.

Being consistent with the above-mentioned position of the RA Constitutional Court, it should be noted that according to Article 7 of the RA Law on "Human Organs and/ or Tissue Transplantation", in one case the principle of alleged consent it is legitimate the obtaining a donor material from the corpse, if during his lifetime, he did not express a desire not to receive donor material during his lifetime), and in the other case, besides the alleged agreement, the consent of the close relatives (relatives) of the deceased donor is also essential.

For the first time in the text of the RA Constitution the term "eugenics"[6] has been used. In general, the constitutional prohibition on the use of eugenic experiments is to curb scientific or political suspicious goals for the research of the population genetic foundation, as well as the selection of genetic norms.

[5] DAVTYAN, S. Bioethics. Yerevan State Medical University. Yerevan, 2009, p. 83 (in Armenian).

[6] Eugenics (Greek – noble, dynasty) is a teaching about the improvement of human nature in a biological way.

Eugenics is a study of the human hereditary health, as well as the improvement of hereditary properties that are solved within the framework of genetic engineering in the modern world.[7]

There are two eugenical manifestations – positive and negative. In the case of the positive one, it is aimed at the development of human abilities, physical abilities, improvement of human health, and the negative attitude directs towards the elimination of inherited defects in human beings.

Negative examples of eugenic manifestations are in the 20th century the Nazi Germany's act, ethnic cleansing in Rwanda, resulting in the genocide. Moreover, sometimes there are also pessimists who consider scientific and technological progress only from a negative point of view, indicating that biotechnology has a negative impact on the following objects such as: genomics, genetically modified organisms, molecular medicine, biochemistry, eugenics, ecogenetics, human biomedical research.[8] It is necessary to understand one simple truth that any phenomenon has its positive and negative aspects, consequently the problem here is not to prohibit the phenomenon, but to use it correctly. Simultaneously, let's discuss the issue of creating an atomic bomb. From a scientific point of view it is often discussed whether the creation of an atomic bomb is destructive or peaceful. Today, it has restraining, peace-loving nature, since at least two states have it, but they do not apply, given the likelihood of using that bomb on the other side as well. At the same time, if we examine the history of the creation of the bomb, we will see that from the very beginning it was called a horrible, destructive phenomenon. That is to say, the problem is that it is necessary to set up clear mechanisms of use and to provide legal resurrection.

As it is truly was indicated in Armenian literature, the mentioned norm of the RA Constitution will bring to the agenda of the RA legal system, particularly the following issues:

1. Discussions on the signing and ratification of the Convention on Human and Biomedicine (Ovidium Convention).
2. Study of the constitutional concept of "eugenical experiments" and clarification of borders. First of all, the RA Constitution prohibits not only the activities of eugenics, but also the experiments, while a number of methods of population selection have already passed the purely test phase and are independent activities. Secondly, negative eugenics (genetic medical intervention of a specific person, with the aim of eliminating the incurable diseases) and positive eugenics (biotechnological intervention of human heredity, with the aim to selectively change of its "genetic sort") is distinguished. Moralists note that the first eugenics is generally welcomed, and the latter gives rise to doubts and objections.[9]
3. The systematic review of the current legislation in the context of the constitutional prohibition on the Eugenics, in particular, the study and clarification of the selection and choice of donor seeds for the purpose of voluntary medical malnutrition and artificial (experimental) excretion, as provided for by the RA Law on Human Reproductive Health and Reproductive Rights. It should be born in mind that the type of eugenics is the choice of human choice by gender, as well as the removal of reproductive people from the ill or socially unwanted gene pool.

7 KUSHERBAYEV, S. Medical-juridical aspects of gene engineering. In Eurasian juridical journal, N 8, Velikey Novgorod, 2010, p. 98 (in Russian).

8 BAKSANSKEY, O., GNATIK, E., KUCHER, E. Nanotechnologies, biomedicine, philosophy of education in the mirror of interdisciplinary context. In Moscow, 2010, p. 150 – 160 (in Russian).

9 KUCHEROV, I. Modern biotechnologies: social-aesthetical aspects. The autoreferat for the PhD dissertation. In Moscow, 2006, p. 5 (in Russian).

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4. Eugenic experiments, reproductive cloning of human beings, the use of reproductive technologies to plan the future gender of the child, and the provision of other socially dangerous acts in the field of bioethics as independent crimes in the RA Criminal Code.[10]

In general, the cautiousness towards genetic changes is accelerating in Armenia under the light of Article 25 of the RA Constitution. Gene alteration is the situation when, for example, a person is getting prenatal testing to exercise reproductive rights to check the future baby's possible deviations, so in result of changes the future child will get rid of a number of diseased phenomena. Sometimes it is called pronation.[11]

The genetic engineering is a combination of methods and approaches that are intended to create biological structures. Genetic engineering examines the changes in the sex cells related to the body's new form and nature.[12] It should be noted that the right to genetic change is a possibility for a person to carry out a genetic change at his own risk, which, first of all, is aimed at the elimination of genetic defects. It will only create a favorable environment for improving the quality of human life as it will be possible to avoid or get rid of a number of illnesses and pathological states. At the same time, it is necessary to set up clear legal mechanisms to pay close attention to the issue of scientific and practical research.

There are plenty of controversial and debated issues about the right of physical and mental immunity, as it is linked to the highest value, which is the human.

It can be argued further in the context of physical and mental immunity, however it should be noted that in the countries where the population is not large (as of January 1, 2018, the population in Armenia is 2,972,900[13]), this issue is more acute is in the context of security, national security and independence of the state.

The average age of the permanent population as of the beginning of 2017 year was 36.2 (35.9 years in 2016), 34.3 for men (2016, 34.1), and for women – 38.0 (in 2016, 37.6).[14] The aging of the population also focuses on the protection of physical and mental immunity.

4 CONCLUSION

Summarizing the report, it can be noted that the constitutional guarantee of the right to physical and mental immunity in the Republic of Armenia will give a new impetus to the protection of this right, however there should be cautious and balanced approach to innovations, their application and their legal regulations, avoiding the mistakes that have already been known to mankind.

Some manifestations of physical and mental immunity, assault and other forms of violence, torture, etc. have long been known both by national practice and specialized literature, but some

[10] GAMBARYAN, A. The horizons of the development of jurisprudence and bioaesphetics in the 21-st century. The system of biojuridacy, the biomedical and ethical, juridical issues. The collection of materials of republican scientific conference. Armenian-Russian (Slavonic) University, Yerevan State Medical University. Yerevan, 2016, p. 26 – 27 (in Armenian).

[11] In the circle of child planning pregnancy before the child's planning is either a woman or a man subjected to genetic testing to check whether he or she has a disease or has a premature illness that may hinder the development of the fetus (or the baby will be born with defects), in other words, there are negative phenomena or addiction to such phenomena.

[12] KUSHERBAYEV, S. Medical-juridical aspects of gene engineering. In Eurasian juridical journal, N 8, Velikey Novgorod, 2010, p. 97 (in Russian).

[13] http://armstat.am/file/article/sv_12_17a_520.pdf, p. 137:

[14] Ibid., p. 138.

manifestations, in particular, violations of the transplantation, eugenic experiments, need serious study.

Everyone should feel safe and secure in the legal state, and no one can directly or indirectly violate his or her physical and mental integrity, for example, by taking advantage out of the lack of knowladge, low legal awareness, vulnerability or other circumstances that have a significant impact on the person's weighted and comprehensive expression of will.

The performed study is a cornerstone for the study of the human in the context of both legal and biological unity.

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SOCIOLOGICAL AND LEGAL ASPECTS OF "PRISON MOVIES" [1]

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Abstract: The paper focuses on the cinematic depiction of the various problems of the European and the American penitentiary systems.

The paper presents an analysis of two movies – one relating to civil European legal system and the other one from the area of American legal culture – on purpose. Our ambition was to compare two different approaches to prison theme and subsequently to illustrate the diversity of conditions in prisons facilities, the regress of individuals in "hostile" territory and others interesting but also unsettling consequences of life in prison.

Key words: movies, prison, prisoner, legal problems, punishment, law and art, legal theory, French penitentiary, American penitentiary, sociology, Présumé coupable, Shot Caller

1 GENERAL REFLECTION ON PRISON

It is a simple fact based on the common knowledge that the human body and mind are not designed for long-lasting loss of freedom. Therefore, it is crucial that the environment "behind the prisons walls" comply with the principles of humanity. However, the qualitative differences between prisons are enormous – in some countries (e. g. Scandinavian states) prisons reminds more of "scout camps" then state facilities and in other countries, prisons represent the worst social environment in the state (e. g. in Russia, Turkey, and Thailand). Following this context, this article aims to partially analyze following presumption: "*Today's rational choice perspectives continue to assume that imprisonment reduces crime, but this assumption has not been proved—indeed, the majority of people released from prison on parole soon recidivate. Moreover, by interpreting crime solely as the result of individual choice, these theories deny the role in crime causation of poverty, race, class, and gender.*"[2]

We assume the prison's condition always reflects the politics of state and values of the particular society. The correlation simply exists – we can identify the same problems on the state level as well in relation to the prisons: state/prison corruption, awful living conditions, the insignificance of human life, violations of human rights and freedoms, lack of money in national/prison budget. Before mentioned significant problems exist worldwide, even in the penitentiary system of western countries, where the prison system is considered to be "civilized". However, the real controversial situations occur in the confrontation with the "uncivilized" prison systems. Typical example of this "conflict" is the

[1] The article was processed within the project VEGA 1/0859/18 „*Limitation of the freedom of expression: case of "vault" movies.*"

[2] RAFTER, N., BROWN, M.: Criminology goes to the movies: crime theory and popular culture, New York : New York University Press, 2011, p. 17.

situation of the imprisonment of foreigners for smuggling or selling illegal drugs in some of the Asian countries (e.g. Thailand) – these convicts are confronted with a drastic environment in the local prisons that significantly differs from the civilized standards. This type of situation was an inspiration for many TV series (*Bangkok Hilton, 1989; Banged Up Abroad, 2007*) and movies (*Dadah Is Death, 1988; Brokedown Palace, 1999; Return to Paradise, 1998; Ma fille est innocente, 2007; Midnight Express, 1978*).

2 PRISON, TV, AND MOVIE

Cinematography has created various genres that directly reflect the reality and the genre of "prison movies" is one of them. The prison movies are relevant and also important sources of information on the issues of the crime, the punishment, the life in prison and life after releasing from a prison: "*People have always been fascinated with punishment. In the past, they would gather in the town square to watch as wrongdoers were punished; however, in the late eighteenth century, most punishment moved behind prison walls. What took place there was a mystery to most. In the modern era, people often turn to the media and popular culture to feed their curiosity about this social institution. The prison film genre developed early in the history of moviemaking.*"[3]

Filmmakers and audiences alike have a morbid curiosity about what goes on behind the bars and this natural human fascination with the topic of punishment and imprisonment has led to a production of numerous TV shows and movies about life in prison:

i. TV shows: *Orange is New Black, OZ, Prison Break, Wentworth, Bad girls, Porridge, Arrested development, Bangkok Hilton*.
ii. Movies: *Presumed Innocent, The Shawshank Redemption, Cell 211, The Green Mile, Cool Hand Luke, Brubaker, Papillon, Escape from Alcatraz, Felon*
iii. Documentaries: *The Biggest Prison System in History, Solitary Confinement, Prison Terminal: The Last Days of Private Jack Hall, Coming Home, Lost for Life, The House I Live In, American Chain Gang, Into The Abyss and a lot of other documentary films*.

2.1 Movies as a source of information about life in the prison

Movies are not the only source of valuable information on crimes, victims, punishment, trial, jury, judge or prisoners, but they are also a powerful tool of prevention. A significant part of the human population has never been in a prison, they have never studied law or they have never worked in police forces. These people live their everyday stereotypes and they have never had problems with the law throughout an entire life. How is that possible? Intuitively we all respect legal norms but (in fact) we don't understand them so well. We don't recognize them in their complexity.

To solve this paradox, sociology has a crucial role: parenting, school education and other sociological aspects of our life. Culture and religion are also a very important element in human life. The religion operates with religious norms that are very similar to legal norms (e.g. in Christianity – "Thou shalt not kill", "Thou shalt not steal" and others).

[3] OLESON, J.: Dawn K Cecil, Prison life in popular culture: From the Big House to Orange is the New Black, In: Australian & New Zealand Journal of Criminology, Vol 49, Issue 2, 2015, pp. 303 – 305. Available at https://doi.org/10.1177/0004865815616535 [q. 2019-12-10].

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The culture forms human character through TV, songs, theatres, movies, paintings, architecture, popular literature and other forms of art. We can observe a crime, life in prison and after prison in TV-shows, movies, theatres. We can read about victims, murders, punishments in popular books, comics, and magazines.

"*Imprisonment is a widespread punishment all over the world, but prison is for most of us an unknown experience and anything we know is mostly, through media and cinema representations. Therefore, it is very likely these representations play an important role in the formation of our social representation for this matter. Additionally, the audience captivated for issues which are unknown and unreachable and that relate to the criminal behavior and action of institutions of social control of crime, but also to life in prison*."[4] Movies have an important, even essential role as a prevention tool. The audience sees the awful condition in prisons and this visual experience could discourage them from committing a crime.

3 EUROPEAN PERSPECTIVE – LIFE IN THE PRISON AND AFTER

Most of the people have misleading illusions about life in a prison. They respect legal norms and they have never had a problem with state authority. Consequently, these people have never seen a prison from inside. The logical question arising from this fact is this: "*how could the deterrence effect of imprisonment effectively work if most of the people perceive the life in prison distorted*"?

The possible key for solving this inconsistency could be connected to popular culture, mostly to movies. Movies about prison, punishment or crime are very popular and interesting, especially among European audience. We can identify a large group of European movies dealing with life in prison and after the imprisonment, concretely from these states:

- Germany: *Das Experiment, Baader Meinhof Komplex*;
- France: *Présumé coupable, Le trou, A Man Escaped or The Wind Bloweth Where It Listeth*;
- Denmark: *Anklaget; R*
- Italy: *A Prophet; Caesar Must Die*
- Turkey: *Midnight Express*;
- Great Britain: *In the Name of the Father, Bronson, Scum, Starred up, Ghosted*;
- Spain: Cell 211;
- Romania: *Bless You, Prison*;
- Poland: *Interrogation*;
- Austria: *Breathing*;
- Czech republic: *Kajínek*
- Ireland: *Maze*
- Slovakia: *Comeback*

This index contains only a small percentage of many movies showing the concept of a life behind bars in different European countries. The variety of movies helps to comprehend the diversity of national concepts of the imprisonment. The audience can find a lot of detailed information about national specifics, related not only to "jail issues", but also to social and religious values.

[4] BOUGADI S. G.: Fictional Representation of Prison in Films and TV's Series Genre: Public and Academic Perceptions of Prison, In: Forensic Research & Criminology International Journal, Vol. 2 Issue 1, 2016.

3.1 A short analysis of a European movie: Guilty (Présumé coupable, France – Denmark, 2011)

The French movie *Présumé coupable* (Guilty) could be easily considered as one of the most powerful and influential contemporary French movies. The narrative of the movie is uncompromising – "Guilty" grabs the audience from the beginning and does not let it go – much like the French legal system. The plot of the movie revolves around the story of the most infamous miscarriage of justice in modern-day France.

The movie focuses on actual events and in its center is the main protagonist Alain Marécaux who was one of the innocent defendants in the famous case called "Outreau trial". The movie is a reconstruction of the events according to Alains memoirs. The movie tells the story of a man who was wrongfully convicted of sexual abuse against children and then taken to prison. It is also a story of a man who lost everything: his family, job, house, property, dignity, and health. The movie even shows his desperate attempt to commit suicide in prison and his protest (hunger strike). The viewer can see how devastating effect has the imprisonment on a human.

This movie could be very effectively used for various pedagogical and academic purposes as it enables us to demonstrate the harsh conditions in prisons, to illustrate various ethical and moral dilemmas or question the effectiveness and fairness of the system of justice. All these (and even more) problematic issues could be discussed either with the students or during academic debates.

4 AMERICAN PERSPECTIVE – LIFE IN THE PRISON AND AFTER

In the American cinematography – both in the commercial distribution and in independent European-like art cinematic production – has the theme of "imprisonment" an important position. Suffice to mention that the most popular and/or best American movie of all the time – The Shawshank Redemption – is a prison movie.

In the American perspective, one specific feature of the prison-centric films is prominent: "*More recent cinematic images have provided a sharp contrast to hopeful challenges against a toxic prison authority. Indeed, in these films, the inmates themselves have become poisonous against each other in the context of a faceless prison machine that has as its sole function their containment. This was clearly seen in American History X, American Me, and Escape from New York, with ethnic/racial gangs fighting for power and governing the nature of one's life and survival. For instance, when Derek walked away from the Aryan Brotherhood in American History X, he suffered the consequence of a brutal rape and, then, survived only because he, unknowingly, had the more powerful African American Brothers on his side*."[5]

The American prison movies illustrate not only the negative aspects (and impacts) of the non-functional penitentiary system on the individual but also outlines the inevitable destructive effects of the prison's environment itself. One of the best example of the movie about incarceration that successfully treads the fine line between realism and sensationalism and presents the complexity of the negative impacts of the imprisonment is the movie called "Shot Caller."

[5] ROCKELL, B.A.: Theoretical and Cultural Dimensions of the Warehouse Philosophy of Punishment, In: Journal of Criminal Justice and Popular Culture, vol. 16, issue 1. Available at https://www.albany.edu/scj/jcjpc/jcjpc_vol16.html [Watched 22. 3. 2018].

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Shot Caller is a 2017 American crime thriller film directed and written by Ric R. Waugh. The film chronicles the transformation of a well-to-do family man and successful, white-collar businessman into a hardened prison gangster, undergone to survive California's penal system after he is incarcerated for his role in a deadly car accident (actually sentenced to jail for involuntary manslaughter and driving under influence). Subsequently, over the course of ten years in prison, the "human animal" emerges in the main protagonist Jacob – he becomes a ruthless savage, a reluctant pawn in the corrupt, unorganized U.S. prison system. Shocked by the brutality of prison life, Jacob follows his lawyer's advice to stand his ground. He attacks an African-American inmate when provoked, drawing the attention of white power gang closely affiliated with the Aryan Brotherhood. In return for protection and entry into this gang, Jacob is forced to smuggle heroin and kill a "snitch" within the gang. As the story progress, Jacob falls, even more, deeper into the binding structures of the prison society and he is forced to commit various brutal actions. At the end of the movie, Jacob as fully validated gang member is sentenced to life imprisonment with no possibility of parole (due in part to California's three strikes law).

The film takes a heavy dose of inspiration from another famous movie – American History X and it focuses on the idea that actions in prison heavily affect upon your life outside. It is undoubtedly a realistic portrayal of a flawed, regressive penal system that not only focuses on punishment over rehabilitation and treatment for its guilty inmates, but forces morally sound human beings to do the unspeakable to survive. The film leaves you with a sense that the system has irreparably ruined Jacob's life and the lives of the people he loves.

In the final act of the movie, Jacob starts to study and read books (mostly philosophy, e.g. the book The Prince by Niccolò Machiavelli is placed on his bookshelf). An interesting fact is that his selection of literature includes a fictitious book titled The Human Animal. This title of the book sounds is actually based on a real novel written by anthropologist Raoul W. La Barre. The main idea of this book is the opinion, that "man" is closer to its primate ancestor than we think, and that social constructs and appropriate human behavior are simply superfluous, evolutionary defects in our species. In placing this subtext within the movie Shot Caller, we can observe the life-threatening necessity for the immediacy of Jacob's adjustment in prison society to survive his lengthy sentence, i.e. the necessity to became "animal".

For an open-minded audience is the movie Shot Caller a depth-inside exploration of the animalistic nature in humanity through the shortcomings of the American penal system.

5 MOVIES ON PRISON AND THEIR SOCIOLOGICAL EFFECTS ON PEOPLE

Another very stimulating (also important) alternation of the previously raised question could be the following: Are the movies, TV-shows, and documentaries able to prevent crimes? Answer to this question is once again very complicated, but we could try to outline the basic approaches of the solutions.

In general, media have a substantial influence on human behavior in modern society. Media, including movies, tell us captivating stories and thus they considerably form our opinion to politics, society, culture and ordinary life.

Media and the internet have enormous influence in every European country. Freedom of speech and the right to be informed are one of the most precious human (political) rights in the European

Union. This "gift" has brought unfortunately also burdens – the people have everyday dilemmas with conceiving so much information and they often fail to select which are relevant, important or reliable (the outcome of this is the popularity of the phenomenon of fake news). The media (movies included) should ease the complicated situation and provide a guide. It relates also to movies on life in the prison – these movies could affect our opinion in the same way.

In theory, the media combines three essential communication levels in the process of social perception of prisons:

i. devising, giving general background of prison or showing reactions of the community.
ii. comparison, allowing the 'benchmark', both for moral elevation and the authenticity and sets the limits of acceptance pressing behavior and
iii. the prism through which we 'see' the prison. With other words, the films reflect the academic explanation: this display of media forming our social construction of reality in a way that distorted reality.[6]

On the contrary, the influence of the movie and its social impact could be, indeed, distortionary (concerning reality). The content of the prison movies could be not only informative and educational but potentially also "toxic" and dangerous. The hidden risk within the prison movies is related to the fact these movies often depict prisoners (i.e. convict) as a dramatic heroes: "*For instance, the public now demonstrates its willingness to heroize individuals simply for violence, such as Charles Bronson, who is reputed to be the most violent prison inmate and serial hostage taker in Britain. Bronson is heroized for his strength and dangerousness that has led to him spending 24 years in solitary and making him into a form of anti-hero consolidated by the 2009 movie Bronson. In the culture-industry age, criminal-celebrity is becoming corrupted, allowing criminals such as Bronson to become heroized without the gentlemanly characteristics of the original criminal-hero cases*."[7] For the broader context of the example with Charles Bronson is worth to mention that he was also played by a popular and charismatic British actor Tom Hardy, whose portrayal of the notorious killer encouraged many viewers to sympathize with the character.

On the other hand, the prison movies also represent an important visual display of the negative sociological and psychological impact of imprisonment (and the negative influence of the prison's environment) on the inmates. This aspect is even more impactful in the movies in which the story revolves around common, normal people who have been imprisoned for the first time and/or as the result of an unfortunate event (e.g. in the movie Shot Caller). After few years in prison, these people have become dangerous criminals without normal life perspective. This scenario is presented in movies like Felon (USA, 2008), Prophet (France, 2009), Shot Caller (USA, 2017) or Brawl in Cell Block 99 (USA, 2017). From the sociological point of view, these types of prison movies indirectly question the efficiency of the penitentiary system itself.

The prison movies frequently demonstrate also another problematic aspect of everyday life inside the prison walls. These movies, respectively the narrative of these movies often implement the element of the carrot and stick' approach: "*Prisoners receive token rewards when they conform to the rules on the theory that eventually conformity will become habitual. A second type of behavior modification—aversive conditioning—uses loud noises, drugs that induce vomiting or paralysis, and elec-*

[6] BENNETT, J.: The Good, the Bad and Ugly: The Media in Prison Films. In: The Howard Journal of Criminal Justice 45(2), 2006, p. 97 – 115.

[7] PENFOLD-MOUNCE, R.: Celebrity Culture and Crime: The Joy of Transgression, New York: PALGRAVE MACMILLAN, p. 86.

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troshock to discourage prisoners' deviant behaviors. This is the type depicted in A Clockwork Orange."[8] The method of the stick is dominant in most of the prison movies. Hard work, torture, violence, corruption, fights, rape, solitary cell and many other inhumane instrument are presented in prison-centric films, often in very explicit and vivid images. These components of the movie may challenge the trust of the viewers in the state institutions.

The last specific topic that is inspiring from the sociological and also philosophical point of view and is often addressed in the prison movies is the so-called "Stanford prison experiment". It is one of the most famous academic experiments in the world and the amount of the filmographic reproduction of this experiment is numerous.[9] The topic of these movies is interesting not only in relation to the impact of the prison environment on the inmates but also regarding the psychological influence on the guards.

This chapter presented the most frequent and at the same time, the most interesting topics in the prison movies. The role of academics is essential in analyzing and solving the summarized problems in the thematic area of the movies on the imprisonment. Thus, the main goal of this paper was to identify and pinpoint which movies are particularly important and which illustrate most accurately the actual life in a prison, the relations between prisoners, the social order in a prison and the life of the inmates after leaving the prison.

6 PAST, PRESENT AND FUTURE IN IMPRISONMENT POLICY

The popular culture allows us to easily compare the prison systems and their functionality in the past and the present. Especially the movies on actual events are valuable and inspiring for academic purposes. Directors often reinterpret true stories about people in complicated life situations (loss of freedom, dignity, health, family and even of future perspective). Undoubtedly, a prison is a complicated "closed" world designed for a life of a strictly limited group of people. It is a specific type of human society could be entitled as a "prison society".

A prison society functions on actual rules, on a system of own values and social norms made by prisoners. The story-line of prison movies is always located in a particular prison existing in the specific time. Based on the assumption that we are able to determine the historical background of the movie, we could compare the current actual situation in prisons with the condition in prisons of the past.

By application of the same methodology (determination of the context – contextual comparison), we could effectively compare different aspects of imprisonment not only through the time but also through (geographical) space, i.e. in different European countries. This idea (method) is a solid proof of the usefulness and practicality of the sociological and legal analysis based on the analysis of the prison movies that were presented in this paper.

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8 RAFTER, N., BROWN, M.: Criminology goes to the movies: crime theory and popular culture, New York: New York University Press, 2011, p. 49.

9 Examples of this type of movie includes documentary movie called Quiet Rage: The Stanford Prison Experiment (USA, 1992) and three live-action movies. First one was produces in Germany in 2001 and it was inspired directly with this experiment. Its remake was consequently shot in USA in 2010 and leading roles were cast Adrien Brody as one of prisoners and Forest Whitaker as one of guardian in "fake" prison. The last movie was produced in 2015 and its reconstruction of events from real Stanford experiment and name of movie is very straightforward – The Stanford Prison Experiment.

The paper presents analysis of two movies – one relating to civil European legal system and other one from the area of American legal culture – on purpose. Our ambition was to compare two different approaches to prison theme and subsequently to illustrate the diversity of conditions in prisons facilities, the regress of individuals in "hostile" territory and others interesting but also unsettling consequences of life in prison.

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REPORT

THE CHALLENGES OF REGULATING AND ENFORCING COMPETITION LAW (BUCHAREST 14 – 15 NOVEMBER 2019)

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On 14 – 15 November 2019, the Faculty of Law of the Bucharest University, particularly the Centre of Competition Law Studies, and the Competition Council of Romania co-organized the international scientific conference "The Challenges of Regulating and Enforcing Competition Law". The conference's scientific committee led by Adriana Almășan put together senior scholars affiliated with universities of fourteen European countries (Belgium, Denmark, France, Germany, Greece, Hungary, Italy, the Netherlands, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom), the judge of the General Court of the Court of Justice of the European Union and the president of the Competition Council of Romania (Romanian national competition authority) to discuss challenges and limits of substantive and procedural competition law. The conference was held in Aula Magna of the Bucharest University with more than 300 registered participants. The conference was split into the introductory panel, seven panels (not strictly focused only on one issue) and the conference was followed by the seminar for judges from the High Court of Cassation and Justice and the Courts of Appeal.

Procedural and institutional framework of the application of competition law (European and national) was discussed several times during the conference. B. Chiriţoiu (president of the Competition Council of Romania) described limits of institutional framework of application of competition law in Romania. Limits of judicial review on the EU level, particularly within the General Court were analysed by Judge A. M. Collins (title of presentation: Some limitations on the judicial enforcement of competition law). Independence of NCAs was under scrutiny of A. Almășan of the University of Bucharest (Rose is a rose is a rose: the NCA autonomy within the ambit of ECN+ Directive). The ECN+ Directive sets the autonomy of the NCAs as a general principle, paramount for the consistent application of competition law within the European Union. This objective is heavily challenged however, at practical level, by the financial autonomy, the appointment of the NCA decisional bodies, the political system enabling interference and even the competence of the operational staff of the NCA. The presentation tackled the most relevant challenges in search for both the level of risk entailed by each challenge and possible solutions thereto. The theoretical analysis was confronted with the status of application of competition law in Romania. Institutional challenges were also linked to the presentation of Cs. I. Nagy of the University of Szeged (EU competition law's centralized interpretation and decentralized enforcement: procedural challenges). The enforcement of EU competition law features a remarkable peculiarity that distinguishes it from other antitrust/competition systems: it is a unitary/centralized system in terms of substantive law and (partially) decentralized in terms of enforcement. This dichotomy, which is attributable to the very special structure of EU law's enforcement at large, raises various practical issues concerning both public and private enforcement and impacts on the effectiveness of EU competition law. He analysed the efforts EU law has made to increase the effectiveness of EU competition law's enforcement, while respecting Member States' procedural autonomy within the map of vertical and horizontal effects of EU law, raising also question of "diagonal" effect of EU rules of procedure.

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M. Martyniszyn of Queen's University Belfast (Competitive Harm Crossing Borders: Regulatory Gaps and a Way Forward) was trying to find a solution for enforcement of competition law at the international level. The analysis identified some of the key gaps within this regulatory framework which currently allows for enforcement lacunae, providing room for transnational anticompetitive practices to flourish at the expense of consumers, principally in the less resourceful and less developed states. Many states have introduced competition laws and an international consensus has emerged as to the harmful nature of some of the most damaging types of anticompetitive arrangements. Yet gaps persist that were not addressed by the significant growth in contacts and cooperation between competition law enforcers all over the world. The speaker's proposals focused, in particular, on pursuing international cartels, which constitute the most rampant example of competition law violation and which are virtually universally condemned. Implementation of these proposals requires no international negotiations and most carry little, if any, inherent extra cost. If implemented by a sufficient number of states (a bottom-up regulatory change), these proposals would importantly readjust the currently sub-optimal system of enforcement, which gives violators ample opportunities to extract wealth from less affluent states.

Private enforcement of competition law became a thoroughly discussed topic among scholars and practitioners within the EU. M. Sousa Ferro of the University of Lisbon (Antitrust damages in the EU: lessons and dreams) discussed the possibility, or more precisely the impossibility, of proving violation of competition law at national courts, particularly in stand-alone cases. The second step of private enforcement – definition of compensation – was examined by E. Camilleri of the University of Palermo (The right to full compensation in passing-on cases).

Relationship between competition law ("traditional" antitrust) and unfair business practices, including B2B practices, is a political as well as a legal question of competence of EU Member States and NCAs. Ever more Member States are making use of the mandate under Regulation 1/2003 to adopt rules against the abuse of economic dependence or unfair trade practices. W. Devroe of the KU Leuven and the Maastricht University (Abuse of economic dependence), on the basis of practical examples and in a context of convergence between competition law and B2B unfair market practices law, focused on: (a) the nexus (buyer power) and differences with traditional competition law, (b) the diversity of national regulatory options, (c) the advantages and disadvantages of the options and their diversity, and (d) the impact of Directive (EU) 2019/633 on unfair B2B trading practices in the agricultural and food supply chain. M. Behar-Touchais of the University of Paris 1 Panthéon-Sorbonne (The conflict between European antitrust law and national law of unfair commercial practices B to B: the Booking case) identified several examples when French law against unfair B2B practices may undermine antitrust law.

Current competition law was also tested in the context of digital markets and current case law and decision practice were under scrutiny. B. Oppermann of Leibniz University of Hannover (Market Law Aspects of Automatic and Autonomous Driving) showed challenges for competition law in the sector of autonomous cars, e.g. consumer and data protection, modifications of distribution contracts, and consequences for market law and competition law.

A. Gerbrandy of the Utrecht University (The challenges of applying competition law in the digital economy) focused on powerful positions of Big Technology companies and the response of competition law, the interplay between competition law and other regulatory regimes and the application of the cartel prohibition in the digital arena. Critical assessment of "Google Shopping Decision" was brought by Ch. Bergqvist of the University of Copenhagen (What does EU 2017 Google Shopping

Decision tell us about self-favouring as a competition law infringement?). During the late 2000 s, several jurisdictions, including the EU and the U.S., opened investigations into potential antitrust violations by the Internet search firm, Google, for alleged bias in the ranking of the links returned in response to search queries. While the outcome has differed substantially between jurisdiction, the factual allegations against Google are almost indistinguishable. Moreover, EU decision, and the articulated theory of abusive self-favouring, have formed the core of parallel investigations into other IT-companies making it relevant to dissect the theory of abusive self-favouring under Article 102 TFEU.

Dynamic development of competition issues is not only stemming from "new" sectors of economy, such as digital markets, but involves also more traditional sectors. Both D. Tzouganatos of the University of Athens (Selective Distribution and third-party online platforms - In Search of the Scope of the Coty Rules) and L. Bercea of the West University of Timişoara (Market for Lemons under Pressure: Recent Developments in ECJ Case-Law on Price Transparency) analysed impact of vertical agreements, however form different point of views. On the basis of Coty and Pierre Fabre judgments, D. Tzouganatos claimed that the scope of the legality presumption of the ban on third-party platform sales in a selective distribution system is not entirely clear. In particular, whether it applies merely to luxury goods and what is the definition of luxury goods. The presentation of L. Bercea critically analysed the evolution of recent CJEU case law on price transparency in consumer credit agreements, which supplements the standard of informative transparency, introducing several requirements on the explanatory transparency and influencing the competitive advantages of non-transparent sellers or suppliers.

In the context of dynamic development of EU competition law, relationship to intellectual property rights must be taken into account. Conciliation between these two legal regimes was suggested in the presentation of D. Trăilă of the University of Bucharest (Practical aspects of conciliation between the monopoly rights attached to the IP and the competition regulations).

Current issues of merger regime caught attention of F. Marcos of IE Law School (Design of Merger Control in the EU and beyond: Institutions and Procedure) and J. Nowag of the Lund University (The unintended consequences of EU merger control in the time of protectionism). J. Nowag identified that the protection offered to large (often multinational) companies under the EUMR against protectionist measures is greater than that offered to small and medium-sized companies within the general framework of EU law.

Activities of public authorities and their impact on competition law was also one of the topics of the conference. M. Papp of Eötvös Loránd Research Institute of Budapest (The Transformation of EU State Aid Law and Policy) identified challenges for new decentralized system of state aid. S. Gherghina of the University of Bucharest (State Aid for SGEI Entrusted to Public Companies) analysed, by reference to specific challenges and practice of Romanian authorities, the identification of the SGEI and its relation to the Altmark criteria in order to identify the thin domain where the financing from public funds of public companies is compatible with the EU law provisions protecting the free competition. O. Blažo of Comenius University in Bratislava (Protection of competition and public procurement integrity protection – true couple or marriage of convenience?) analysed different measures for securing integrity of public procurement vis-à-vis bid rigging suggesting that, on the one hand, competition law is the most effective enforcement weapon, but, on the other hand, it can easily turn NCA into "bid-rigging agency".

The presentations of the conference are planned to be materialized in an edited volume in 2020.

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