UNIVERZITET CRNE GORE

ZBORNIK
PRAVNOG FAKULTETA
UNIVERSITY OF MONTENEGRO
LAW JOURNAL

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

UNIVERZITET CRNE GORE
UNIVERSITY OF MONTENEGRO

ZBORNIK PRAVNOG FAKULTETA
UNIVERSITY OF MONTENEGRO LAW JOURNAL

Izdavač - Publisher
Pravni fakultet, 13. Jul, br. 2., 81000 Podgorica

Štampa:

Tiraž: 200

ZBORNIK
PRAVNOG FAKULTETA U PODGORICI
UNIVERSITY OF MONTENEGRO LAW JOURNAL

Podgorica, godina XXXVI – 2022 – BR. 45

ZBORNIK
PRAVNOG FAKULTETA
UNIVERSITY OF MONTENEGRO
LAW JOURNAL

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

Table of contents

Prof. Gordana Gasmi, PhD
Council of Europe's expert for human rights, Full Professor, Research fellow in the Institute of Comparative Law, Belgrade,

Prof. Dragan Prlja, PhD
Full Professor, Research fellow in the Institute of Comparative Law, Belgrade

ACCESSION OF MONTENEGRO TO THE EUROPEAN UNION – RELEVANT ASPECTS

Summary

The study analyzes the general (European) and regional, as well as national context of the process of accession of Montenegro to the European Union. The EU is in a negative stage of its development, after Brexit, but even more since the Pandemic has seriously hampered global economy and the economy of the EU. Consequently, the general context of the EU enlargement process is to be taken into consideration when analyzing the accession of each candidate country from the Western Balkans region. Next relevant context is the regional one. Within those frameworks, national context - the case of Montenegro as candidate country is considered. Montenegro is the regional frontrunner in the accession to the EU, since thirty three screened chapters have been opened and three are provisionally closed. The question of the EU absorption capacity remains open, together with enlargement dynamic and deadlines. Enlargement process is not a priority for the Union, but it will not be abandoned. It will be performed in a longer period than it had been previously scheduled, at Thessaloniki Agenda (2003), when European future was promised to all countries in the region. Montenegro, as candidate country, has special geostrategic importance for the Union.

Key words: *Montenegro, EU Accession, Western Balkans.*

I Introduction

EU Commission published a new enlargement strategy document to reinvigorate the process. It qualified the Western Balkans EU integration as a "geostrategic investment" and put forward a best-case scenario for the accession of Serbia and Montenegro by 2025.[1] European Union (EU) membership has overwhelming support in Montenegro, a country of 600,000 people, where recent opinion pools (February 2021) show support for membership at around 80%, compared to 63% in Serbia.[2] EU membership is seen as a significant driver of strengthening the foreign policy capacity of small and medium-sized countries.[3]

However, the Union is in a negative phase of its development, especially after the outbreak of corona virus Pandemic, which added very bad momentum to the monetary and migrant crisis. Furthermore, the EU is confronted with other contemporary challenges, such as Post-Brexit consequences, migrants, terrorism, sustainable economic growth, relations with superpowers and climate change.[4] Therefore, the general context of the EU enlargement process, namely the internal crisis within the Union should be taken into account when analyzing the accession of each candidate country from the Western Balkans region. Another relevant context is the regional framework for the accession of the

[1] European Commission, "Enhancing the accession process - A credible EU perspective for the Western Balkans", COM (2020) 57 final, Brussels, 5 February 2020, p. 1.

[2] Crowcroft, Orlando, *Montenegro wants to join the EU - but will Brussels have it?*, 2021, https://www.euronews.com/2021/02/01/montenegro-wants-to-join-the-eu-but-will-brussels-have-it, p.1. (25.12.2021).

[3] Lopandić Duško, *Moguća Evropa i godine pred nama – ogledi i osvrti*, Beograd, 2018, p. 54.

[4] Gasmi Gordana, "EU facing challenges: Migrants and relations with superpowers – *QUO VADIS EUROPE* after European elections in 2019", Strategic Streams 2019: European Elections and the Future of Europe, (ed. By Cvetićanin N. et al.), Institute of Social Sciences Belgrade, 2020, p. 41.

Balkan countries. "Fatigue de l'Europe" is at stake, given the EU's numerous institutional, political and economic problems, which some authors define as "multicrisis".[5] EU is focused at building its security and defense identity in the recurrent culmination of the migrant crisis since 2015.[6] Consequently, the enlargement process is no longer a priority issue for the EU, as it used to be at the beginning of the XXI century. The departure of Great Britain after Brexit in 2016 was serious stroke at the EU.[7] All those negative elements have a negative impact for candidate countries' EU accession prospects.

The next relevant context is the regional one, i.e. Western Balkans context, to be analyzed in second part of the text. The dynamics of the accession process of these countries to the Union remains open. Montenegro is the regional frontrunner in the accession to the EU, since thirty-three screened chapters have been opened (at the time of writing this paper) and three are provisionally closed.

National context of the process of accession of Montenegro to the EU is the third part of the study. Main feature of this process is that Montenegro, as candidate country, has special geostrategic importance for the Union.

In concluding remarks, the contextual approach is applied, based on synthesis of analytical elements from the text.

II EU framework of the Union enlargement

After culmination of migrant crisis in 2015, followed by tragic terrorist attacks in France, Austria, Spain, Finland and Germany (Cologne), the Union is hit, with the rest of the world, by fatal consequences of Covid -19 Pandemic since the start of 2020 (UN Report, 2020). The migrant crisis strongly indicated

[5] Lopandić D., *ibidem*,p. 23.

[6] Gasmi, Zečević, "Evropski bezbednosni i odbrambeni identitet i migrantska kriza", Strani pravni život, 2016/2, pp. 57 – 76. p. 58.

[7] Gasmi G., *Quo Vadis* EU? *Relevantni pravni i institucionalni faktori*", Beograd, 2016, p. 235.

the EU institutional problems,[8] the absence of a common Union migration policy and a lack of internal solidarity among Member States. Nevertheless, that was only beginning of the multi-crisis in the EU.

Even before Pandemic, there was internal talk of Member States on repealing the Schengen Agreement, which legally symbolized a borderless space among Member States, in the situation of raising concrete and wire barriers at border crossings between those same states and in the midst of their mutual accusation of a lack of solidarity in the care of refugees. The situation was all the more aggravated given the negative security dimension of the migrant crisis, because without the transparent registration of refugees, no one can guarantee that there are no well-trained terrorists among the migrants.[9] The Schengen Agreement (1985) is a legal reflection of the idea of free movement of people, but also a reflection of the fears of immigration and cross-border organized crime. It was signed by the Benelux countries (the Netherlands, Belgium and Luxembourg), the Federal Republic of Germany and France, which are the five founding members of the Community.[10] Other countries signatories joined gradually. The Schengen agreement originally provided for a gradual suspension of controls at the internal, common borders of these countries. The Schengen Agreement was followed by the Convention on its Implementation (1990), which entered into force in 1995. Those legal documents constitute the Schengen Acquis, which since the adoption of the EU Treaty of Amsterdam (1999), has become an integral part of the *Acquis Communautaire*.[11] The

[8] Macek L., *Refugee Crisis: A new East – West rift in Europe?*, 2015, Paris, Foundation Robert Schuman, www.robert-schuman.eu (28.04.2016).

[9] Gasmi, Prlja, *European path of the Western Balkans Region – Normative Aspects and Geopolitical Factors*, 2020, UDK: 341.23 (4-672EU:497) DOI: https://doi.org/10.18485/iup_rlr.2020.ch5, Regional Law Review, 2020, Institute of Comparative Law, pp. 59-76. (29.03.2021.).

[10] Ivanda Stipe, *Schengenski sporazumi i unutarnja sigurnost*, Zagreb, 2001, p. 11.

[11] Gasmi, Prlja*, ibidem*, 2020, p. 61.

Schengen *Acquis* gradually expanded, although it has never extended to all Member States. Namely, the UK and Ireland remained outside, as did the new members who have to pass a period of compliance with the Schengen criteria (Cyprus, Romania, Bulgaria and more recently Croatia). Cyprus is outside Schengen due to the unresolved issue of Turkey's occupation of the Northern part of the island. Non-EU countries are also signatories to Schengen (Norway and Iceland, 2001), followed by Switzerland (2008), as well as Liechtenstein.[12]

Under the existing EU migration system, asylum seekers are not treated uniformly and recognition rates in different EU countries vary. Moreover, only a very few countries, based on their geographical position, are responsible for essentially all asylum claims submitted within the EU. In order the legal framework to be more efficient, harmonised, fair and more resistant to future migratory pressures, it needs to be reformed. During summer 2019, fourteen member countries of the EU have agreed to a new "solidarity mechanism" proposed by Germany and France to allocate migrants across the bloc, but the problem is that Italy's Interior minister Matteo Salvini, whose country is at the forefront of the migrant influx in Europe, did not take part in the meeting. Italy took in almost all of the migrants rescued by humanitarian groups at Mediteranean sea until a populist coalition government took office in 2018 and immediately sought to close the nation's ports to the charity ships. Therefore, it is high time to build a future valid migration and asylum policy of the EU.[13]

At the start of Pandemic of Covid -19, internal borders in the Schengen zone were temporarily closed, but without prior coordination at the level of the EU institutions, since each

[12] Piris J.C., *The Lisbon Treaty – A legal and Political Analysis*", Cambridge: Cambridge University Press, 2010, p. 192, 193.
[13] Wihtol De Wenden C., *A new European pact on immigration and asylum in response to the migration challenge*, 2019, European issues No 537, www.robert- schuman.eu (29.11.2021).

Member State adopted separately regulations on closing its borders. In the domain of the public health protection, the EU institutions enjoy very limited powers. The limits of their competence are legally grounded in the provisions of the Lisbon Treaty on the EU: „the Union will act only within the limits of the powers conferred on it by the Treaties" – art. 3 of the EU Treaty of Lisbon.[14]

However, cancellation of the Schengen zone at the early beginning of the Pandemic was done informally and without use of coordinating competences of the EU Commission, as previously foreseen in the Lisbon Treaty. The implementation of the EU coordinating competencies has proven to be delicate.[15] Therefore, the Commission launched the initiative (November 2020), which would enable the Commission to declare a state of emergency in public health protection throughout the EU in order to quickly activate the emergency response mechanisms in the Union.[16] Furthermore, severe border checks and travel restrictions introduced across Europe to fight new Covid-19 variants in 2021, raise questions on how the EU Commission can keep the passport-free Schengen zone open.[17] Grave economic consequences appeared causing chaos to goods transport by road across Europe[18].

Those facts point out to the weakness of decision-making that is based only on the national situation in the country,

[14] Fairhurst John, Law of the European Union, England: Longman, Pearson Education L., 2010, pp. 615.
[15] Gasmi, Grahovac*, ibidem*, 2021, p. 88.
[16] European Commission, Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats, Brussels, 11.11.2020, COM (2020) 724 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0724 (accessed on 14th February 2022).
[17] Brehon, *The European Union and the Coronavirus*, 2020, Paris, Robert Schuman Foundation, European issues, n°553, http://www.robertschuman.eu (10.04.2020).
[18]https://euobserver.com/economic/150957?utm_source=euobs&utm_medium=email, (17.02.2021).

especially during urgent state of affairs, such as pandemic, but in other so-called regular situations as well. Many external challenges and threats, such as: climate change, negative relations with Russia, instability in the Middle East and the Sahel, terrorist attacks, financial deregulation, the rise of China, American isolationism and the COVID-19 crisis, may prompt the EU Member States to respond more effectively.[19] The Pandemic had negative effects for the three major EU cornerstones: the Schengen agreement (restrictions of mobility); the internal market, when some Member States began to restrict exports of medical equipment and medicines; and the third one: economic and monetary union.[20] Consequently, the enlargement process seems not to be a priority for the Union, especially during the Pandemic and bearing in mind mentioned external threats and internal challenges.

In a situation where a good global governance does not exist, the EU is faced with continuation of a strong migration pressures amidst Pandemic. Before Covid-19, the migrant crisis was the most significant problem facing the Union, according to the results of the Eurobarometer survey.[21] The Dublin asylum system has been the most criticized by A. Merkel, the German ex- Chancellor, but also by other EU officials, as it provides the greatest pressure on the Member States that are on the frontline of the migrant flows. Article 3 of the Treaty on European Union (TEU) binds the EU, as a non-state actor, to align itself with United Nations (UN) norms, as well as to the strict observance and the development of international law, including respect for the principles of the UN Charter in its role in promoting and protecting human rights through all its actions. It is noteworthy to stress that EU leaders have announced the need to step up cooperation with countries where migrants originate or transit and agreed that

[19] Gasmi, Grahovac, 2021, p. 91.
[20] *Ibidem*, p. 95.
[21] White Paper by World Economic Forum, 2016, p. 3.

migration issue can only be addressed at the EU level. Consequently, EU priority in a forthcoming period is a significant strengthening of the EU's external borders.[22]
There are important divisions among the Member States, but the Union helps to overcome them.[23] The proponents of a federal European state and the advocates of a confederal Europe of nation states conduct longstanding conceptual battle within the EU. Nevertheless, this battle has never denied European values, such as: rule of law, democracy, protection of human and minority rights, freedom and human dignity, pluralism, tolerance, justice, solidarity and equality between women and men, as being defined in the Art. 2 of the Lisbon Treaty[24]. History shows that the EU is advancing in times of crises, as J. Monet once predicted, saying that crises are great unifiers.

Will the EU enlargement process regain momentum is still open question in Pandemic circumstances followed by unavoidable grave economic disturbances in EU Member States. This was the reason of adoption of the EU economic recovery plan of the Commission titled as Next generation EU (July 2020) in the form of an extraordinary budget of €750 billion over and above the EU's multi-annual budget (MFF) and the annual budgets of the Member States together.[25] This

[22] Strengthening of EU's external borders - through the creation of a new Integrated Border Management Fund worth €9.3 billion and through a significant increase of funding of €12 billion for the decentralized agencies supporting Member States protecting EU borders, notably the European Border and Coast Guard Agency (Frontex). Eurobarometer, "European Parliament - Perceptions and expectations", http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635542/EPRS_BRI(2019)635542_EN.pdf published in March 2019 (25.06. 2021).
[23] Giuliani, 2020, p. 2.
[24] Consolidated version of the Treaty on European Union, TITLE I - COMMON PROVISIONS, Article 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016M002 (29.01.2022).
[25] Kahn S., *The Covid-19 pandemic, what lessons for the European Union?*, 2021, European issues n°617, 2021, Fondation Robert Schuman, http://www.robert-schuman.eu (26.01.2022).

fact is a positive signal of unified EU response to Pandemic, but on the other side, there are still some negative developments of the Union. Rejection of the EU Constitution in France and then in Netherlands (2005), the Eurozone crisis (2010-16) and Brexit (2016), which was a great stroke at the Union,[26] all those crises indicate a huge need for the Union to deal with its internal reforms.

New geopolitical context has marked the decrease of the EU influence in the world.[27] However, it did not diminish the attractiveness of the EU membership, taking into account the magnet of the concept of the welfare state (Member State), followed by benefits of full use of the EU funds. This is main driver of migration flows towards the EU as well. Some authors explain complexity of new geopolitical structure, not only by the EU common foreign and security policy weakness, but furthermore by "the failure of the great powers in general and of the multilateral system in particular, which have been unable, or unwilling, to support the necessary transitions taking place in Asia, the Maghreb, Africa and the Middle East".[28]

In the globalization era, the EU is left to find its own influence path. Despite all those external and internal problems, the Union is a normative power, which is mirrored in the GDPR – General Regulation on protection of personal data area[29] and in its competition law. Supranational feature of the EU legal system is especially valuable for small and medium Member States in protection of their interests confronted with national strategies of big Member States.[30] The EU is furthermore a commercial power since it has signed more than 50 trade agreements compared to 18 for Japan and 14 for the United States; and is a development aid power,

[26] Gasmi, 2016, p. 235; Chopin & Jamet, 2016, p. 2; Deloy, 2016, p. 2.
[27] Gasmi, 2020, p. 51; Kahn, 2021, p. 4.
[28] Dupre, 2022, p. 1.
[29] Prlja, Cerović, Diligenski, 2018, p. 11.
[30] Lopandic, 2018, p. 54.

because "the Union and the Member States account for more than half of the world's ODA".[31] Therefore, it can be assessed that the EU will continue to use its soft powers (diplomatic pressure, commercial benefits, etc.) in the enlargement process in the forthcoming period. This process will continue through screening the national legal systems' of the candidate countries and their harmonization with the EU *Acquis* and through monitoring of their reforms in the field of institutional, administrative and economic capacities as well. It can be assessed that the EU enlargement process needs adequate reform to be more effective, because the EU requirements for candidate countries have become more complex and more precise than the previous twenty-four chapters required a decade ago for the accession of the countries of Central and Eastern Europe. The comparative experience of the previous EU enlargement cycles shows that candidate countries are intensely aligning their markets with the Union's single market.[32] Some authors particularly criticize the inadequate approach of the EU in the process of harmonization of the national legal systems of the countries of the region with the *Acquis Communautaire*, i.e. with EU regulations and policies – being a legal "patchwork"[33] in the sense that insufficient account is taken of local legal specificities.

III Regional context - will Western Balkans rebound its accession prospects?

The good news is that at the EU-Western Balkans Summit in Thessaloniki in June 2003, the Union promised a strategic partnership with the Western Balkan countries in their accession to the EU and their secure European future, but without a precise timetable. Due to the slow pace of the enlargement process, despite the formal progress of these

[31] Dupre, 2022, p. 2.
[32] Ceylan, 2006, p. 3.
[33] Mustafaj, 2020, p. 4.

countries towards accession, during the Bulgarian Presidency of the Council of Ministers, an EU - Western Balkans summit was held fifteen years later (May 2018, Sofia), under the striking title: „In the Western Balkans: Creating a region of growth, security and connectivity on the road to Europe." The aim of this Summit was to give fresh impetus to the integration of the Balkan countries into the Union by 2025. The horizon of future possible membership by 2025 represented a new incentive for the region to complete all necessary internal reforms. Bulgaria has included in its program of the EU Council Presidency a strategic focus on connecting the Western Balkan countries with the Union, at all levels.[34] The leading vision was that the EU is the best geo-strategic choice for the Western Balkans.[35]

However, the countries of the Western Balkans (WB) do not have a common strategy aimed at improving and accelerating their accession to the EU. Hence, the regional context can only be described conditionally, from the standpoint of the specific characteristics of the region itself. The term Western Balkans refers to the grouping of countries, the term which the Union has introduced under the political designation of the region and includes Bosnia and Herzegovina, Albania, North Macedonia, Serbia and Montenegro. The WB region lacks homogeneity in economic and political terms. Partly due to the EU approach, there is a stratification of each country's political status into the so-called "in" countries (candidate countries) and on the other hand "out" ie. non-candidate countries (Bosnia & Herzegovina).[36]

The EU operates comprehensive approval procedures that ensure new members are admitted only when they can demonstrate they will be able to play their part fully as members, namely by:

[34] Gasmi, Prlja, 2020, p. 60.
[35] Matias, 2018, http://www.legalpoliticalstudies.org/bulgarian-presidency-council-eu-meant-western-balkans (20.06.2018).
[36] Gasmi, Prlja, 2020, p. 67.

- complying with all the EU's standards and rules;
- having the consent of the EU institutions and EU Member States;
- having the consent of their citizens – as expressed through approval in their national parliaments or by referendum[37].

The first step for the candidate country is to meet the key criteria for accession. These were mainly defined at the European Council in Copenhagen in 1993 and are hence referred to as 'Copenhagen criteria'. Countries wishing to join need to have:

- stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- a functioning market economy and the capacity to cope with competition and market forces in the EU;
- the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.

The EU also needs to be able to integrate new members. However, the question of the EU absorption capacity remains open, together with enlargement dynamic and deadlines. In the case of the countries of the Western Balkans additional conditions for membership, were set out in the so-called "Stabilization and Association process", mostly relating to regional cooperation and good neighbourly relations.[38] Zagreb Summit in May 2020 was the following meeting between EU and WB at high level focused at renewal of accession aspirations of the region through refreshing of the EU enlargement commitments. Council conclusions of March

[37] https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership_en (29.01.2022).
[38] Ilic- Gasmi, 2002, p. 7.

2020[39] defined that good neighbourly relations and regional cooperation remain essential elements of the enlargement process, as well as of the Stabilization and Association Process. Respect for human and minority rights was emphasized by the Council. Those conclusions are based on the EU Commission's Communication on "Enhancing the accession process - A credible EU perspective for the Western Balkans" of 5 February 2020[40], which established more predictable, more credible, more dynamic accession process, but also more politically monitored by the Union.

This new enlargement methodology is focused on rigorous positive and negative conditionality, which assumes that in case of violation of the rule of law and democratic principles, the EU is authorized to revert back the accession process. Furthermore, the Council repeated the importance of the EU capacity to integrate new members in line with its own development. On the other side, the EU approach offers the possibility of faster accession for Montenegro and Serbia, under condition of complying with the EU objective criteria on the rule of law, fighting corruption, the viable market economy and ensuring the proper functioning of democratic institutions and public administration, and foreign policy alignment as well. Negotiating chapters are organized in thematic clusters. These clusters follow broad themes such as good governance, internal market, economic competitiveness and connectivity. Negotiations on each cluster will be opened as a whole – after fulfilling the opening benchmarks[41]. Annual assessment by the Commission in the form of a progress report remains key for eventual stopping or reversing back the accession process.

In October 2021 another EU – WB Summit in Slovenia did not bring clear deadline for the accession that was desirable to

[39] Council of the European Union Brussels, General Affairs Council, 25 March 2020, 7002/20, Enlargement and Stabilization and Association Process.
[40] COM(2020) 57 final
[41] *Ibid.,* p. 4.

be set up, especially for Serbia and Montenegro. Although the 2025 year was previously mentioned by the EU, the absence of clear timetable by the Union brought vague perception on the side of candidate countries. The Stabilization and Association process, set up by the Union as a mechanism for integrating the countries of the region into the EU,[42] lacked the strength and momentum to accelerate the consolidation of the post-conflict WB region and assist its essential long-term stabilization. The current tensions in the region prove this assessment. All those elements indicate, in our opinion, a strong political focus of the accession where the rule of law in a candidate country is decisive in progress evaluation by the EU Commission. Furthermore, Member States gained renewed opportunity to "contribute to this process by signaling to the Commission any stagnation or serious backsliding in the reform process"[43].

In March 2020, at the same session the EU Council decided to assign an official candidate status to Albania and North Macedonia. Accession negotiations have not yet started, (at the time of writing this paper) due to blockage of Bulgaria related to North Macedonia. EU rules require a unanimous vote in the Council to start talks with potential new member states. This may result in inserting of bilateral open issues of the Member State and a candidate country in its accession process, causing specific pressure on that candidate country. Nevertheless, the EU (European Commission President Ursula von der Leyen) said the EU wants to start the talks with Tirana and Skopje at the same time, meaning Bulgaria's veto of North Macedonia is impacting Albania[44]. The Vienna Institute for International Economic Studies warned that "A weakening of enlargement momentum could cause setbacks to the reform

[42] Ilić – Gasmi, 2002, p.22.
[43] *Ibid.*, p. 6.
[44] EU Hopes to Start Accession Talks with Albania, North Macedonia By Year's End, 28 09 2021, https://www.rferl.org/a/macedonia-albania-eu-accession/31482691.html (28.01.2022).

agenda in the region, and create openings for China and Russia to exert greater influence, something that is not in the EU's interests"[45].

Western Balkans is important for the Union for security reasons, which was explicitly shown during the 2015-16 migration crisis. It is less costly for the EU to invest into more developed Western Balkans, with better functioning institutions and more resources at the disposal of the state through accession process, instead of financing its peace keeping missions and to fight against spill-over effects of the region's possible destabilization. When these facts are added to the prevailing unfavorable geopolitical image of the region within the EU[46], seen as a post-conflict area with strong security challenges –a "powder keg", due to insufficiently resolved neighborhood relations in the region, the need for a common strategy in the EU accession by different countries in the region is obvious. This phenomenon is a huge challenge in the accession process, especially given the complex problem of Kosovo.[47]

There is an insufficient degree of developed regional cooperation among the countries of the region, which is to be a direct manifestation of a commitment to European integration.[48] More precisely, the Union advises the candidate countries not to ask from the EU what they are not prepared to offer each other in terms of economic cooperation, reconciliation processes and political stability.[49] Initiative for the Open Balkans that included Serbia, Albania and North

[45] https://wiiw.ac.at/press-release-eu-should-not-delay-the-start-of-accession-negotiations-with-albania-and-north-macedonia-english-pnd-68.pdf (28.01.2022).

[46] European Policy Centre, "EU member states and enlargement towards the Balkans", July 2015, http://aei.pitt edu/66050/1/pub_5832_eu_member_states_and_enlargement_towards_the_balkans.pdf.

[47] Gasmi, Prlja, 2020, p. 68.

[48] Regional Cooperation Council, 2013, p. 8.

[49] Fouéré, 2015, p. 2.

Macedonia (2021) is unfinished try to enable free trade in the region through the philosophy of "transforming swords into plowshares". The economy of scale is essential for regional cooperation, but the rest of the region is not convinced in purely economic benefits of this platform and it remains to be seen the results in near future. The region needs stronger co-operation for the joint development of the regional infrastructure, trade, cohesion policy and, in particular, bilateral relations between individual countries of the Western Balkans, which have recently deteriorated significantly. Doing so would highlight the shared common values of the Western Balkans, such as multiculturalism, natural resources, tourism capacities and cohesion.[50]

French Presidency of the Council of the EU, starting from January till July 2022 does not include explicitly the accession of the Western Balkans region into the EU in its Presidency program[51]. Under the first priority of the six-months Presidency, titled: "A more sovereign Europe", there is the following: "taking action for the prosperity and stability of its neighbors, particularly through its engagement in the Western Balkans and its renewed relationship with Africa"[52]. Instead of "the EU enlargement", the expression "engagement" is applied, which is self-explanatory for current analysis of the EU official stand towards the region. Moreover, some pro-European authors in their comments about challenges of the French Presidency do not mention the enlargement process.[53] The assessment follows that the dynamics of the accession process of these countries to the Union remains open.[54]

[50] Gasmi, Prlja, 2020, p. 70.
[51] Programme of the Presidency - French Presidency of the Council of the European Union 2022 www.europa.eu (25.01.2022).
[52] *Ibidem.*
[53] Maurice, 2022, p. 5.
[54] Grieveson, Grübler and Holzner, 2018, p. 6.

IV National context - Montenegro - benefits of the EU accession

In its 2015 Annual Progress Report,[55] the Union confirmed that Montenegro is a leader in the accession process compared to other candidate countries in the Western Balkans region. This is a logical consequence of the previous development phases of Montenegro since the moment of gaining independence on May 21, 2006. In the period of the joint state with Serbia (2003-2006), negotiations were conducted with the EU on the principle of the so-called double track, in order to follow the competencies of each of the republics during the negotiations. This was especially true for economic areas. After gaining independence and a successful referendum, Montenegro has been taking more intensive steps on its path to the EU since mid-2006. The Stabilization and Association Agreement with the EU was signed in October 2007. Montenegro applied for EU membership in December 2008. The EU Council invited the European Commission to submit an opinion on Montenegro's request in April 2009. Based on this, the European Commission sent a Questionnaire to Montenegro in July 2009. The Government of Montenegro responded to the Questionnaire in two phases, in December 2009 and April 2010. These are detailed reports on the situation and reforms undertaken in the legal, economic and political national system in the form of answers to hundreds of detailed questions.

In accordance with its procedure,[56] the Union ratified the bilateral Association Agreement of Montenegro in November 2009. A positive opinion of the European Commission followed in November 2010. The EU Council officially granted

[55] EU Enlargement Strategy, 2015. Montenegro 2015 Report, European Commission, SWD (2015) 210 final, Brussels, 10 November 2015, http://ec.europa.eu/enlargement/pdf/ key documents/2015/20151110_report_montenegro.pdf (29-03-2016).
[56] Gasmi, 2016, pp. 138-161.

Montenegro candidate status on December 17, 2010 at a meeting of EU heads of state and government. Negotiations on Montenegro's accession to the EU officially began in June 2012, after the Commission's 2011 recommendation was accepted by the EU Council.

In the meantime, the Union also showed goodwill towards other countries in the region, in November 2009, by abolishing visas for travel to Schengen countries. It was a gesture of political symbolism, in order to enable the citizens of these countries to feel more like members of Europe than before. Thus, the European future of the countries in the region has become more important.

In December 2014, Montenegro adopted the Program of Montenegro on Accession to the European Union for the period 2014-2018, which became the main strategic document of accession. The Strategy for Informing the Public about Montenegro's Accession to the European Union 2014-2018 (Communication Strategy) was another important strategic document. The process of Europeanization of Montenegro is taking place with the parallel strengthening of regional cooperation. For example, Montenegro signed border agreements with Kosovo and Bosnia and Herzegovina in 2015, which, together with such an agreement previously signed with Albania, sets an example for other Western Balkan countries.
In addition to strategic documents, further progress in the process of Montenegro's accession to the Union depends primarily on the implementation of reforms. Implementation is considered a major challenge in the future, according to EU estimates. In the new 2021 Montenegro Progress Report[57], the EU Commission evaluates that „key judicial reforms are stagnating, and a decisive political commitment at all levels of government, parliament and judiciary is needed to unblock progress towards meeting the rule of law interim benchmarks".

[57] EU Commission, Montenegro 2021 Report, Strasbourg, 19.10.2021 SWD(2021) 293 final/2.

The complexity of the accession process requires synergies between government circles and the civil sector in Montenegro. This is especially true concerning improving the general image of Montenegro in the EU. Besides, it is necessary to improve the level of knowledge of the EU's functioning among the citizens of Montenegro. This fact arises from the results of public opinion polls conducted in Montenegro.[58]

Montenegro, as candidate country, has special geostrategic importance for the Union. This is especially true considering security interests of the EU and vice versa. Besides, according to some analysts,[59] due to the „positive discrimination effect", small country can benefit in the decision making process in line with weighting of votes between big and small countries. Thanks to its future EU membership, Montenegro would be enabled to protect its interests and to even express its influence on concrete issues in international relations. There are furthermore strong economic benefits of future EU membership, such as better attractiveness for direct foreign investment from the EU Member States, trade integration and the use of the EU funds.[60]

Majority of population (71%),[61] would vote for the EU accession. Euroscepticism does not exist as an organized or structural approach in Montenegro. The Parliamentary elections resulted in a change of the ruling coalition and in December 2020, Parliament elected government of Montenegro with reduced number of ministries (12), the first government in Montenegro composed mostly of non-politically affiliated experts. The government adopted a new national Program for EU accession for the period 2021-2023. This government was given a vote of no-confidence in the Parliament in early February 2022. The administrative capacity is significantly

[58] IPSOS Strategic Marketing conducted a survey in April 2016 that showed a clear commitment of Montenegrin citizens to join the Union.
[59] Lopandić, 2018, pp. 53-55.
[60] Reiter and Stehrer, 2021, p. 20.
[61] CEDEM, 2021.

weakened, since many negotiation positions remain vacant, due to the resignation or dismissal, at the time of writing.[62] The EU gave assessment that „amendments to the Law on Civil Servants and State Employees lowered the requirements for competence, independence and merit-based recruitment of civil servants. Moreover, the recent reorganizations of public administration led to substantial staff changes, including at senior levels, jeopardizing Montenegro's capacity to retain experienced staff in EU-accession process related matters in many sectors".[63] Therefore, in its Monitoring Report of 2021, SIGMA recommended that government should finalize the new public administration (PAR) Strategy and the public financial management (PFM) Reform Program and should establish functional administrative level co-ordination bodies for both strategies in the forthcoming two years.

In 2021 and at the start of 2022 the political landscape is still very polarized. Parliament should improve women's political representation. Gender-based violence and violence against children remain issues of serious concern.[64] On the economic criteria, Montenegro has made some progress and is moderately prepared in developing a functioning market economy, according to the EU estimates. The sectoral structure of the economy, in particular the share of tourism, caused the severity of the economic fallout due to the Pandemic Covid-19. By June 2020, all 33 screened chapters have been opened, three of which are provisionally closed. In October 2020, the EU Commission proposed Economic & Investment Plan to support and bring the Western Balkans closer to the EU. Regulation on the EU Instrument for Pre-Accession Assistance (IPA III) was adopted on 15 September 2021,[65] which is to enable

[62] SIGMA/OECD, 2021, pp. 7-8.
[63] EU Commission, Montenegro 2021 Report, Strasbourg, 19.10.2021 SWD(2021) 293 final/2.
[64] EU Commission, Montenegro 2021 Report, Strasbourg, 19.10.2021 SWD(2021) 293 final/2.
[65] Official Journal L 330, 20.9.2021.

implementation of the Economic and Investment Plan for the whole Western Balkans, aimed at recovery of the region.

In June 2021 the first political Intergovernmental Conference under the revised enlargement methodology was held to provide political steer to the accession process. In our opinion, the EU political criteria, especially the rule of law and the functioning of democratic institutions, will have a decisive impact on the forthcoming accession process. It is the result of the EU new enlargement methodology, which was accepted by Montenegro in June 2021. In order to further the success of the future course of negotiations, it is necessary to maintain the transparency of the process, both in terms of positive results and in relation to omissions. Consequently, the population support for the accession process will remain high, which represents important signal for Europeanization of Montenegro. Furthermore, it is necessary to make additional efforts to improve the reputation and general image of Montenegro in the EU. This makes Montenegro's path to the EU stable. Besides, a positive contribution will be the intensification of engagement of Montenegro in strengthening regional cooperation. Insufficient development of administrative structures indicates the need to improve the representation of Montenegrin interests in EU Member States.[66] Hence the importance of highlighting the benefits of EU membership in the implementation of legal and economic reforms at the national level.

V Concluding remarks

Admission of new member countries in the EU is primarily an issue of political will. So, in the EU, is there the political will for enlargement[67]? On the EU side, it is necessary to define

[66]Sgueo, Gianluca, https://www.scribd.com/document/281758925/Lobbying-in-the-EU-The-cost-of-a-lack-of-transparency (28.03.2016).

[67] "The uncertainty of the EU enlargement process will benefit the EU rivals and the part of the public on the West Balkans that is against membership

precisely whether there will be any enlargement and when, because the EU enlargement cannot be endlessly postponed. Many EU Member States would not fully meet the requirements for membership that are set forth to the Western Balkans countries. EU would have never evolved into such a respectable regional integration process without its enlargement[68].

There is a prevailing perception in the Western Balkans region that the Union is insufficiently engaged in concrete support to candidate countries on their path to the EU. Although Montenegro is the most successful candidate in the region, this perception is present as a result of insufficient knowledge of the way of decision-making and the functioning of the EU by the citizens of these countries. It is also a consequence of poor management of expectations in relation to the EU, which does not take into account the internal agony in which the Union has been for a long time.[69] It is therefore important to point out that the current political framework in Europe is averse to further EU enlargement. The majority in the EU Member States single out the migrant crisis, security issues, the rise of ultra-right ideologies and movements, the instability of the Eurozone and the complicated bureaucratic procedures of the EU as responsible factors during the years.[70] There are views that these problems could be exacerbated if new countries join the EU's internal structures. It seems that "Europe – Fortress" is at stake, especially in time of ongoing horrible Pandemic. However, Jean Monnet said a long time ago, that crises are also great unifiers. It remains to be seen whether this visionary thought will guide the Union and

of their respective countries in the EU. Regional cooperation does not mean that countries in the region have given up on their European path and membership in the EU."
https://www.ifimes.org/en/researches/2021-eu-western-balkans-summit-eu-credibility-in-western-balkans-undermined/4936 (24.12.2021).

[68] *Ibid.*

[69] Gasmi, 2016, p. 287.

[70] Bertelsmann Stiftung, 2015, p. 2.

overcome the current narrow-minded approach of the EU. National support for EU accession will be reduced in proportion to the lack of the Union assistance to candidates in the Western Balkans on their path to the EU. Candidate countries (Montenegro and Serbia, who are in the negotiation procedure) are not only hostages of the EU's current institutional weaknesses and lack of solidarity among EU members, but generally see the Union as a distant and "moving target"[71], taking into consideration the amount of legislative pieces to be complied with in the process of harmonization with the EU *Acquis*.

On the other side, the EU concluded that: "The priority for further overall progress in the accession negotiations - and before moving towards the provisional closure of other chapters or clusters - remains the fulfilment of the rule of law interim benchmarks set under chapters 23 and 24. In order to reach this milestone, Montenegro needs to further intensify its efforts to address the outstanding issues, including in the critical areas of freedom of expression and media freedom and fight against corruption and organized crime, without reversing earlier achievements in the judicial reform. This requires the authorities to demonstrate in practice their commitment to Montenegro's EU reform agenda"[72].

In the complex and delicate space between the advantages of accession and the complexity of the process itself, there is a room for maneuvering the challenges of Montenegro's accession to the EU, in an optimal way. This maneuvering is to be guided by clear benefits of future EU membership: stability in Europe, multiculturalism and diversity, better attractiveness for direct foreign investment from the EU Member States, trade integration and the use of the EU funds, as well as the raising the potential of the tourism sector and natural resources. It is necessary to dispel stereotypes about

[71] Gasmi, Prlja, 2020, p. 72.

[72] EU Commission, (2021), 2021 Communication on EU Enlargement Policy, Strasbourg, 19.10.2021 COM(2021) 644 final, p. 27.

the countries of the Western Balkans and doubts on the part of the Union about the need to support their accession in order to preserve stability and prosperity. Montenegro holds the title of the most successful candidate country, and in that sense it can be expected that this trend will further continue in the EU accession process.

Bibliography

- Bertelsmann Stiftung, *What Do the People Want? Opinions, Moods and Preferences of European Citizens*, 2015, Gütersloh, Germany, https://www.bertelsmannstiftung.de/fileadmin/files/user_upload/Study_EZ_EUpinions_2015.pdf (15.12.2018).
- Brehon, N. J. (2020), *The European Union and the Coronavirus*, 2020, Paris, Robert Schuman Foundation, Policy Paper, European issues, n°553, http://www.robertschuman.eu (10.04.2020).
- CEDEM, *Političko javno mnjenje Crne Gore, decembar 2021*, 2021, https://www.cedem.me/images/Prezentacija_decembar_2021._FINAL_compressed.pdf, (29.01.2022).
- Ceylan, O., *A Co-integration Analysis Approach to European Union Integration: The Case of Acceding and Candidate Countries*, 2006, Vienna, European Integration online Papers (EIoP) Vol. 10 (2006) N° 7; http://eiop.or.at/eiop/texte/2006-007a.htm (30.05.2011).
- Chopin, T. & Jamet. J.F., *After the UK's EU referendum: redefining relations between the "two Europe*, 2016, Paris, Robert Schuman Foundation. Policy Paper, European issues, n°399, 5. 07. 2016, http://www.robert-schuman.eu (30.09.2016).
- Consolidated version of the Treaty on European Union, https://eur-lex.europa.eu/legal-ontent/EN/TXT/?uri=celex%3A12016M002, 2010, (29.01.2022).

- Council of the European Union, *Program of the Presidency - French Presidency of the Council of the European Union 2022*, 2022, https://presidence-francaise.consilium.europa.eu/en/, (25.01.2022).
- Council of the European Union Brussels, General Affairs Council, 25 March 2020, No 7002/20, Enlargement and Stabilisation and Association Process.
- Crowcroft Orlando, *Montenegro wants to join the EU - but will Brussels have it?*, 2021, https://www.euronews.com/2021/02/01/montenegro-wants-to-join-the-eu-but-will-brussels-have-it, (25.12.2021).
- Deloy, C., *43 ans après leur adhésion, les Britanniques décident de quitter l'Union Européenne*, 2016, Paris, Robert Schuman Foundation, Policy Paper. http://www.robert-schuman.eu, (24.06.2016).
- Dupre Bruno, *European sovereignty, strategic autonomy, Europe as a power: what reality for the European Union and what future?,* 2022, Paris, Robert Schuman Foundation. Policy Paper, European issues No 620, http://www.robert-schuman.eu, (26.01.2022).
- Eurobarometer, "European Parliament - Perceptions and expectations", 2019, http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635542/EPRS_BRI(2019)635542_EN.pdf, (25.06.2021).
- EU Commission, Montenegro 2021 Report, Strasbourg, 19.10.2021 SWD(2021) 293 final/2.
- EU Commission, Communication on EU Enlargement Policy, 2021, Strasbourg, 19.10.2021 COM (2021) 644 final.
- European Commission, "Enhancing the accession process - A credible EU perspective for the Western Balkans", COM (2020) 57 final, Brussels, 5 February 2020.
- European Commission, *Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats*, 11.11.2020, COM (2020) 724 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0724, (4.02.2022).

- European Commission, *EU Enlargement Strategy, 2015. Montenegro 2015 Report*, European Commission, SWD (2015) 210 final, Brussels, 10 November 2015, http://ec.europa.eu/enlargement/pdf/ key documents/2015/20151110_report_montenegro.pdf (29.03.2016).
- European Policy Centre, *EU member states and enlargement towards the Balkans*, 2015, http://aei.pitt.edu/66050/1/pub_5832_eu_member_states_and_enlargement_towards_the_balkan.pdf, (30.03.2016).
- Fairhurst John, *Law of the European Union*, England: Longman, Pearson Education L., 2010, pp. 615.
- Fouéré, E., *The EU's Enlargement Strategy 2015: Will the 'new elements' make a difference?*, 2015, Brussels: CEPS Commentaries, https://www.ceps.eu/system/files/EF%20 Enlargement%20Package%202015.pdf (17.03.2016).
- Gasmi, Gordana, *Quo Vadis* EU? *Relevantni pravni i institucionalni faktori*", Beograd, Institut za uporedno pravo, 2016, pp. 319.
- *Gasmi Gordana, Grahovac Momir,* "European Response to COVID 19 Pandemic – Legal Framework and Lessons for the Future", Fiat Iustitia, No 1/2021, pp. 86-98., p. 87.
- Gasmi Gordana, "EU facing challenges: Migrants and relations with superpowers – *QUO VADIS EUROPE* after European elections in 2019", Strategic Streams 2019: European Elections and the Future of Europe, (ed. By Cvetićanin N. et al.), Institute of Social Sciences Belgrade, 2020, p. 41.
- Gasmi Gordana, Prlja Dragan, *European path of the Western Balkans Region – Normative Aspects and Geopolitical Factors*, 2020, UDK: 341.23 (4-672EU:497) DOI: https://doi.org/10.18485/iup_rlr.2020.ch5, Regional Law Review, 2020, Institute of Comparative Law, pp. 59-76. (29.03.2021).

- *Gasmi Gordana, Zečević Slobodan*, "Evropski bezbednosni i odbrambeni identitet i migrantska kriza", Strani pravni život, 2016/2, pp. 57 – 76. p. 58.
- Giuliani J. D., *Living with the virus*, Paris, Foundation Robert Schuman, 2020, https://www.jd-giuliani.eu/en/article/cat-2/685_Living-with-the-virus.html, (22.06.2020).
- Giuliani J.D., *Now or never*, 2020, Paris, Foundation Robert Schuman, https://www.jdgiuliani.eu/en/article/cat-2/679_Now-or-Never.html, (12.04.2020).
- Grieveson Grübler and Holzner, *Western Balkans EU Accession: Is the 2025 Target Date Realistic?*, 2018, The Vienna Institute for International Economic Studies, Policy Notes and Reports, wiiw.ac.at (31.01.2022).
- Ilić – Gasmi Gordana, *EU Policy towards Western Balkans and the Position of Serbia*, GTZ GmBH, Germany, 2002, p. 7, 22.
- IPSOS Strategic Marketing, *Montenegro Public Opinion, April 2016*, Podgorica, https://www.ipsos.com/sr-me (24.03.2020).
- Ivanda Stipe, *Schengenski sporazumi i unutarnja sigurnost*, Zagreb, Sveučilišna knjiga, 2001, p. 11.
- Kahn S., *The Covid-19 pandemic, what lessons for the European Union?*, 2021, European issues n°617, 2021, Fondation Robert Schuman, http://www.robert-schuman.eu (26.01.2022).
- Lopandić Duško, *Moguća Evropa i godine pred nama – ogledi i osvrti*, Beograd, 2018, p. 54.
- Macek L., *Refugee Crisis: A new East – West rift in Europe?*, 2015, Paris, Foundation Robert Schuman, www.robert-schuman.eu (28.04.2016).
- Matias, B., *What the Bulagarian presidency of the Council of the EU meant for the Western Balkans*, 2018, Sofia: Group for legal and political studies, http://www.legalpoliticalstudies.org/bulgarian-presidency-council-eu-meant-western-balkans (20.06.2018).

- Maurice E., *The challenges of the French Presidency of the Council*, 2022, European issues n°618, Fondation Robert Schuman, http://www.robert-schuman.eu, (25.01.2022).
- Mustafaj A., *Advocating a true reform of the European Union's enlargement process*, 2020, Paris, Foundation Robert Schuman. www.robert-schuman.eu, (2.04.2020).
- Piris J.C., *The Lisbon Treaty – A legal and Political Analysis*", Cambridge: Cambridge University Press, 2010, p. 193.
- Prlja Dragan, Cerović Dražen, Diligenski Andrej, *Pravo zaštite podataka – GDPR*, Beograd, 2018, p. 11.
- Regional Cooperation Council, RCC, *South-East Europe 2020*, 2013, http://www. rcc.int/files/user/docs/reports/SEE2020-Strategy.pdf (28.10.2021).
- Reiter Oliver, Robert Stehrer, *Value Chain Integration of the Western Balkan Countries and Policy Options for the Post-COVID-19 Period*, Vienna, 2021, p. 20.
- Sgueo Gianluca, *Lobbying in the EU - the cost of a lack of transparency*, 2015, European Parliamentary Research Service, https://www.scribd.com/document/281758925/Lobbying-in-the- EU-The-cost-of-a-lack-of-transparency (28.03.2016).
- SIGMA/OECD, *Monitoring Report: The Principles of Public Administration – Montenegro*, November 2021, www.sigmaweb.org (31.01.2022).
- UN Report, *Shared responsibility, global solidarity: responding to the socio-economic impacts of COVID*-19, UN, March 2020, https://unsdg.un.org/sites/default/files/2020-03/ SG-Report-Socio-Economic-Impact-of-Covid19.pdf (10.04.2020).
- Wihtol De Wenden C., *A new European pact on immigration and asylum in response to the migration challenge*, 2019, European issues No 537, www.robert-schuman.eu (29.11.2021).
- World Economic Forum, White Paper, 2016, p. 3.

Prof. Jadranka Dabović Anastasovska, PhD
Full Professor at the Ss. Cyril and Methodius University, Faculty of Law Iustinianus Primus in Skopje, Republic of North Macedonia

Prof. Goran Koevski, PhD
Full Professor at the Ss. Cyril and Methodius University, Faculty of Law Iustinianus Primus in Skopje, Republic of North Macedonia

LEGAL FRAMEWORK FOR THE PROTECTION OF TRADE SECRETS - ENCOURAGING INNOVATION AND COMPETITIVENESS OR INTRODUCING ANOTHER BARRIER TO TRADING ON THE EUROPEAN UNION SINGLE MARKET

Summary

The authors in their paper are elabourating the impact of legal framework for the protection of trade secrets on the promotion of innovative activities and in increasing of competitiveness of products and services and labour mobility. Academic debates related to the issue of whether a trade secret is a type of intellectual property or a sui generis right, and the differences between the American and the European scholars as to the legal nature of the institute of trade secret, do not diminish the practical value of trade secret protection.

The authors emphasize the fact that recently two very important legislative bodies for protection of trade secrets were adopted: EU Directive 2016/943 of the European Parliament and the Council for the protection of undisclosed knowledge and experience and the US 2016 Defend Trade Secrets Act.

Finally, developing a good trade secret protection strategy is a very important tool for creating both, intellectual capital and competitive advantages.

Key words: *trade secret, innovation, competitive advantage, protected data, intellectual property rights, single internal EU market.*

I Introduction

The companies' intellectual capital expressed through the intellectual property rights, trade secrets, confidential information, knowledge and the employees' skills represents the most valuable part of the assets.

In a world of rapid development of new technologies and fast communications, the exchange of new ideas and information can be easily achieved. On one hand, the business community is interested in exchanging innovative knowledge and improving the products and services quality, while, on the other hand, the same business world wants to realize a competitive advantage and returns of its own investments in research and development.

Large companies that invest substantial resources in research and development often devote a lot of time in international protection of their intellectual property rights. However, it's well known fact that in case of innovation patenting procedures, they must describe the respective invention and make it available to the public. In return they receive protection which itself is time limited up to a maximum of 20 to 25 years.

Trade secrets are more attractive and beneficial for companies in certain industries, since they avoid the long lasting and costly patenting procedure on one, and enjoy unlimited time protection on the other hand. Finally, protection of innovative ideas throughout a trade secret is also useful for small- and medium-sized enterprises, which themselves do not have sufficient resources to protect them via available mechanisms for intellectual property rights protection.

The primary hypothesis of this paper is the importance of trade secrets is the contemporary business environment. A modern and sufficiently harmonized legal framework for protection of trade secrets can considerably contribute in international trade growth, knowledge sharing and increased innovation. Secondary hypotheses that can be extracted from the primary one are the stances that there are still differences in national legislation of the European Union Member States when it comes to the legal regulation of trade secrets; even when legal regulation exists, in some national legal systems it is dispersed and fragmented in several different laws which opens the room for legal uncertainty; and most of the companies have no knowledge of the legal regulations existing and the available procedural methods for trade secrets protection.

The European Union by the adoption of the Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (EU Trade Secrets Directive/Directive 2016/943 EU)[73] recognized that the companies in the current business environment are investing in intellectual capital creation in order to achieve both a competitive advantage, and to foster their innovation-related performances. Hence, it seems that EU identified the importance of adoption of harmonized specific rules for better protection of trade secrets. The innovative undisclosed know-how and information protected as confidential trade secrets have become value added asset to companies' capital as opposed to the alternative intellectual property rights protection (e.g. patents, design rights and copyright).

[73] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&rid=4, accessed on 1st of March 2022

II Legal framework for trade secret protection

A. The early stages of the international legal protection of trade secrets

The only multilateral treaty that addressed, even indirectly, the legal protection of trade secrets was the Paris Convention for the Protection of Industrial Property ("Paris Convention")[74]. Article 10bis of the Paris Convention requires all countries of the Paris Union to provide effective protection against unfair competition. This protection must be provided on a "national treatment" basis pursuant to Paris Article 2.[75] The term "unfair competition" is defined as "[A]ny act of competition contrary to honest practices in industrial or commercial matters (…)". While it is clear that countries of the Union must, at a minimum, prohibit the listed acts contrary to honest practices, they do not directly relate to undisclosed information.

The Agreement for Trade-Related Aspects of Intellectual Property (TRIPS Agreement) is the first step towards harmonization of trade secret protection rules.[76] Protection of undisclosed information is addressed in Article 39 of TRIPS Agreement. This agreement entered into force on 1 January 1995 and established an international standard requiring

[74] Stockholm Act, July 15, 1967, reprinted in G.H.C. Bodenhausen, Guide to the application of the Paris convention for the protection of industrial property, as revised at Stockholm in 1967 (1968), available at http:// www.wipo.org/treaties/ip/paris/index.html (01.03.2022).

[75] The Paris Convention provides that "the countries to which this Convention applies constitute a Union for the protection of industrial property." Subsequent articles employ the phrases "a country of the Union" and "countries of the Union" to describe parties to the Convention, rather than using more modem terms such as "contracting parties" or "member states." Id., at art. 1. As of July 15, 2003, 164 States were countries of the Union. A list of these States is available at http://www.wipo.org/treaties/ip/paris/index.html (01.03.2022).

[76] Available at: https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (20.03.2022).

WTO Members to protect undisclosed information, including agricultural and pharmaceutical test data. The TRIPS Agreement is binding on all WTO Members.[77] The approach legislated in the TRIPS Agreement is based on the notion that protection against unfair competition should include protection for undisclosed information. In presenting this approach, the TRIPS Agreement makes reference to the prior-existing protection against unfair competition as presented in the Paris Convention for the Protection of Industrial Property (Box 3.2.).

Article 39(2) provides protection for undisclosed information as long as: the information is secret, it is not known or not generally ascertainable to the public, the information has commercial value due to its secrecy and reasonable precautions are being taken to maintain the secrecy. The TRIPS Agreement obliges WTO member countries to protect undisclosed information meeting certain requirements, so as to empower "natural and legal persons to prevent information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices[78]. The information protected must actually be secret, but secrecy need not to be absolute, the trade secret owner may share the information with employees and business partners. Secrecy, instead, requires that the information must not be readily publicly accessible and that it is revealed to others only under conditions that maintain secrecy with respect to the broader public. When it comes to the commercial value, the information

[77] The EU and all of its Member States are bound to implement the TRIPS pursuant to Council Decision 94/800/EC Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay round multilateral negotiations (1986-1994) (OJ L 336, 23 December 1994, p. 1); source: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&from=EN

[78] *Skillington G. Lee, Solovy Eric*, "The Protection of Test and Other Data Required by Article 39.3 of the TRIPS Agreement", Northwestern Journal of International Law & Business, Volume 24, Issue 1 Fall, 2003, p. 2

must have economic value as a result of its being secret. In fact, trade secret law protects most typically commercial information i.e. information that provide some utility from being kept secret. Reasonable efforts to maintain secrecy means that the information must be the subject of reasonable efforts on the part of the rights holder to maintain its secrecy. In national laws, the necessary effort is often broadly described as "reasonable," in keeping with Article 39 of TRIPS. However, some countries impose more specific, additional obligations, which might be characterized as a particular implementation of the broad reasonableness requirement.

B. Recent trends towards better legal protection of trade secrets

Globally, trade secrets are viewed as increasingly important to economic and enterprise growth. A 2015 Study by the Organization for Economic Co-operation and Development ("OECD") found that increased trade secrets protection results in better innovation inputs and international economic flows.[79] Among companies, there is increasing recognition of the importance of trade secrets for business growth.[80]

In 2016, important steps towards stronger protection of trade secrets were made in the EU and the US.

---

[79] OECD (2015) Enquiries into Intellectual Property's Economic Impact. Chapter 4: An Empirical Assessment of the Economic Implications of Protection for Trade Secrets, available at: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP(2014)17/CHAP4/FINAL&docLanguage=En (28.03.2022).

[80] A 2017 survey by Baker McKenzie found that 8 in 10 respondents regarded trade secrets as an important, if not essential, part of their business (Baker McKenzie 2017). The Board Ultimatum: Protect and Preserve. The Rising Importance of Safeguarding Trade Secrets. A 2021 study by the Economist Intelligence Unit also found that the top perceived consequences of trade secret misappropriation were loss of business (cited by 52% of the respondents), loss of competitive advantage (51%), and reputational damage (42%) (Economist Intelligence Unit. 2021. Open secrets? Guarding value in the intangible economy).

In the United States, trade secret laws had traditionally been a matter left to the individual states. A Uniform Trade Secrets Act was proposed to the states in 1979 and since then has been widely adopted, but with varying provisions that made enforcement on a national scale fairly complicated. In 1996, the federal government enacted the Economic Espionage Act, but it was limited to criminal remedies. Twenty years later, in May 2016, the US Congress passed the Defend Trade Secrets Act of 2016 (DTSA), which for the first time, gave trade secret holders the option to file civil claims in federal court, offering a number of procedural advantages over state courts,[81] The DTSA created a national standard for trade secret claims, introduces an ex parte seizure order procedure, and protects information provided in confidence by whistle-blowers to the government or court officials.

The EU adopted the EU Trade Secrets Directive, with an aim of harmonization of trade secret legislation across the EU. The EU Trade Secrets Directive was adopted on 8 June 2016, entered into force on 5 July 2016 and the Member States were due to transpose it in their national legislation by 9 June 2018. The Directive was the key instrument in harmonizing national laws concerning trade secrets by following measures: ensuring an equivalent level of protection of trade secrets throughout the Union; introducing a uniform definition of the term trade secret; providing common measures against the unlawful acquisition, use, and disclosure of trade secrets, etc. The EU Trade Secrets Directive introduces a common set of legal principles, procedures, and protection measures with the aim of creating a Pan-European regime, being an incentive for

[81] Prior to the development of the DSTA, improper use or disclosure of a trade secret was traditionally a common law tort. Sections 757 and 758 of the Restatement of Torts (1939) set forth the basic principles of trade secret law that were widely adopted by U.S. courts. In particular, § 757, comment b, listed the six factors to be considered in determining whether information constitutes a trade secret. Available at: https://www.law.cornell.edu/wex/trade_secret, accessed on 30th of March 2022.

companies to invest in research and innovation in Europe with confidence.

The trends in changing the legislative approach towards enactment of separate trade secret laws did not stop within the EU and the United States.

Article 2(6) of the Japanese Unfair Competition Prevention Act (UCPA) defines a trade secret as: "technical or business information useful for commercial activities such as manufacturing or marketing methods, that is kept secret; and that is not publicly known." In 2015 significant revisions were proposed and enacted in order identified loopholes of UCPA to be closed. The three primary objectives of the amendments are to expand criminal penalties, increase deterrents to trade secret theft and implement more effective civil remedies.[82] Sequentially, in 2018 and in 2019, China made significant amendments to its Anti-Unfair Competition Law to expand the definition of a protectable trade secret and to increase penalties for theft, including the availability of punitive damages.

Although the legislative trends are changing with the adoption of the EU Trade Secrets Directive, generally, it can be concluded that the legal protection of trade secrets differs depending on whether the respective country belongs to the common law or the continental law legal tradition. Common law countries generally are favoring a comprehensive normative approach with developing a separate branches of law, while the civil law countries traditionally rely on specific provisions in different bodies of law, such as: civil contract law, labour law, tort law, criminal law, and the law of unfair competition.

[82] https://blogs.orrick.com/trade-secrets-watch/2016/04/18/were-not-gonna-take-it-significant-changes-to-japans-trade-secret-protection-law/ accessed on 2nd of April 2022.

C. The legislative approach in the countries of the region

The Croatian Law on the Protection of Unpublished Information of Market Value was adopted in 2018.[83] This Law is harmonized with the EU Trade Secret Directive and the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. The definition of a trade secret, in accordance with the above, is now more clearly and broadly defined. The Croatian Law on the Protection of Unpublished Information of Market Value therefore brings a novelty in a way that avoids to strictly define what is a trade secret and introduces criteria on the basis of which certain information should be considered a trade secret.[84]

The Law on the Protection of Unpublished Information of Market Value on the other hand, clearly defines that illegal acquisition, use and disclosure of business secrets is prohibited. Such a definition provides the holder with significantly broader possibilities for the protection of business secrets as well as the possibility of compensation for damages, both from parties who have illegally obtained or disclosed business secrets of the holder and third parties who illegally use business secrets. This law is a modern legal framework for the protection of trade secrets. However, it seems that in the Republic of Croatia the holders of the trademark should be more educated about the benefits of this law.[85]

[83] Zakon o zaštiti neobjavljenih informacija s tržišnom vrijednosti, NN 30/18 - 07.04.2018, available at: https://www.zakon.hr/z/1017/Zakon-o-za%C5%A1titi-neobjavljenih-informacija-s-tr%C5%BEi%C5%A1nom-vrijednosti , accessed on 15th of April 2022.

[84] *Rački Marinković Ana*, „Zaštita poslovnih tajni kao oblika intelektualnog vlasništva“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 40, br. 2, 2019, p.765-797.

[85] https://www.psod.hr/objave/poslovna-tajna-regulacija accessed on 15th of April 2022

On April 20 2019, the Trade Secrets Act entered into force in Slovenia[86], transposing the EU Trade Secrets Directive into Slovenian legislation. Before the Act entered into force, trade secrets were regulated by the Companies Act and the Employment Relationships Act. Their subject matter was defined in broader terms, leaving room for various court interpretations. Under the new Act, a trade secret is defined as undisclosed expert knowledge, experience or business information that is not generally known or easily accessible, that has a certain market value and for which sufficient measures have been taken to keep it a secret. Apart from defining trade secrets, the Act lays down the rules for their lawful and unlawful acquisition, use and disclosure, and the rules for maintaining their confidentiality in and after court proceedings. The Act also provides trade secret holders with a number of measures to be used in the event of trade secret misappropriation, including compensatory damages.

The new Law on Protection of Trade Secrets in the Republic of Serbia was adopted in 2021.[87] This Law is a modern legal framework that follows the European standards for protection of trade secrets. The legal concept of trade secret now includes an example of specific information that is covered by it: it is envisaged that trade secrets are considered, among other things, knowledge and experience, business and technological information. In addition to the very concept of trade secret, the new Law expands the range of key terms and precisely defines who is considered: holder of a trade secret, a person who has violated a trade secret, a person suspected of violating a trade secret, as well as what will be considered goods that have violated trade secrets. The new Law explicitly

[86] Zakon o poslovni skrivnosti, Official Gazette of the Republic of Slovenia, no. 22/2019, available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7758 accessed on 16th of April 2022

[87] Zakon o zaštiti poslovne tajne, "Sl. glasnik RS", br. 53/2021. Available at: https://www.paragraf.rs/propisi/zakon_o_zastiti_poslovne_tajne.html accessed on 15th of April 2022

states in which cases the acquisition, use and disclosure of trade secrets will be considered legal or illegal. The new provisions of this segment of the Law have been improved in relation to the previous legal solution, which in a more precise way defined the permitted and impermissible cases of obtaining or disposing of trade secrets. A particularly interesting novelty is contained in one of the examples of permitted disposal of business secrets stated by the Law, and that is the situation of reverse engineering, provided that other conditions provided by the Law are met. It is considered to be an extremely modern law, which raises the level of protection of trade secrets. However, it will certainly be necessary for the holders of trade secrets to implement the envisaged protection of trade secrets and to understand what opportunities are offered to them in order to provide legal protection of trade secrets in court proceedings.

There is a very recent Law on Law on Protection of Trade Secrets in Montenegro[88]. This law gives a definition as to which information constitutes a trade secret: what represents legal and unlawful acquisition, use and disclosure of trade secrets: what measures can be imposed by the court of competence during the procedures for trade secrets protection, etc. In brief, the EU Trade Secrets Directive is already transposed in the Montenegrin legal system.

Bosnia and Herzegovina and the Republic of North Macedonia represent countries in the region that have no *lex specialis* regulation regarding the trade secrets protection. This matter is fragmented in several pieces of legislation. For illustration purposes, we can mention following laws: laws regulating companies, labour laws, obligation laws, relevant adjective laws, etc. In our opinion, this fragmentation increases the legal uncertainty when it comes to trade secrets infringement. Thus, both countries should follow the regional

[88] Zakon o zaštiti poslovne tajne, "Official Gazette of Montenegro", no. 145/21, available at: https://www.gov.me/dokumenta/756c7c5c-027f-4e67-b30b-31f3770f20fa accessed on 17th of April 2022

legislative trends in the transposition of the EU Trade Secrets Directive without delay.

III What is a trade secret?

Trade secrets as a concept existed for centuries. The secret ingredients of food and medicine, the specific skills transferred from generation to generation are traditions were very similar to the trade secrets. In the era of fast-growing technology trade secrets are attributed with bigger and bigger importance[89]. Coca-Cola's formula is one of the examples how trade secret can bring a substantial trade advantage.[90] In order to determine the importance of legal protection of trade secrets, the business community needs to know what the business secret is in its nature, how it contributes in the company value growth, how much it provides in gaining competitive

[89] With its main IP being nearly two hundred years old, Angostura has found that the best way to protect its product is by using of trade secrets (Government of Trinidad and Tobago, 2014). To that end, the company closely guards a secret that has been the mainstay of its success, ensuring that it does not make its way into the hands of competitors. For example, as few as five company directors are allowed to enter the room where the ingredients that make up Angostura Bitters are mixed (A Bottle of Run: A History of the New World in Ten Cocktails, 2007). Taking such measures has allowed the recipe to remain a secret since 1824 (according to the company) and help keep the company competitive.

[90] The Coca-Cola formula is a secret for nearly 130 years. The formula is a trade secret because no one else has been able to figure it out. Efforts to reverse-engineered it have failed and the Coca-Cola Company goes to great lengths to keep it a secret. Unconfirmed reports and speculation suggest that Coca-Cola actually keeps different parts of the formula in different places and that no one person knows the entire formula. The loss of the formula would likely cost Coca-Cola untold millions of dollars, or more. See: https://www.dbllaw.com/intellectual-property-and-the-importance-of-trade-secrets/#:~:text=Copyrights%20protect%20the%20form%20of,competitive%20edge%20to%20its%20owner accessed on 16th of March 2022

advantage and what are the potential legal consequences of trade secret abuse or breach.[91]

When it comes to the legal nature of trade secrets, one of the key questions remaining is whether they are a kind of intellectual property rights (IPR) or not. Trade secrets differ from patents, trademarks, and industrial designs because for each of these rights it is necessary to meet certain legal requirements and to register and protect them before a competent authority. Trade secret protection, however, does not require engagement of authorized representatives who will represent the interests of the intellectual property rights holder. While the IPRs are carefully limited to creative works that meet a very specific set of requirements, protection of trade secrets applies broadly to any information that is secret, that has some commercial value, and that the owner has taken some steps to maintain its confidence.

The relationship between know-how and trade secrets is often misunderstood. Know-how refers to factual knowledge that is not generally known to the public and which may be difficult for others to copy. This knowledge might not necessarily represent a trade secret. Trade secrets, as their name implies, need to be kept secret. Trade secrets, however, usually include know-how.

The legal theory defines several factors to consider in determining whether information constitutes a trade secret: the extent in which the information is known outside the business; the extent in which it is known by employees and other parties involved in the business; the extent of measures taken to safeguard the secrecy of the information; the value that the information has from the viewpoint of the competitors; the amount of effort or money spent by the business in developing the information; and how ease or how difficult the

[91] Examples for famous trade secrets encompass: Google's search engine algorithm; the Coca-Cola and Pepsi recipes; the formula for the lubricant WD-40; the KFC chicken coating recipe, the New York Times Bestseller List, etc.

information could be properly acquired or duplicated by others. Even "negative" information as to "what does not work" or works less well could qualify as a trade secret [92].

Trade secrets encompass both technical and commercial information. Technical information refers to information concerning manufacturing processes, pharmaceutical test data, designs and drawings of computer programs, while commercial information usually contain distribution methods, a list of suppliers and clients and advertising strategies[93]. A trade secret may also be represented by a combination of elements, each of which by itself could be in the public domain, but their combination creates a trade secret that provides a competitive advantage.

Other examples of information that may be protected by trade secrets include financial information, formulas and recipes and source codes.[94]

Confidential information, on its own hand, is private information that helps to ensure a company's growth and development by providing it with a competitive edge. Trade secrets and know-how are both subsets of confidential information and only differ in the fact that trade secrets may be protected by law if reasonable efforts have been taken to protect their secrecy. Most businesses, regardless of size, depend on some combination of trade secrets, know-how, and confidential information for their success.[95] Confidential information is a much broader category and includes: employees' personnel information, pricing lists, customer lists,

---

[92] Protecting trade secrets — recent EU and US reforms - International Chamber of Commerce, Recommendations for policy makers worldwide 2019 pp. 6-7.

[93] Many restaurants have their secret recipes. Hotels, beauty salons, and gyms, today have lists of customers and know their habits and specific requirements.

[94] https://www.wipo.int/tradesecrets/en/ (02.10.2022).

[95] Study on Trade Secrets and Confidential Business Information in the Internal Market Final Study April 2013, Prepared for the European Commission, available at: 130711_final-study_en.pdf (03.04.2022).

customer information, discount policies, pricing strategies, methodologies and strategies, training materials, information on major business deals, including trade secrets.

Measures such as confidentiality agreement or non-disclosure agreement execution, must be taken into consideration in order to reasonably protect confidential information.[96]

There is a debate in the academic literature as to whether trade secret law is based on relational obligations (for example, contract, employment status, or fiduciary duty); property rights; fairness and equity; or unfair competition law tort or delict.[97]

Companies choose trade secrets protection to maintain a competitive advantage by avoiding the disclosure associated with other types of IPR. However, trade secrets are vulnerable by being subjects of reverse engineering, misappropriation or theft. Cyber theft and economic espionage are of increased concern as well. Trade secrets protection is often a lower-cost alternative to other IPR, although they enjoy relatively weaker protection.

Out of everything elabourated above, it can be concluded that establishing a homogenous definition of a trade secret is of great importance. Our position in this respect is that definition should not be restrictive and exhaustive. On the contrary, it should be constructed so as to cover know-how, business information and technological information where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved. Furthermore, such knowhow or information should have a commercial value, whether actual or potential. Such know-how or information should be considered to have a

[96] https://www.wpdlegal.com/confidential-information-versus-trade-secrets-are-you-protected-tips-on-how-to-protect-both/ (02.04.2022).

[97] Enquiries into intellectual property's economic impact © OECD 2015-Chapter 3. Approaches to the protection of trade secrets, available at: https://www.oecd.org/sti/ieconomy/KBC2-IP.Final.pdf (10.04.2022).

commercial value, for example, where its unlawful acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential, business or financial interests, strategic positions or ability to compete. The definition of trade secret excludes trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question.[98]

Both legislative pieces, the EU Trade Secrets Directive and the DTSA contain definitions of trade secrets. While the EU Trade Secrets Directive is more about the conditions that need to be met for something to be considered a trade secret, the DTSA in USC 18§1839 gives the following definition of trade secret: "Trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." Article 2 of EU Trade Secrets Directive contains the following definition of a trade secret: "Trade secret" means information that meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration

[98] Recital 14 of Directive 2016/943.

and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

Legal protection of a trade secret depends on how it is defined as "misappropriation" and the unlawful acquisition of a trade secret. In the DTSA and the EU Trade Secrets Directive, we have a different approach, but there is still a certain approximation.

DTSA determines that: "Misappropriation" means: acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or disclosure or use of a trade secret of another without express or implied consent by a person who - used improper means to acquire knowledge of the trade secret; at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was - derived from or through a person who had used improper means to acquire the trade secret; acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or before a material change of the position of the person, knew or had reason to know that - the trade secret was a trade secret; and knowledge of the trade secret had been acquired by accident or mistake. "Improper" means includes theft, bribery, misrepresentation, breach or induction of a breach of a duty to maintain secrecy or espionage through electronic or other means; and does not include reverse engineering, independent derivation, or any other lawful means of acquisition."

Under the Article 4 of the EU Trade Secrets Directive: "The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever

carried out by unauthorized access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced; any other conduct which, under the circumstances, is considered contrary to honest commercial practices. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions: having acquired the trade secret unlawfully; being in breach of a confidentiality agreement or any other duty not to disclose the trade secret; being in breach of a contractual or any other duty to limit the use of the trade secret. The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use, or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully. The production, offering, or placing on the market of infringing goods, or the importation, export, or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully."

Both regulations use different terms for those who have the right to legal protection against abuse and against the unlawful use of trade secrets. DTSA uses the term owner, while the term used by the EU Trade Secrets Directive is the holder of the right. The term "owner," with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.[99] "Trade secret holder" means any natural or legal person lawfully controlling a trade secret.[100]

[99] 18 U.S.C. §1836 and 18 U.S.C. §1839

[100] Article 2 and Article 3 of the Directive 2016/943.

The DTSA, contrary to the EU Trade Secrets Directive, does not provide for the lawful acquisition, use or disclosure of a trade secret when such acquisition, use, or disclosure is required or allowed by Union or national law.

A lawsuit for breach of the trade secret can be filed within a certain period. Limitation periods set a time limit for bringing claims, thereby providing predictability and an incentive for victims to gather evidence and present claims while they are fresh. The US and EU trade secret legislation provides for differing limitation periods According to the DTSA, it can be filed within three years of the violation or finding out about the violation. According to the EU Trade Secrets Directive, actions for trade secret infringement must be brought within a maximum of 6 years, but the Member States can implement shorter time periods.

Due to the knowledge that those who possess a trade secret do not apply to the court for protection for fear that the court proceedings will reveal the trade secret, the legal norms that protect the trade secret in court proceedings are of interest. It has already been noted that enforcement of a claimed trade secret through litigation may increase the risk of its unauthorized acquisition, disclosure, or use. During discovery in the US, each side is allowed access to the other side's relevant records. As part of that process, the parties seek from the court, sometimes by agreement, a protective order that allows each side to designate discovery materials that they wish to protect. Frequently, such orders will create two categories of protected information: "confidential" information limited to certain designated individuals; and "highly confidential" information limited to the parties' lawyers and qualified experts allowed to access such information. The most striking difference between the whistle-blower protections provided by the EU Trade Secrets Directive and by the DTSA is that the latter extends only to confidential disclosures to government officials, while the former appears to approve of any disclosure made "for the purpose of protecting the public

interest" potentially including public disclosure through the news media.

In a civil case in the US, the trade secret holder bears the burden of proving, at trial or in a proceeding for special pre-trial relief, each element of the claim by a preponderance of the evidence. With a civil lawsuit under the DTSA for breach of trade secret, the court may order the infringer to stop the abuse or actions that endanger the trade secret. The court may order action to protect trade secrets. The EU Trade Secret Directive instructs Member States to provide for the availability of measures, procedures and remedies to prevent, and to obtain redress for, the unlawful acquisition, use or disclosure of the trade secret. The EU Trade Secrets Directive is silent on the burden of proof but an applicant can expect to be required to provide reasonably available evidence to establish with a sufficient degree of certainty that a trade secret exists, meaning that the requirements for protection under the EU Trade Secrets Directive are fulfilled, the applicant is the trade secret holder and the trade secret has been or is being unlawfully acquired, used or disclosed, or an unlawful acquisition, use or disclosure of the trade secret is imminent.[101]

[101] According to EU Trade Secret Directive Member States shall ensure that, where a judicial decision taken on the merits of the case finds that there has been unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant, order one or more of the following measures against the infringer: the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret; the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes; the adoption of the appropriate corrective measures with regard to the infringing goods, which includes: recall of the infringing goods from the market; depriving the infringing goods of their infringing quality; destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided that the withdrawal does not undermine the protection of the trade secret in question; the destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or, where appropriate, the delivery up to the applicant of all or part of those

How important is the precise definition of trade secret and its protection, shows the practice that in the past different academic stances towards the legal protection of trade secrets caused practical controversies in the international trade. Some of the most referential cases are the case of General Electric's secret procedure to produce artificial diamonds abused in South Korea and the case of withdrawal of the Coca Cola company from the Indian market due to the danger of revealing the secret formula of the syrup used to produce the most famous drink.[102]

IV Conclusion

It can be inferred that the modern EU legal framework met the most of the expectations in terms of trade secrets protection. It offers a broad definition of trade secrets, indicates criteria that must be met in order some information to be considered as trade secret, strengthens the protection of trade secrets; clarifies what cannot be considered as violation of trade secret; provides greater secrecy during court proceedings, offers various claims and measures to protect trade secret and the types and amounts of compensation available to trade secret holders, etc. Trade secrets holders should constantly be educated in order the legal framework to be better enforced which will enable greater cross-border cooperation, and lift the barriers to international trade.

However, the data contained in the document entitled „Baseline of Trade Secrets Litigation in the EU "commissioned by the EUIPO's European Observatory on Infringements of Intellectual Property Rights (the Observatory), shows that EU Trade Secrets Directive in many Member States has not been

documents, objects, materials, substances or electronic files; the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into, or circulation on, the market.

[102] In fact, when faced with the request to reveal the specific ingredients, Coca-Cola simply left the country back in 1977.

transposed into single codified national law, but the practice of dispersing the protection of trade secrets in a number of laws is still exercised. As we already pointed out, it is a big question whether this normative approach leads towards greater legal certainty in trade secrets protection enforcement.

Bibliography

- Economist Intelligence Unit. 2021. Open secrets? Guarding value in the intangible economy
- G. Lee Skillington Eric M. Solovy "*The Protection of Test and Other Data Required by Article 39.3 of the TRIPS Agreement"* Northwestern Journal of International Law & Business Volume 24 Issue 1 Fall 2003;
- Protecting trade secrets — recent EU and US reforms - International Chamber of Commerce, Recommendations for policy makers worldwide 2019
- Rački Marinković A., Zaštita poslovnih tajni kao oblika intelektualnog vlasništva, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 40, br. 2, 765-797 (2019)
- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri= CELEX:32016L0943&rid=4
- https:// www.wipo.org/treaties/ip/paris/index.html
- http://www.wipo.org/treaties/ip/paris/index.html
- https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm
- http://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:32016L0943&from=EN
- https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP(2014)17/CHAP4/FINAL&docLanguage=En
- https://www.law.cornell.edu/wex/trade_secret
- https://blogs.orrick.com/trade-secrets-watch/2016/04/18/were-not-gonna-take-it-significant-changes-to-japans-trade-secret-protection-law/

- https://blogs.orrick.com/trade-secrets-watch/2016/04/18/were-not-gonna-take-it-significant-changes-to-japans-trade-secret-protection-law/
- https://www.psod.hr/objave/poslovna-tajna-regulacija
- http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7758
- https://www.paragraf.rs/propisi/zakon_o_zastiti_poslovne__tajne.htm
- https://www.gov.me/dokumenta/756c7c5c-027f-4e67-b30b-31f3770f20fa
- https://www.dbllaw.com/intellectual-property-and-the-importance-of-trade-secrets/#:~:text=Copyrights%20protect%20the%20form%20of,competitive%20edge%20to%20its%20owner
- https://www.wipo.int/tradesecrets/en/
- https://www.wpdlegal.com/confidential-information-versus-trade-secrets-are-you-protected-tips-on-how-to-protect-both/
- https://www.oecd.org/sti/ieconomy/KBC2-IP.Final.pdf
- Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure
- Zakon o zaštiti poslovne tajne, "Službeni list Crne Gore", no. 145/21
- Zakon o zaštiti neobjavljenih informacija s tržišnom vrijednosti, NN 30/18 - 07.04.2018
- Zakon o poslovni skrivnosti, Official Gazette of the Republic of Slovenia, no. 22/2019
- Zakon o zaštiti poslovne tajne, "Sl. glasnik RS", br. 53/2021

Prof. Tatjana Jevremović Petrović, PhD
Full Professor at University of Belgrade Faculty of Law, Serbia

COMPANY'S REGISTRATION PROCEDURE IN THE REPUBLIC OF SERBIA

Summary

In the Republic of Serbia, the procedure of company's registration is regulated by the Law on Registration procedure into the Business Agency Registers. Recent changes of Serbian Law related to companies also included changes to the Law on Registration and made further steps to improve registration procedure.

This paper will present a brief overview of provisions by which company's registration procedure is regulated. They remain under the strong influence of the European Company Law, in particular Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. Still, they are also very much focused on improved efficiency and economy of registration procedure, to which full attention was paid in the recent amendments.

Key words: *company's registration, Business Agency Registers, disclosure, Directive (EU) 2017/1132, incorporation of companies, nullity of registration.*

I Introduction

Serbian law has specific provisions on company's registration procedure, now in force from 2011. These provisions are contained in the Law on Registration procedure

into the Business Agency Registers.[103] They were made under the strong influence of different national European legal systems. Furthermore, of particular significance is the law of the European Union. It can be generally observed important impact of the European company law regarding registration procedure, in particular the issues related to collection, receipt, registration, filing and keeping, as well as public disclosure of documents and information. Majority of these issues are regulated by the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.[104] After the signing of the Stabilization and Association Agreement, the Republic of Serbia started to harmonize its laws with the EU, including issues related to company law. The process is still ongoing, even though Serbia already harmonized its provisions with EU Law in most relevant issues, in particular when it comes to registration procedure.[105]

---

[103] Law on Registration procedure into the Business Agency Registers (Zakon o postupku registracije u Agenciji za privredne registre), *Official Gazette of the RS*, 99/2011, 83/2014, 31/2019 and 105/2021 (further referred to as Law on Registration). Many important issues related to the registration procedure are also regulated by the Law on Commercial Companies (Zakon o privrednim društvima), *Official Gazette of the RS*, 36/2011, 99/2011, 83/2014 – in other law, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021 (further referred to as LCC 2011).

[104] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ* L 169, 30.6.2017, p. 46 – 127.

[105] Stabilization and Association Agreement between the European Communities and the Republic of Serbia, signed on April 29th, 2008, is of direct relevance to Serbian Company Law, influencing structure, definitions, principles and many important particular provisions related to companies. Available at: https://www.mei.gov.rs/upload/documents/sporazumi_sa_eu/saa_textual_part_en.pdf (18.5.2022). According to provisions of the Stabilization and Association Agreement, the Republic of Serbia agreed to ensure that its existing laws and future legislation will gradually be made compatible with the EU acquis and that such laws will be properly implemented and enforced. See Art. 72 of the Stabilization and Association Agreement. The

The following paper will emphasize how the registration procedure is regulated in the Republic of Serbia. It will bring light on its general development from the procedure of inscription into the court register to the current position of efficient and centralized system of registration into the Business Agency Registers (section II). The procedure of the registration of company's formation will be particularly considered, calling particular attention to the new amendments introducing electronic registration of the company's formation (sections III and IV). Finally, the possibility and limits of the nullity of registration of the company' formation will be also underlined (section V). After that, we conclude with general remarks on the current system of registration procedure.

II General Provisions on registration of companies

A. Historical perspective

Until 2004 inscription of all legal persons, including commercial companies in Serbian law (also in former Yugoslavia) was performed in front of the court. The court was in charge of the inscription on the basis of material as well as formal control of conditions necessary for inscription.[106] Among formal requirements, it was necessary that application for inscription was made timely, by authorized person, on the required form and with necessary content; that all necessary

same obligation the Republic of Serbia expressed within the Resolution on the accession to the EU, adopted by the National Assembly on October 13th, 2004. Full text of the Resolution in Serbian available at: https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/rezolucija_narodne_skupstine_o_pridruzivanju_eu.pdf (18.5.2022).

[106] Arts. 32 – 34 Law on inscription into the Court Register (Zakon o postupku za upis u sudski registar), *Official Gazette of the SRY*, 80/94. This Law was applicable until 2004 for majority of inscriptions of legal persons, including commercial companies, when registration procedure was transferred to the Business Registers Agency.

documents were supplied *and that they were made according to valid procedure with necessary content*. Also, material requirements were necessary, including that application is made according to law and other acts already registered. The court was allowed to require from the applicant changes to his/her application, if not all necessary *formal* conditions were met, in a period no shorter than 8 days and no longer than 60 days.[107] The registration court (if not competent to establish by itself), was allowed to require additional document or information if in doubt of the existence and validity of facts. It was also allowed to inform a competent body to initiate a court procedure when court proceedings were necessary to determine existence and validity of the facts in case.[108] It can be, therefore, concluded that a thorough examination of material and formal requirements was part of the inscription procedure. On the other hand, it took longer time to be performed, in particular if there were reasons for additional requirements or court (or other) proceedings to be performed before inscription is completed.

In cases of unfounded inscription it was possible for an interested party to require the court to delete the inscription in a very short time period of 15 days from the knowledge of the inscription, but no longer than 60 days from the publication of the inscription, or otherwise the court could delete the inscription *ex officio* during two years from the inscription itself.[109] Conditions for the court to delete an unfounded inscription included inscriptions made without necessary documents, change of conditions in regard to pursuit of activity after inscription took place or other cases of unfounded inscription.[110]

Since 2004 Serbian law was under major influence of Anglo-American legal systems in regulating issues of

[107] Art. 35 Law on Inscription into the Court Register.
[108] Art. 39 Law on Inscription into the Court Register.
[109] See Art. 59 Law on Inscription into the Court Register.
[110] Art. 60 Law on Inscription into the Court Register.

administrative procedure and control of registration. It is, therefore, since 2004 that Serbian law adopted a different system of administrative registration of company's information and data into the central Business Agency Register.[111] This system is in force still today.

Nevertheless, continental lawyers usually find Anglo-American legal systems to have serious control deficits, and point out the importance of control during registration, reinforced by notary authentication, in most important issues.[112] Among other cases, they have an important role during formation of a company, and provide a "substantive guarantee of correctness of legal acts under corporate law", having a double protective function regarding third parties but also parties involved.[113] The same is obvious if we take a look at the former system for inscription in Serbian law and control which was performed during the procedure.

On the other hand, preventive control made by judiciary is inefficient, expensive and could in rare cases still be inadequate.[114] Therefore, it was often suggested that it is not necessary that a court be involved in the registration procedure but that this procedure could be left to other, more efficient control mechanisms. For example, a public notary could solve these problems by performing control of certain requirements for the registration. Nevertheless, involvement of public notary can also be expensive, it could prolong procedure, while control

[111] This procedure was introduced by the Law on Registration of commercial companies (Zakon o registraciji privrednih subjekata), *Official Gazette of the RS*, 55/2004, further amended (further referred to as Law on Registration 2004), not in force anymore and later substituted by the Law on Registration 2011, as cited before.

[112] Roth Günter, Kindler Peter, *The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe*, C.H.Beck – Hart – Nomos, München, 2013, p. 157 – 158.

[113] *Ibid*., p. 158 – 161.

[114] See: Cannu Paul Le, Dondero Bruno, *Droit des sociétés*, 3e édition, Montchrestien, Lextenso éditions, Paris, 2009, p. 238.

provided can be less certain.[115] Control performed by public notary usually also involves other criticism such as professional monopoly.[116]

Third possible mechanism of control, which particularly emphasize efficiency of procedure, is now adopted in Serbian law and is comparable to several other European systems (including, among others, also the law of Montenegro). It involves administrative control, usually of the person in charge of the registration. Although only formal and limited in scope, it is still very important for proper registration. It is usually very quick and does not involve high expenses. As a negative consequence of this efficient system, the control performed by administrative authority is usually focused on formal requirements only and it is understandable that control of the procedure is, therefore, limited. Negative effects of that can be seen through possibility that registration was performed, even though some of the requirements (including valid procedure and content of documents and acts necessary for registration) were not met. Also, other negative effects, in particular different cases of fraud and circumvention of law are possible. This can be potentially dangerous for the functioning of the market and whole system of registration and can have particularly negative effect on the principle of reliability of information by third parties. Unfortunately, these negative effects are not unknown in recent years.

B. Overview of the registration procedure in the Republic of Serbia

Registration procedure is regulated by the Law on Registration procedure into the Business Agency Registers. Business register is a central electronic database for all data and documents relevant for registration. It operates under the principles of publicity, accuracy, and protection of third parties.

[115] *Ibid.*
[116] *Ibid.*

Registration procedure is acted upon the administrative procedure rules. It can be initiated by the application for registration submitted by authorized person, or upon request of a competent authority. Applications for registration can be made in person, in paper or electronic form, or by mail.[117] New amendments in regard to registration of the incorporation of all commercial companies will make this procedure to be *in electronic form only*, and this provision will be applicable starting from May 2023.[118] All new data or documents necessary for registration, including changes to the data or documents already registered, must be applied for registration within fifteen days (or within other prescribed time limit).

Registration procedure is performed by the *registrar – a person who performs registration* whose position and authority are prescribed by the provisions on the Registration Agency. Registrar performs registration upon *registration application* under provision of certain conditions. First, there must be competence to act upon application, application must be submitted by a competent person(s), data or documents applied for registration must be within scope of registration, submitted in prescribed time limits (if any) and in accordance with special laws and competent authority decisions. Data or documents must not already be registered. The data from the application form must be in accordance with documents submitted and already registered in the case of publicly available data or documents. Finally, in the case of incorporation of a new company, a legal person or sole proprietor cannot be registered under the same name (or applied for registration). The name of the company must be in accordance with legal provisions applicable and all relevant fees must be paid.[119]

---

[117] Art. 9 Law on Registration.

[118] See: *Jevremović Petrović Tatjana*, „Elektronska registracija osnivanja privrednih društava u Republici Srbiji“, Pravo i privreda, 59(3), 2021, p. 305 – 325, p. 305ff.

[119] See Art. 14 Law on Registration.

The person performing the registration needs to *decide on the application* within a time limit of five working days, whereby this decision needs to be affirmative in the case where all conditions for application are met.[120] On deciding on the application, only formal requirements, and not the authenticity and credibility of data or documents enclosed with the application form are relevant for the positive registration decision. This is important feature of the registration procedure and is explicitly prescribed in the principle of formality.[121] Should the person who performs registration fail to decide on the application within five working days from the day of its submission, it shall be considered that the request in the application is granted.

The person performing the registration can make a negative decision by *rejection of the application* only when conditions for registration are not fulfilled. If there is negative decision and conditions can be additionally fulfilled, applicant can re-apply within thirty days, although only once, and keep the right of priority of the previously submitted application by payment of the half of the prescribed fee.[122]

On decisions made by the person who performs registration there is a *right of appeal* to the competent Minister through the Registration Agency within thirty days.[123] Registration Agency can reject the appeal on procedural grounds, accept appeal and make a positive decision on the application or forward appeal to the competent Minister. The Minister must decide within thirty days, and he can reject the appeal on procedural grounds or refuse the appeal on material grounds; accept the appeal and make affirmative decision or forward the appeal to a registrar to reconsider application. This

120 Art. 15 Law on Registration.
121 See in particular Art. 3 para. 3 Law on Registration.
122 See Art. 17 Law on Registration.
123 On the appeal procedure see Arts. 25 – 32 Law on Registration.

decision is final, and to object there is a possibility to bring a lawsuit in front of a competent court.[124]

The person performing the registration can act independently and delete documents and data already registered, but only in the case of a registration made contrary to registration conditions and within a short period of time of twelve months since the registration was performed. There is a possibility to ask for a court decision of the nullity of registration only in regard to registration of incorporation and on limited grounds, including short period of time: within thirty days of the knowledge of these conditions but no later than a year after the registration of incorporation took place.[125] Conditions for nullity of registration of incorporation include that registration application contained false data or registration was made upon false, illegal or untrue documents, as well as in other cases provided by law. We will discuss nullity of registration further in detail in section V.

Decisions on the registration are publicly disclosed. *Publication* of the affirmative decision is made together with data and documents whose registration is obligatory. Other information on the company, including financial information and documents are also disclosed, upon provisions on disclosure of financial information and documents; while other information for which disclosure is not obligatory can be disclosed upon request.[126]

The *effects of the registration* take place one day after disclosure and cannot have retroactive effect.[127] Third parties may rely on all registered data, documents, and particulars (*positive effect* of registration) and they cannot have bear

[124] Art. 32 Law on Registration.

[125] Art. 33 Law on Registration. See *Jevremović Petrović Tatjana*, "Nullity of companies' registration in Serbian law under the influence of European legal systems", Law and Transition: Collection of Papers (eds. Milisavljević Bojan, Jevremović Petrović Tatjana, Živković Miloš), University of Belgrade Faculty of Law, Belgrade, 2017, p. 215 – 229, p. 215ff.

[126] Arts. 22, 36a and 37 Law on Registration.

[127] Art. 22 Law on Registration.

negative effects because registered information was incorrect.[128] Nevertheless, third parties can prove that it was impossible to have the information within fifteen days after disclosure of registered information. The company may also prove that third parties had knowledge of the information and documents before they were registered.

III Registration of company's formation

In the Republic of Serbia formation of companies and registration procedure are regulated by the Law on Commercial Companies and the Law on Registration Procedure into the Business Registers Agency. Both of these Laws were simultaneously adopted and, as already mentioned, are recently amended, in order to provide complete system of company's formation. Existing system of company's formation can be described as modern, harmonized with EU law and very efficient.

All companies in the Republic of Serbia are formed simultaneously in a formal procedure which implies obligatory registration.[129] Companies are incorporated upon the articles of incorporation (or unilateral decision if there is only one founder) and statute (only for the joint-stock company). Articles of incorporation must be in written form, signed by all founders, and their signatures must be certified.[130] Articles of incorporation can be drafted as an electronic document, when company members can apply their qualified electronic signature, when there is no need of additional certification of

[128] For registration effects see also Art. 6 LCC 2011.

[129] On the general foundation formalities see Arts. 3 – 16 LCC, as well as Arts. 264 – 268 (for joint-stock company), Art. 141 (for limited liability company), Art. 94 (for partnership) and Art. 127 (for limited partnership).

[130] Serbian law prescribes certification of signatures by public notary, or solemnization in the case of transfer of immovable property. See: Art. 93 Law on Public Notaries (Zakon o javnom beležništvu), *Official Gazette of the RS*, 31/2011, 31/2011, 85/2012, 19/2013, 55/2014 – in other law, 93/2014 – in other law, 121/2014, 6/2015 and 106/2015.

the document by the public notary, except for the transfer of immovable property. If articles of incorporation are in electronic form or are digitalized by a person entitled to digitalize document with his qualified electronic signature, this document is registered in the Business Register in electronic form. All founders of the joint-stock company are also due to adopt and sign the statute of the company. Registration is obligatory for both documents.

Formation of a company is usually followed by several technical and administrative requirements. They include opening of bank accounts and performance of other administrative requirements. The procedure of registration of formation of a company performed by the Business Registers Agency is carried out through as *one-stop shop* procedure, and includes that company once registered simultaneously obtains company identification number, assigned by the Statistical Office of the Republic of Serbia; taxpayer identification number (*PIB – poreski identifikacioni broj*), which is assigned by the Tax Administration Office, VAT registration, as well as a certificate (*M-A form*) confirming submission of the application for the compulsory social security of the founder who is registered as the representative of the company.[131]

Pursuing certain activities requires applying with competent inspection agencies or other authorities (market, sanitary, labour, building inspection authorities, etc.) in order to obtain necessary certificates and approvals on meeting necessary requirements for performing registered business. These approvals and certificates are dependent on company's activities. Therefore, it is prescribed as a general provision in the Law on Commercial Companies that registration or pursuit of certain activity may be, under specific laws, conditioned upon approval, permission, or other authorization of the

[131] See official site of the Business Registers Agency, including information of the one-stop shop procedure. Available at: https://www.apr.gov.rs/registers/companies/instructions/formation.4339.html (24.3.2022).

competent authority.[132] Such is, for example, the case of formation of most important specialized commercial companies, such are banks, insurance companies, investment funds and other participants in the financial markets.

Serbian law provides for a very efficient system of registration. According to official data from the Registration Agency, the registration procedure for a company is usually performed within 24 hours (in 98.74% of cases), mostly during the same working day and is same for the "paper", as well as on-line registration.[133] Procedure of formation has low costs, including low minimum capital requirement (particularly for a limited liability company).[134]

IV New amendments to the Registration of company's information and data

By the end 2021 new amendments of the Law on Registration were adopted. New amendments were also made to the Law on Commercial Companies. Among other issues, amendments to the Law on Registration moved forward from the current position and presented new system of formation of companies, which will be exclusively performed on-line.

---

[132] See Art. 4 LCC 2011.

[133] See statistical data on the Business Registers Agency website. Available at: http://www.apr.gov.rs (10.4.2022).

[134] On the initial capital requirement for the LLC of 100 RSD see Art. 145 LCC. Other costs include 4900 RSD registration fee and 1000 RSD publication fee for each document (articles of incorporation and statute). In the case of on-line formation all costs (including registration and publication fee) are 4500 RSD. See: Decision on the Fees at the Business Registers Agency (Odluka o naknadama za poslove registracije i druge usluge koje pruža Agencija za privredne registre), *Official Gazette of the RS*, 119/2013, 138/2014, 45/2015, 106/2015, 32/2016, 60/2016, 75/2018, 73/2019, 15/2020, 91/2020 and 11/2021, Art. 2 para. 1 and 4, Art. 5. Fees must be paid for the certification of signatures by public notary, or solemnization in the case of transfer of immovable property (one page of certification of signature costs 300 RSD) and is paid only in the case of "paper" registration. Issuance and use of certified electronic signature is free of charge.

New amendments of the Law of registration provided registration for all commercial companies to remain as before: either in person – in paper or electronic form, or by post. Nevertheless, exceptionally to this general provision, *registration of incorporation of all commercial companies can be made only in electronic form*. This provision will be applicable starting from mid-May 2023.[135] The explanation of this change was "efficiency", as well as improvement of the position of the Republic of Serbia on the Doing Business list.[136] Namely, even though the Business Registers Agency claims to perform formation for 24 hours (including all requirements as well as the opening of the bank account), the World Bank Doing Business Report claims that this procedure is performed within two days. Therefore, it was considered that "the only way to provide that procedure is reduced to one day is introduction of (exclusive – authors note) electronic procedure".[137]

The Business Registers Agency recently announced to introduce on-line formation for all company types during 2022 – so far this was, and at this moment is still possible only for registration of entrepreneurs and limited liability companies (single member or with more than one member). Also, introduction of all other on-line registrations is also announced during 2022, including change or deletion of already registered

[135] Art. 4 Law on Amendments to the Law on Registration Procedure in the Business Registers Agency (Zakon o izmenama i dopunama Zakona o postupku registracije u Agenciji za privredne registre), *Official Gazette of the RS*, 105/2021. See also new Art. 9 Law on Registration.

[136] See Explanatory Memorandum to the Law on Amendments to the Law on Registration Procedure in the Business Registers Agency (Obrazloženje uz Predlog zakona o izmenama i dopunama Zakona o postupku registracije u Agenciji za privredne registre). Available at: https://otvoreniparlament.rs/uploads/akta/Predlog%20zakona%20o%20izmenama%20i%20dopunama%20Zakona%20o%20postupku%20registracije%20u%20Agenciji%20za%20privredne%20registre.pdf (12.4.2022), p. 4, p. 8 – 9.

[137] *Ibid*., p. 9.

data or documents.[138] Final goal of the Business Registers Agency is to introduce as soon as possible exclusive on-line formation of companies, giving credit to this procedure as "the most efficient and the most economic".

V Nullity of registration

The current system of nullity regarding registration was adopted following the traditional approach of incorporation and registration of legal persons in Serbian law. Still, change regarding nullity of registration is quite evident since 2011 after the adoption of the Law on Registration Procedure into the Business Agency Registers. The Law on Registration adopted a new mechanism in the case of breach of the mandatory registration requirements. It is divided into two set of provisions – one regarding registration of the incorporation, and the other group in relation to registration of all other information or documents.

Registration of the incorporation which did not meet all necessary conditions falls within the scope of provisions of the nullity of registration of incorporation.[139] On the other hand, non-compliance with all mandatory requirements for registration of all other information or documents can only lead to an *ex officio* administrative procedure to repeal the decision of registration, after which information or document has to be deleted from the Register.[140] Unlike nullity procedure, which

[138] See Infographic: Rise of the on-line formation of limited liability companies and entrepreneurs (Raste broj DOO i preduzetnika osnovanih putem servisa eRegistracija), 14.10.2021. Available at: https://www.apr.gov.rs/%D0%B8%D0%BD%D1%84%D0%BE%D0%B3%D1%80%D0%B0%D1%84%D0%B8%D0%BA%D0%B5.4318.html?infoId=96 (12.4.2022).

[139] See Art. 33 Law on Registration for nullity of the registration of incorporation of the company, as well as Art. 34 for the nullity of registration of sole proprietor.

[140] Art. 30 Law on Registration. Further consequence includes restitution to previously registered information or document.

was commonly used in connection to registration (and previous inscription to the Court Register) generally, the administrative procedure to repeal the decision of registration and delete a document or information from the Register is a completely new concept relating to registration and was introduced for the first time in the Law on Registration.[141]

Therefore, nullity is available only for the registration of incorporation, while all other cases fall within the scope of the administrative procedure to repeal the decision of registration with the effect to delete information or document and to reinstate the previous registered status as if registration never occurred. Administrative procedure is performed *ex officio*, but nothing prevents interested parties from informing the Register of the existence of irregularities regarding a registration. Even then, this mechanism is very time limited, due to the fact that it can be initiated no later than twelve months from the registration of the information or document. Finally, in certain situations, it can be difficult or even

[141] Compare with procedure in German law to delete unlawful inscription in Art. 395 of the German Law on non-contentious procedure in family or other matters (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit). Available at: https://dejure.org/gesetze/FamFG/397.html (18.5.2022). This provision is dealing with explicit cases of material reasons for nullity wherefore general provision to give right to court to delete company (and different registered data) can also encompass formal requirements. Still, this system is not undisputed even in German theory. On different substantive (but also important) formal conditions which can initiate the procedure see in detail: Baumbach Adolf, Hueck Alfred, *GmbHG*, 20. Auflage, Verlag C.H.Beck, München, 2013, p. 2104; Müller Welf, Winkeljohann Norbert (Hrsg.) *Beck'sches Handbuch der GmbH: Gesellschaftsrecht, Steuerrecht*, 4. vollständig überarbeitete und erweiterte Auflage, Verlag C.H.Beck, München, 2009, p. 114. Other formal requirements are convalidated once a company is registered. See: Fleischer Holger, Goette Wulf (Hrsg.), *Münchener Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG), Band 3: §§53–85*, 2. Auflage, Verlag C.H.Beck, München, 2016, p. 885. The major difference is in the competence of the Register Court in German law, which is substituted by the Registration Agency in Serbian law, acting upon administrative procedure.

impossible to apply, such as in the case of (nullity of) a merger.[142]

The adopted mechanism of the administrative procedure replaced the previous system of nullity of registration of any information or document (including incorporation, but also general meeting decisions, changes regarding parts or shares, capital, members or directors, statutory change, etc.) which relied on the traditional system of inscription into the Court Register. It was introduced in order to modernize and make even more efficient the current system of registration, abandoning, therefore, the concept of nullity with regard to registration issues. Nevertheless, some issues could not be dealt through the mechanism of the administrative procedure to repeal the decision of registration and delete information – and the obvious example was the incorporation of a company itself. That is the reason why nullity of registration is still present in Serbian law, although only for irregular incorporation of commercial companies (or sole proprietors). The current regime of nullity of incorporation relies very much on previous laws as well as comparative laws, and therefore, can explain its content and prescribed conditions. Also, it can explain reasons for the inconsistency within the current system of nullity of the articles of incorporation.[143]

Registration of incorporation of a company can be declared null and void upon request of an interested party in front of the court.[144] It is possible under certain "traditional" conditions.

---

[142] See in detail on this issue: *Jevremović Petrović Tatjana*, „Ništavost statusne promene nakon registracije", Anali Pravnog fakulteta u Beogradu, 64(2), 2016, p. 79– 104, p. 97ff.

[143] See further on the issue of nullity of the registration: Jevremović Petrović Tatjana, "Nullity of companies' registration in Serbian law under the influence of European legal systems", op. cit., p. 215ff.

[144] Although not explicitly mentioned, it must be under the jurisdiction of the Commercial Court, and not the Administrative Court. Same: *Stanić Branko*, „Ništavost osnivačkog akta i ništavost registracije osnivanja privrednog društva", Vrhovni kasacioni sud, Bilten, (3), 2015, p. 323 – 331, p. 326.

First, nullity of registration of incorporation is possible if the registration application contains untrue information, or registration was performed based on a document which is false, issued in illegal procedure or containing untrue information. Also, nullity is possible in other cases provided by law.[145] Unlike previous legislation when "other cases" were explicitly provided, such was the provision of the Art 11 of the previous Law on Commercial Companies (2004), the current regime does not stipulate those "other cases". It can, therefore, be observed that conditions for the nullity were copied from the previous Law on Registration, without bringing the conditions contained in the Law on Commercial Companies in connection with them. Obviously, that failed to be noticed during the legislative process.

Because of this oversight, the system of nullity opened possibility for nullity which is not in line with the requirements of the EU Directive 2009/101/EC. They are not limited to the most important breach of a registration procedure, so it is not clear what breach could be covered by this "other case".

For example, would it be possible to say that if all conditions for registration were not met there is a reason to claim nullity of registration, because registration was not made lawfully. In that case, would *any* breach of the mandatory registration requirement lead to a declaration of nullity, including (non-) payment of the registration fee? Obviously, that is not a proper interpretation of the Law. Other cases must be explicitly mentioned, which is currently not the case and therefore this condition should not be applied.

Also, should *any* inconsistency within the registration application lead to a possibility to declare registration null and void? For example, if the registration application contains information on the seat of the company, which is not in line with the real (and statutory) seat of the company, as required by the Law on Commercial Companies?[146] Should this

[145] Art. 33 para. 1 Law on Registration.
[146] See Art. 19 LCC 2011.

inconsistency or any other, which can be (easily) amended, lead to nullity? Obviously, the answer is again negative. Unfortunately, there are no provisions to underline that nullity of the registration of incorporation must be the ultimate mechanism, and it is not to be applied if there is another possibility to rectify the irregularities during registration.

The current system allows an interested party to bring a suit in front of the court in order for the registration to be *declared* null and void.[147] The suit can be brought within 30 days from the knowledge of the condition for nullity, but no longer than *one year* from the registration.[148] Again, unlike the previous system of nullity of registration which provided for the nullity during three years from registration, the time period was significantly reduced to a very (and possibly too) short a period of time. The suit can be brought only by a person with a justified interest in order for nullity to be declared. Therefore, his rights or interests regarding registration (or nullity thereof) must be involved.[149]

Upon claimant's request the Registrar must register a note stating that court proceedings were brought in regard to declaration of nullity of a registration of incorporation. Once registration of incorporation is declared null and void the court must inform the Register within 15 days in order to register a note stating that registration of incorporation was declared null and void.

[147] It is explicitly provided that the nullity is to be declared by the court. On the issue of declaration or constitutive effect of nullity of company in German law see in detail: *Schmidt Karsten*, "Fehlerhafte Gesellschaft und allgemeines Verbandsrecht: Grundlagen und Grenzen eines verbandsrechtlichen Instituts", Archiv für die civilistische Praxis, 186(5), 1986, p. 421 – 452, p. 428; Hüffer Uwe, *Aktiengesetz*, 8. Auflage, Verlag C.H.Beck, München, 2008, p. 1383; Baumbach Adolf, Hueck Alfred, *GmbHG*, op. cit., p. 2078.

[148] Art. 33 para. 2 Law on Registration.

[149] See case law on that matter in: Rešenje Vrhovnog kasacionog suda, Prev. 183/2014 (16 July 2015).

Finally, and most importantly, once registration of incorporation is declared null and void by the court, the Business Agency Register *must initiate compulsory liquidation proceedings*.[150] It is, therefore, not possible for a nullity to come into effect automatically, in order to protect interested parties. Nevertheless, unlike the explicit provision that nullity of the articles of incorporation does not have retroactive effects, there are no specific provisions regarding effects in regard to nullity of registration of incorporation. Still, third parties, especially creditors should be protected by provisions of compulsory liquidation. Other effects, including validity of obligations and rights in regard to a company whose registration of incorporation was declared null and void are not automatically affected, but need to be dealt with in separate proceedings.[151] Serbian law improved existing regime of nullity by introducing additional provision which gives possibility to delete registration of incorporation or change of other registered information if based on appeal decision of competent authority pronouncing nullity or repeal of final decision of the registrar.[152] Nevertheless, it failed to answer many uncertainties in the existing regime of nullity of registration.

VI Conclusion

Serbian law has specific provisions on company's registration procedure, now in force from 2011. These provisions are contained in the Law on Registration procedure into the Business Agency Registers. They were made under the strong influence of different national European legal systems. Of particular significance is the law of the European union, which served as a basis for harmonization, but also modernization of Serbian law.

---

[150] Art. 33 para. 3 – 4 Law on Registration.

[151] Compare with: *Stanić Branko*, „Ništavost osnivačkog akta i ništavost registracije osnivanja privrednog društva", op. cit., p. 330 – 331.

[152] Art. 34a Law on Registration.

Registration procedure in the Republic of Serbia is acted upon the administrative procedure rules. Applications for registration can be made in person, in paper or electronic form, or by mail. New amendments in regard to registration of the incorporation of all commercial companies will made this procedure to be in electronic form only, and this provision will be applicable starting from May 2023. The person performing the registration needs to decide on the application within a time limit of five working days, whereby this decision needs to be affirmative in the case where all conditions for application are met. On deciding on the application, only formal requirements, and not the authenticity and credibility of data or documents enclosed with the application form are relevant for the positive registration decision.

In the Republic of Serbia formation of companies is also regulated by the Law on Commercial Companies. Its adoption was parallel to the adoption of the Law on Registration Procedure into the Business Registers Agency. It is the same with the amendments of both laws, recently parallelly adopted in order to make existing system of registration more efficient and more economic.

Nevertheless, even though existing system of company's registration can be described as modern, harmonized with EU Law and very efficient, it is still necessary to be improved. It is very much so regarding nullity of registration (of formation) of companies, where still many open issues remain.

Bibliography

- Baumbach Adolf, Hueck Alfred, *GmbHG*, 20. Auflage, Verlag C.H.Beck, München, 2013.
- Cannu Paul Le, Dondero Bruno, *Droit des sociétés*, 3e édition, Montchrestien, Lextenso éditions, Paris, 2009.
- Fleischer Holger, Goette Wulf (Hrsg.), *Münchener Kommentar zum Gesetz betreffend die Gesellschaften mit*

beschränkter Haftung (GmbHG), Band 3: §§53–85, 2. Auflage, Verlag C.H.Beck, München, 2016.
- Hüffer Uwe, *Aktiengesetz*, 8. Auflage, Verlag C.H.Beck, München, 2008.
- Jevremović Petrović Tatjana, "Nullity of companies' registration in Serbian law under the influence of European legal systems", Law and Transition: Collection of Papers (eds. Milisavljević Bojan, Jevremović Petrović Tatjana, Živković Miloš), University of Belgrade Faculty of Law, Belgrade, 2017, p. 215 – 229.
- *Jevremović Petrović Tatjana*, „Elektronska registracija osnivanja privrednih društava u Republici Srbiji", Pravo i privreda, 59(3), 2021, p. 305 – 325.
- *Jevremović Petrović Tatjana*, „Ništavost statusne promene nakon registracije", Anali Pravnog fakulteta u Beogradu, 64(2), 2016, p. 79 – 104.
- Müller Welf, Winkeljohann Norbert (Hrsg.) *Beck'sches Handbuch der GmbH: Gesellschaftsrecht, Steuerrecht*, 4. vollständig überarbeitete und erweiterte Auflage, Verlag C.H.Beck, München, 2009.
- Roth Günter, Kindler Peter, *The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe*, C.H.Beck – Hart – Nomos, München, 2013.
- *Schmidt Karsten*, "Fehlerhafte Gesellschaft und allgemeines Verbandsrecht: Grundlagen und Grenzen eines verbandsrechtlichen Instituts", Archiv für die civilistische Praxis, 186(5), 1986, p. 421 – 452.
- *Stanić Branko*, „Ništavost osnivačkog akta i ništavost registracije osnivanja privrednog društva", Vrhovni kasacioni sud, Bilten, (3), 2015, p. 323 – 331.
- Legal Sources
- Decision on the Fees at the Business Registers Agency (Odluka o naknadama za poslove registracije i druge usluge koje pruža Agencija za privredne registre), *Official Gazette of the RS*, 119/2013, 138/2014, 45/2015, 106/2015, 32/2016, 60/2016, 75/2018, 73/2019, 15/2020, 91/2020 and 11/2021.

- Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ* L 169, 30.6.2017.
- Explanatory Memorandum to the Law on Amendments to the Law on Registration Procedure in the Business Registers Agency (Obrazloženje uz Predlog zakona o izmenama i dopunama Zakona o postupku registracije u Agenciji za privredne registre). Available at: https://otvoreniparlament.rs/uploads/akta/Predlog%20zakona%20o%20izmenama%20i%20dopunama%20Zakona%20o%20postupku%20registracije%20u%20Agenciji%20za%20privredne%20registre.pdf (12.4.2022).
- German Law on non-contentious procedure in family or other matters (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit). Available at: https://dejure.org/gesetze/FamFG/397.html (18.5.2022).
- Law on Amendments to the Law on Registration Procedure in the Business Registers Agency (Zakon o izmenama i dopunama Zakona o postupku registracije u Agenciji za privredne registre), *Official Gazette of the RS*, 105/2021.
- Law on Commercial Companies (Zakon o privrednim društvima), *Official Gazette of the RS*, 36/2011, 99/2011, 83/2014 – in other law, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021.
- Law on inscription into the Court Register (Zakon o postupku za upis u sudski registar), *Official Gazette of the SRY*, 80/94.
- Law on Public Notaries (Zakon o javnom beležništvu), *Official Gazette of the RS*, 31/2011, 31/2011, 85/2012, 19/2013, 55/2014 – in other law, 93/2014 – in other law, 121/2014, 6/2015 and 106/2015.
- Law on Registration of commercial companies (Zakon o registraciji privrednih subjekata), *Official Gazette of the RS*, 55/2004.

- Law on Registration procedure into the Business Agency Registers (Zakon o postupku registracije u Agenciji za privredne registre), *Official Gazette of the RS*, 99/2011, 83/2014, 31/2019 and 105/2021.
- Resolution on the accession to the EU, adopted by the National Assembly on October 13th, 2004. Available at: https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/rezolucija_narodne_skupstine_o_pridruzivanju_eu.pdf (18.5.2022).
- Stabilisation and Association Agreement between the European Communities and the Republic of Serbia. Available at: https://www.mei.gov.rs/upload/documents/sporazumi_sa_eu/saa_textual_part_en.pdf (18.5.2022).

Prof. Mirjana Radović, PhD
Associate Professor at the University of Belgrade – Faculty of Law

SHAREHOLDER IDENTIFICATION UNDER THE REVISED SHAREHOLDER RIGHTS DIRECTIVE

Summary

In 2017 the European Union adopted Directive (EU) 2017/828 amending the Shareholder Rights Directive 2007/36/EC and thereby introduced rules on identification of shareholders of listed companies. The new Article 3a now gives listed companies the right to identify their shareholders, while at the same time, obligates intermediaries who hold shares on behalf of their clients to reveal identity of those clients to the issuer (i.e. the company). The analysis of EU law regarding shareholder identification is divided into four main parts. In the first part, the reasons and aims behind regulating these issues at the EU level are discussed. The second part deals with the right of companies to know the personal data of their shareholders. In the third part, an obligation of intermediaries (including central securities depositories) to provide the company with the requested information concerning their clients is examined. Finally, the fourth part concerns the rights and obligations of shareholders with regard to requested identification. The aim of the preceding analysis is to establish whether existing EU rules regarding shareholder identification serve their purpose and to determine how they could be improved in the future.

Key words: *shareholder identification, Shareholder Rights Directive, indirect holding systems, EU company law.*

I Introduction

The possibility to determine identity of shareholders of a particular company represents an important issue, which has been recognized by the EU legislator and regulated for different purposes within the Transparency Directive 2004/109/EC,[153] the Anti-Money Laundering Directive (EU) 2015/849[154] and the revised Shareholder Rights Directive.[155] On the one hand, identifying significant shareholdings enables listed companies and their other shareholders to note relevant changes in the shareholder structure, which further helps them to detect possible creeping takeovers.[156] Hence, in accordance with the Transparency Directive any shareholder who acquires at least 5% of voting rights in a listed company has to promptly notify the issuer (i.e. the company) thereof.[157] On the other hand, determining the identity of so-called 'beneficial shareholders' (i.e. beneficial owners) who exercise

[153] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended in 2008, 2010, 2013 and 2021, *Official Journal of the European Union* L 390, 31.12.2004, p. 38–57 – Transparency Directive 2004/109/EC, Article 9 *et seq*.

[154] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as amended in 2018 and 2019, *Official Journal of the European Union* L 141, 5.6.2015, p. 73–117 – Anti-Money Laundering Directive (EU) 2015/849, Article 30 *et seq*.

[155] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *Official Journal of the European Union* L 184, 14.7.2007, p. 17–24, as amended in 2017 (by Directive (EU) 2017/828) – SRD II, Article 3a.

[156] See Luca Enriques, Matteo Gatti, "Creeping Acquisitions in Europe: Enabling Companies to be Better Safe than Sorry", European Corporate Governance Institute (ECGI), Law Working Paper No 264/2014, p. 24 and 25, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492158#.

[157] Transparency Directive 2004/109/EC, Article 9 and Recital (18); L. Enriques, M. Gatti, p. 25.

ownership or control over a company is considered "a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure".[158] To this end, the Anti-Money Laundering Directive requires Member States to ensure that companies incorporated in their territory obtain and hold accurate and current information about their beneficial owners.[159] Finally, shareholder identification can serve as a tool to enhance shareholder engagement in a company and, consequently, improve corporate governance. The said company law approach was the one taken by the Shareholder Rights Directive, as amended in 2017 (hereinafter, SRD II), which introduced a new Article 3a dealing with identification of shareholders. Article 3a regulates the right of listed companies to know the identity of their shareholders, as well as obligations of intermediaries in case of indirect holding systems to cooperate with the issuer but also between themselves in the identification process.[160] In 2018 rules on shareholder identification in the SRD II have been further elabourated by the Commission Implementing Regulation (EU) 2018/1212 with the aim to prevent diverging implementation of the directive.[161] They have been implemented in all Member States by 2020.[162] The focus of the present paper is on shareholder identification from a company law perspective, as regulated under the SRD II and its implementing regulation.

---

[158] Anti-Money Laundering Directive (EU) 2015/849, Recital (14).
[159] Anti-Money Laundering Directive (EU) 2015/849, Article 30(1).
[160] Commission Implementing Regulation (EU) 2018/1212, Recital (1).
[161] Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights, *Official Journal of the European Union* L 223, 4.9.2018, p. 1-10 – Commission Implementing Regulation (EU) 2018/1212, Recital (2).
[162] See EUR-Lex, National transposition measures communicated by the Member States concerning: Directive (EU) 2017/828, *https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L0828*

Part II outlines the reasons for regulating these issues at the EU level, as well as aims the adopted rules are hoped to achieve. Understanding the ratio behind EU provisions on shareholder identification is then used throughout the paper for determining the justification and appropriateness of particular solutions. In Part III the right of a company to identify its shareholders is examined in more detail regarding not only the scope of such right, but also its actual value for the company. Part IV examines an obligation of each intermediary in the holding chain to disclose information about its client's identity to the company, as well as to forward the company's request to the next intermediary down the chain. The position of intermediaries in the identification process is analyzed having in mind their conflicting obligations under, for example, rules on bank secrecy. In Part V the rights and obligations of shareholders concerning their identification are being discussed. Specifically, the issues which are not explicitly regulated at the EU level, such as the right of a shareholder to opt-out of identification, the right of other shareholders to access information regarding identity of their fellow shareholders, an obligation of a shareholder to reveal its identity to the company, have been discussed. In the end, Part VI contains concluding remarks on the achieved level of harmonization in this field and its usefulness in the current, but also prospective shareholding structures in the EU.

II Reasons and aims of harmonization at the EU level

The original version of the Shareholder Rights Directive from 2007 did not include rules on shareholder identification. However, its objective "to allow shareholders to effectively make use of their rights throughout the Community"[163] could not be fully achieved given the existing capital market infrastructure and the resulting complex securities holding

[163] Shareholder Rights Directive 2007/36/EC, Recital (14).

systems.[164] Especially in cross-border situations where the company (i.e. the issuer) and a particular shareholder are located in different countries, shares are usually held through one or more intermediaries forming a metaphorical 'chain of intermediaries' which at the same time connects but also separates the shareholder from the company.[165]

When shares are immobilized and/or dematerialized, they are being kept in book-entry form, so that ownership over such shares is entered into securities accounts maintained by at least the central securities depository.[166] In case the central securities depository is holding shares directly on behalf of the shareholder, it is the only intermediary interposed between that shareholder and the company. Still, more often than not, the central securities depository maintains securities accounts not for shareholders, but for other intermediaries, who themselves also maintain securities accounts for their clients where the same securities are credited.[167] Since clients of intermediaries can be shareholders of the company, but also (lower-tier) intermediaries holding shares for their clients, the holding chain and the number of securities accounts maintained for safeguarding the same shares may become even longer and more complex. In this situation, the problem regarding identification of shareholders is amplified by the fact that intermediaries often hold shares for a number of clients in

[164] *Cf. Ulrich Noack*, "Identifikation der Aktionäre, neue Rolle der Intermediäre – zur Umsetzung der Aktionärsrechte-Richtlinie II", Neue Zeitschrift für Gesellschaftsrecht 2017, pp. 561 and 562.

[165] See *Mirjana Radović*, "Supranational Regulation of Exercising Shareholders' Rights in Indirect Holding Systems", Annals of the Faculty of Law in Belgrade (Belgrade Law Review), 2012, No. 3, p. 171 *et seq*.

[166] Matteo Gargantini, "Article 3A: Identification of Shareholders", *The Shareholder Rights Directive II: A Commentary* (eds. Hanne S. Birkmose, Konstantinos Sergakis), Edward Elgar Publishing, Northampton 2021, para. 3.34. In countries such as Germany, shares are often issued as one global certificate held by the central securities depository. See U. Noack, p. 563.

[167] See also M. Gargantini, para. 3.36.

one omnibus securities account maintained by the upper-tier intermediary.[168] Moreover, if a cross-border character of a particular shareholding is entered into the equation, this creates additional conflict-of-laws issues due to diverging national rules regarding rights and obligations of shareholders and intermediaries and makes identification of shareholders even more difficult.[169]

Under the former national laws of the Member States it was often complicated or even impossible for a company to know the identity of those shareholders who held their shares indirectly through intermediaries.[170] Therefore, the European Commission decided to increase the level of investor transparency in this field by giving companies the means to identify their shareholders in order to facilitate a dialogue between them in matters of corporate governance and the exercise of shareholder rights.[171] In this respect, shareholder identification was regarded as a precondition for direct communication between the company and shareholders which

[168] M. Gargantini, paras. 3.36 and 3.37.

[169] See Jessica Schmidt, "Die Umsetzung der Aktionärsrechte-Richtlinie 2017: der Referentenentwurf für das ARUG II", *Neue Zeitschrift für Gesellschaftsrecht* 2018, p. 1214; M. Gargantini, para. 3.38.

[170] Cf. J. Schmidt, p. 1214. This especially holds true for bearer shares. See Susanne Kalss, "§ 67a", *Münchener Kommentar zum Aktiengesetz: Nachtrag §§67, 67a-67f, 87, 87a, 107, 111a-111c, 113, 162 infolge des ARUG II Band 1a/2a* (eds. Wulf Goette, Mathias Habersack, Susanne Kalss), 5. Auflage, C.H. Beck, München 2021, Rn. 92.

[171] European Commission, Green Paper – The EU corporate governance framework, Brussels, 5.4.2011, COM(2011) 164 final, available at: *https://op.europa.eu/en/publication-detail/-/publication/3eed7997-d40b-4984-8080-31d7c4e91fb2/language-en*; European Commission, Action Plan: European Company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, Strasbourg, 12.12.2012, COM(2012) 740 final, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0740&from=EN*; Directive (EU) 2017/828, Recital (4).

might result in more loyal shareholders.[172] Introduction of such new rules was hoped to increase the involvement of shareholders in the company,[173] thereby leading to their long-term engagement.[174] In that way, the newly introduced rules served to improve corporate governance in listed companies throughout the EU.[175] An EU regulatory intervention was deemed necessary due to the fact that national laws of the Member States provided different levels of transparency in this field, while existing provisions on shareholder identification were confined to the territory of the respective Member State.[176] For this reason, one of the aims of the SRD II was to bring about harmonization of national laws of the Member States so as to make identification mechanisms more effective in cross-border situations.[177] As a consequence, the resulting harmonization could reduce transaction costs as well as information costs for investors (i.e. shareholders).[178]

[172] Directive (EU) 2017/828, Recital (4). "Loyal investors are less inclined to accept hostile bids, more likely to participate in GMs, more willing to subscribe to shares on the primary market." M. Gargantini, para. 3.10.
[173] European Commission, Green Paper – The EU corporate governance framework, Brussels, 5.4.2011, COM(2011) 164 final.
[174] "Shareholder engagement is a generic term used to describe the ongoing relationship between shareholders and company boards." Roger Barker, "Ownership Structure and Shareholder Engagement: Reflections on the Role of Institutional Shareholders in the Financial Crisis", Corporate Governance and the Global Financial Crisis – International Perspectives (eds. William Sun, Jim Stewart, David Pollard), Cambridge 2011, p. 146.
[175] Corrado Malberti, "Chapter 3. The proposed Directive on the encouragement of long-term shareholder engagement in European listed companies: a critical appraisal", Global Capital Market – A Survey of Legal and Regulatory Trends (eds. P. M. Vasudev, Susan Watson), 2017, p. 77; Cf. S. Kalss, Rn. 92.
[176] M. Gargantini, para. 3.01.
[177] Before SRD II shareholder identification mechanisms existed in about half of the Member States. See M. Gargantini, para. 3.01.
[178] M. Gargantini, para. 3.03.

III The right of a company to identify its shareholders

The idea behind the SRD II is that companies should in principle be able to know the identity of their shareholders – also sometimes referred to as the 'know-your-shareholder' principle.[179] Under the SRD II the right to identify shareholders should as a minimum be granted to listed companies[180] which have their registered seat in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.[181] This includes cooperative societies and investment funds, both UCITS and AIFs, provided that they are treated as companies under national laws of their home Member States.[182] However, the SRD II allows Member States to exclude cooperatives and/or investment funds from the personal scope of application of the relevant national provisions on shareholder identification, due to their specific nature from the perspective of corporate governance issues. On the other hand, having in mind that the SRD II was enacted with the aim to achieve minimum harmonization, Member States are allowed to implement its rules so that they apply to a wider scope of companies – such as non-listed companies – in order to help and improve direct communication of such companies with their shareholders.[183]

The above-mentioned companies have the right to know the identity of their shareholders, irrespective thereof where those shareholders or intermediaries through which shares are

[179] J. Schmidt, p. 1201; S. Kalss, Rn. 90; Lutz Pospiech, Tobias *Reichenberger*, "Aktionärsidentifikation und Interaktion", Neue Juristische Wochenschrift – Spezial 2020, p. 655.
[180] Cf. S. Kalss, Rn. 91.
[181] SRD II, Article 1(1); see also Commission Implementing Regulation (EU) 2018/1212, Article 1(1).
[182] See SRD II, Article 1(3).
[183] U. Noack, p. 562.

being held are located.[184] The SRD II grants companies the right, but not an obligation to identify their shareholders,[185] which is why they are free to decide whether to initiate an identification process. The said decision is within the competence of the board of directors. Moreover, companies are not required to keep an up-to-date record of the shareholders' identities, so that their inquiry can be restricted to a particular relevant time or date (e.g. the record date).[186] The Commission Implementing Regulation (EU) 2018/1212 clarifies that companies are allowed to restrict shareholder identification only to those shareholders who hold a certain number of shares, so as to avoid collecting unnecessary information about too small shareholdings.[187] In addition to that, the SRD II allows Member States to prescribe a threshold not higher than 0.5% of shares or voting rights which would limit the right of companies to know their shareholders.[188] By December 2021 only six Member States have introduced such thresholds, including Austria, Cyprus, Italy, the Netherlands, Slovakia, and partially also Estonia.[189] Member States that use this

[184] Still, the enforceability of such right may be limited if a particular intermediary falls under a different legal system outside the EU. See S. Kalss, Rn. 95 and 96.

[185] S. Kalss, Rn. 109.

[186] *Ibid.*, Rn. 118.

[187] Commission Implementing Regulation (EU) 2018/1212, Annex, Table 1.A.7; cf. S. Kalss, Rn. 117.

[188] If the threshold depends on the percentage of voting rights, it is more difficult to enforce in practice, since the total amount of voting rights is not always easy to determine. See U. Noack, p. 563.

[189] European Securities and Markets Authority (ESMA), National thresholds for shareholder identification under the Revised Shareholder Rights Directive, 14 December 2021, available at: *https://www.esma.europa.eu/sites/default/files/library/esma32-380-143_national_thresholds_for_shareholder_identification_under_the_revised_srd.pdf*. Unfortunately, introducing different thresholds by different countries may impede the functioning of the identification process in the EU. See European Securities and Markets Authority (ESMA), Report on shareholder identification and communication systems, 5 April 2017, available at: *https://www.esma.europa.eu/sites/default/files/library/*

option exclude the right of companies to identify shareholders who hold shares below the prescribed threshold.[190] Introducing such limitation to shareholder identification is considered justified because shareholdings or voting rights of 0.5% or less have a relatively small impact on corporate governance while at the same time they do not stand in correlation with the costs of an identification process (i.e. the costs are fixed).[191] However, applying the threshold faces many difficulties in practice, due to the fact that the same person can hold shares in one company through different intermediaries, whereas neither one of those intermediaries can know for certain the total amount of shares held by its client.[192] Thanks to that, a shareholder can avoid being identified by the company if he splits his shareholdings into smaller numbers of shares or voting rights (i.e. below the threshold) in securities accounts kept by different intermediaries.[193]

The SRD II also regulates the legitimate purpose of shareholder identification by the company. According to the relevant provision, a company may collect personal data of shareholders only for communication purposes, i.e. "in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company".[194] This raises the question whether an identification process can be initiated by the company for any other purpose, except the one explicitly mentioned in the Directive. In practice, a company may want or need to know

esma31-54-435_report_on_shareholder_identification_and_communication.pdf.

[190] Austria is one of the Member States where this exception to the 'know your shareholder' principle applies. See S. Kalss, Rn. 110 and 111.

[191] J. Schmidt, p. 1215; M. Gargantini, para. 3.49.

[192] M. Gargantini, para. 3.51.

[193] U. Noack, p. 563; J. Schmidt, p. 1215. In Austria, this problem is being tackled by prescribing an obligation of shareholders to inform their intermediary of the total (per capita) amount of shares held in one company. See S. Kalss, Rn. 110 and 111.

[194] SRD II, Article 3a(4). See also: S. Kalss, Rn. 152; J. Schmidt, p. 1215.

the identity of its shareholders for various reasons, such as to better understand their interests or how they are judging the prospects of the company, to fend off hostile acquisitions through early adoption of defensive measures, as well as to anticipate how votes are likely to be cast at the general meeting or to forecast the outcome of different corporate actions.[195] Although none of these reasons were included as legitimate purposes of shareholder identification in the SRD II, it is worth noting that the Directive does not require companies to provide evidence on initiating an identification process for specific purposes, nor does it set any time limit for a company to start a direct communication with the shareholders after collecting their personal data.[196]

IV An obligation of intermediaries to reveal identity of their clients

The right of the company to know personal data of its shareholders can be exercised against intermediaries who participate in the holding chain by keeping shares directly or indirectly on behalf of those shareholders. Hence, the SRD II prescribes an obligation of intermediaries to transmit between themselves the request of the company as well as to communicate to the company the requested information regarding shareholder identity.[197] Under the SRD II, an intermediary is defined as a person, such as an investment firm, a credit institution and a central securities depository, which provides services of safekeeping and administration of shares or maintaining securities accounts on behalf of other persons. It follows that an intermediary is a professional market participant whose regular occupation or business is the

[195] European Securities and Markets Authority (ESMA), Report on shareholder identification and communication systems, 5 April 2017; M. Gargantini, paras. 3.21 and 3.23.
[196] M. Gargantini, paras. 3.07 and 3.32.
[197] SRD II, Article 3a(2, 3).

provision of such services to third parties.[198] The general intention of the European legislator was that Article 3a of the SRD II should cover not only intermediaries seated in the EU, but also intermediaries from other (i.e. third) countries.[199] However, imposing obligations on those intermediaries to reveal identity of their clients is complicated, to say the least, especially if the law of the third, non-EU country is applicable to their relationship with the respective clients and does not have comparable rules supporting shareholder identification.[200]

On the other hand, even within the EU an obligation of intermediaries to communicate to the company information about their clients may stand in conflict with their duty under the applicable national law of the Member State to keep the identity of clients secret (e.g. under the bank secrecy provisions) – the breach of which exposes them to a risk of becoming liable for damages or even losing clients. Since the SRD II is not directly applicable to intermediaries in the EU,[201] its rules cannot resolve this conflict between shareholder identification requirements and the applicable national law of the Member State. For this reason, it is up to the Member States to ensure that performance of an obligation to disclose information about intermediary's clients at the request of the company for purposes of shareholder identification represents a justified exception to the duty to keep this information secret.[202] Consequently, an explicit provision in national law is

[198] Hence, the obligation to reveal identity of clients does not cover trustees who are not intermediaries, but nevertheless hold shares on behalf of others (i.e. beneficiaries). See J. Schmidt, p. 1216.
[199] U. Noack, p. 563; J. Schmidt, p. 1214; S. Kalss, Rn. 132.
[200] Clearly, the scope of national legal provisions of the EU Member States cannot encompass foreign or third country intermediaries. European Securities and Markets Authority (ESMA), Report on shareholder identification and communication systems, 5 April 2017.
[201] Cf. S. Kalss, Rn. 138.
[202] SRD II, Article 3a(6); cf. U. Noack, p. 562.

necessary for intermediaries to be freed from liability for revealing their clients' identity.[203]

Having in mind the fact that shares – especially in cross-border situations – are often kept indirectly, through multiple layers of intermediaries, the Commission Regulation (EU) 2018/1212 differentiates between the first intermediary, intermediaries in the chain and the last intermediary.[204] The first intermediary is the one closest to the issuer of shares (e.g. the central securities depository), while the last intermediary holds shares in custody for the shareholder as its client.[205] All other intermediaries connecting the first and the last intermediary are termed 'intermediaries in the chain'. It is important to note that under the SRD II each intermediary has a direct obligation towards the company, irrespective of its position in the holding chain. Hence, the company has the right to request information about shareholder identity from the first, the last intermediary and every intermediary in the chain.[206] In case the company does not know which intermediaries are involved in keeping shares on behalf of shareholders, it will of course contact the first intermediary (e.g. the central securities depository) and initiate the identification process.

After an intermediary receives the request of the company, it has two possible obligations depending on whether it holds the requested information regarding shareholder identity. On the one hand, if the intermediary does not know the identity of the shareholder, it has an obligation to transmit (i.e. forward) the request of the company to the next intermediary down the chain without delay, which as a rule means not later than by the close of the same business day – provided that the request

[203] Cf. S. Kalss, Rn. 139.
[204] Commission Implementing Regulation (EU) 2018/1212, Article 1(6, 9).
[205] J. Schmidt, p. 1214.
[206] *Ibid.*, p. 1215.

is received until 4 o'clock p.m.[207] On the other hand, if the intermediary knows the identity of the shareholder, it has an obligation to communicate the information regarding shareholder identity directly to the company without delay, which in principle means not later than during the business day immediately following the record date or the date of receipt of the request, whichever occurs later.[208] In addition to that, under the national law of the Member State an intermediary can have an obligation to transmit the information regarding shareholder identity to the next intermediary up the holding chain until it reaches the central securities depository which collects and forwards this information directly to the company.[209] Finally, Member States may prescribe that acting upon request of the company the intermediary should reveal the identity of the next intermediary in the holding chain.[210] Information regarding shareholder identity comprises personal data of the shareholder such as his name, contact details, the registration number or the unique identifier for legal persons (e.g. the Legal Entity Identifier) and the number of shares held by the shareholder.[211] At the request of the company, this information should also include the categories or classes of shares held and the date of their acquisition.[212]

Performing these obligations presents a burden to intermediaries, which comes with a cost that should logically be borne by the company making the request.[213] However, in

[207] Commission Implementing Regulation (EU) 2018/1212, Article 9(6); J. Schmidt, p. 1215.
[208] SRD II, Article 3a(2); Commission Implementing Regulation (EU) 2018/1212, Article 9(6).
[209] SRD II, Article 3a(3).
[210] SRD II, Article 3a(3); cf. S. Kalss, Rn. 131.
[211] Directive (EU) 2017/828, Article 2(j); Commission Implementing Regulation (EU) 2018/1212, Article 3(2) and Annex Table 2.C; U. Noack, p. 562; M. Gargantini, para. 3.62; cf. S. Kalss, Rn. 124.
[212] Directive (EU) 2017/828, Recital (5); M. Gargantini, para. 3.62; cf. S. Kalss, Rn. 124.
[213] S. Kalss, Rn. 129; M. Gargantini, para. 3.85.

this respect, the SRD II gives Member States an option to prohibit intermediaries from charging fees for services rendered to the company in the shareholder identification process.[214] It has rightfully been pointed out that using this option by the Member States is not advisable,[215] since it would lead to transfer of costs to the shareholders although the service was provided in the interest and at the initiative of the company itself.

The SRD II does not regulate conflict-of-laws issues with regard to shareholder identification, so that it remains unclear which Member State's national law would be applicable to obligations of an intermediary in this respect – the law applicable to the company requesting identification (i.e. *lex societatis*), or the law applicable to the relationship between the intermediary and its client. This may create problems in cases where the former law allows companies to request identification of all shareholders regardless of their percentage of shares or voting rights, while the latter law adopts a threshold bellow which listed companies do not have the right to know their shareholders.[216] The question is whether in such a situation an intermediary could refuse giving information to the company about the identity of its client who holds shares or voting rights bellow the prescribed threshold. Since the SRD II treats obligations of intermediaries as being owed to the company and, thus, falling under company law, it seems right to apply the *lex societatis* to this issue.

V Rights and obligations of shareholders regarding requested identification

When regulating shareholder identification, the European legislator primarily focuses on the rights and obligations of the company (i.e. the issuer of shares) and intermediaries,

[214] SRD II, Article 3d(3); cf. M. Gargantini, para. 3.88.
[215] U. Noack, p. 564.
[216] Cf. U. Noack, p. 563.

respectively, thus devoting much less attention to the position of shareholders in this regard. That is obvious from the very definition of 'shareholders' in the SRD II which is not substantive, but rather represents a uniform conflict-of-law rule.[217] Hence, a shareholder is defined as 'the natural or legal person that is recognized as a shareholder under the applicable law',[218] whereby the applicable law is the law of the Member State in which the company has its registered office.[219] By referring to the national laws – which are themselves highly divergent – for determining the notion of shareholder, the effects of harmonization of rules on shareholder identification have been seriously put into question.[220] For this reason, certain authors offer a different interpretation of EU law, by pointing to an implied harmonized substantive definition of shareholders in the Commission Implementing Regulation (EU) 2018/1212.[221] Namely, the Regulation defines 'last intermediary' as an "intermediary who provides the securities account in the chain of intermediaries for the shareholder".[222] From this definition an implied conclusion may be drawn that a shareholder is a non-intermediary on whose behalf the last intermediary maintains a securities account to which shares are credited.[223] Although such interpretation of EU law does have its appeal and even may be justified from the perspective of shareholder identification, it seems doubtful whether it can

[217] M. Gargantini, para. 3.45.
[218] SRD II, Article 2(b).
[219] SRD II, Article 1(2).
[220] M. Gargantini, para. 3.45; cf. S. Kalss, Rn. 126 and 127. "[T]here was an even split between countries tending to view the first layer as the shareholder and those tending towards recognition of the final layer, but also a significant number of responses that did not provide a distinct answer or which signaled that more than one layer enjoyed recognition." European Securities and Markets Authority (ESMA), Report on shareholder identification and communication systems, 5 April 2017.
[221] S. Kalss, Rn. 127.
[222] Commission Implementing Regulation (EU) 2018/1212, Article 1(6).
[223] S. Kalss, Rn. 127.

be reconciled with the explicit provision in the SRD II which refers to the applicable law of the Member State for determining the notion of shareholder.

Further issues regarding rights and obligations of shareholders which are not harmonized under the SRD II concern their right: 1) to require from the company to initiate an identification process to find out personal data of other shareholders, 2) to access the results of the identification process, 3) to opt out of identification, etc. When it comes to the first issue, the decision to request shareholder identification on behalf of the company lies within the competence of the board of directors, so that under the SRD II shareholders are not empowered to initiate this process. Nevertheless, the Directive does not forbid Member States to introduce national rules that would somehow include actively engaged shareholders in the decision-making phase (e.g. by granting minority shareholders the right to start an inquiry or to require the company to pursue the identification of other shareholders).[224] As regards the second issue, the SRD II again neither prescribes nor prohibits the right of shareholders to access the information about their fellow shareholders obtained by the company in the identification process.[225] The Member States are, therefore, free to introduce such right of access into their national laws.[226] Finally, it is important to note that under the harmonized EU regime shareholders do not have the right to opt out of identification and, thereby, avoid revealing their personal data to the company.[227] For this reason, identification of a particular shareholder will be possible even if he objects and wishes to remain unknown to the company. Such compulsory character of shareholder identification has been rightfully criticized,

[224] M. Gargantini, para. 3.56 and 3.57.
[225] European Securities and Markets Authority (ESMA), Report on shareholder identification and communication systems, 5 April 2017; M. Gargantini, para. 3.59; C. Malberti, p. 78.
[226] See M. Gargantini, para. 3.59; S. Kalss, Rn. 120.
[227] M. Gargantini, para. 3.13 and 3.54.

since direct communication of the company with the shareholder who does not want to become actively engaged obviously makes no sense from the perspective of improving corporate governance and enhancing shareholder engagement.[228]

VI Concluding remarks

The analysis in this paper has shown that EU harmonized rules on shareholder identification are incomplete and not sufficiently justified as a means for achieving the aim to improve corporate governance in listed companies.[229] It is questionable whether a company would in practice have an interest to identify its smallest shareholders so as to increase their involvement and enhance their long-term engagement. On the one hand, here the board of directors finds itself in a conflict of interest situation, being that enhanced shareholder engagement may limit its freedom to manage the company. On the other hand, active shareholders that already take part in the decision-making process also do not have an interest to increase the number of shareholders engaging in the voting process, being that this reduces their voting powers at the general meeting. Be that as it may, the fact remains that engagement rarely involves the smallest shareholders, which is why their identification is in most cases not justified based on a cost-benefit analysis.[230]

Having in mind that today the capital market infrastructure in most countries is still based on immobilization of shares which are being kept as book-entries in securities accounts maintained by numerous intermediaries, identification of shareholders seems important for establishing

[228] Cf. M. Gargantini, para. 3.54.
[229] Cf. C. Malberti, p. 62; Peter Böckli *et al.*, "Shareholder engagement and identification", European Company Law Experts, February 2015, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568741*, p. 6.
[230] P. Böckli *et al.*, p. 7; M. Gargantini, para. 3.12.

a direct communication between the company and its shareholders. However, the development of blockchain-based technologies and their application in the trading and post-trading industry might cause the current indirect holding system to become obsolete and replaced by direct holdings without the need for chains of intermediaries who connect but also separate the company and its shareholders.[231] This would most certainly take the edge off the problems regarding shareholder identification and possibly make regulation of such issues a matter of legal history.[232]

Bibliography

- Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights, *Official Journal of the European Union* L 223, 4.9.2018, p. 1-10
- Corrado Malberti, "Chapter 3. The proposed Directive on the encouragement of long-term shareholder engagement in European listed companies: a critical appraisal", *Global Capital Market – A Survey of Legal and Regulatory Trends* (eds. P. M. Vasudev, Susan Watson), 2017
- Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as amended in 2018 and 2019, *Official*

[231] U. Noack, p. 566; M. Gargantini, paras. 3.91 and 3.92. Blockchain technology creates "a persistent, tamper-evident record of transactions between parties whose identity has been authenticated". Jean Bacon *et al.*, "Blockchain Demystified: A Technical and Legal Introduction to Distributed and Central Ledgers", *Richmond Journal of Law & Technology*, Vol. XXV, Issue 1, 2018, p. 101.
[232] M. Gargantini, para. 3.91.

Journal of the European Union L 141, 5.6.2015, p. 73–117 – Anti-Money Laundering Directive (EU) 2015/849

- Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, *Official Journal of the European Union* L 132, 20.5.2017, p. 1-25
- Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended in 2008, 2010, 2013 and 2021, *Official Journal of the European Union* L 390, 31.12.2004, p. 38–57 – Transparency Directive 2004/109/EC
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *Official Journal of the European Union* L 184, 14.7.2007, p. 17–24, as amended in 2017 (by Directive (EU) 2017/828) – SRD II
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *Official Journal of the European Union* L 184, 14.7.2007, p. 17-24
- EUR-Lex, National transposition measures communicated by the Member States concerning: Directive (EU) 2017/828, *https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L0828*
- European Commission, Action Plan: European Company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, Strasbourg, 12.12.2012, COM(2012) 740 final, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0740&from=EN*
- European Commission, Green Paper – The EU corporate governance framework, Brussels, 5.4.2011, COM(2011) 164 final, available at: *https://op.europa.eu/en/publication-*

detail/-/publication/3eed7997-d40b-4984-8080-31d7c4e91fb2/language-en

- European Securities and Markets Authority (ESMA), National thresholds for shareholder identification under the Revised Shareholder Rights Directive, 14 December 2021, available at: *https://www.esma.europa.eu/sites/default/files/library/esma32-380-143_national_thresholds_for_shareholder_identification_under_the_revised_srd.pdf*
- European Securities and Markets Authority (ESMA), Report on shareholder identification and communication systems, 5 April 2017, available at: *https://www.esma.europa.eu/sites/default/files/library/esma31-54-435_report_on_shareholder_identification_and_communication.pdf*
- Jean Bacon *et al.*, "Blockchain Demystified: A Technical and Legal Introduction to Distributed and Central Ledgers", *Richmond Journal of Law & Technology*, Vol. XXV, Issue 1, 2018, pp. 1-106
- Jessica Schmidt, „Die Umsetzung der Aktionärsrechte-Richtlinie 2017: der Referentenentwurf für das ARUG II", *Neue Zeitschrift für Gesellschaftsrecht* 2018, pp. 1201-1220
- Luca Enriques, Matteo Gatti, "Creeping Acquisitions in Europe: Enabling Companies to be Better Safe than Sorry", European Corporate Governance Institute (ECGI), Law Working Paper No 264/2014, p. 24 and 25, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492158#*
- Lutz Pospiech, Tobias Reichenberger, "Aktionärsidentifikation und Interaktion", *Neue Juristische Wochenschrift – Spezial* 2020, pp. 655-656
- Matteo Gargantini, "Article 3A: Identification of Shareholders", *The Shareholder Rights Directive II: A*

Commentary (eds. Hanne S. Birkmose, Konstantinos Sergakis), Edward Elgar Publishing, Northampton 2021

- Mirjana Radović, "Supranational Regulation of Exercising Shareholders' Rights in Indirect Holding Systems", *Annals of the Faculty of Law in Belgrade* (*Belgrade Law Review*), 2012, No. 3, p. 170-187.
- Peter Böckli *et al.*, "Shareholder engagement and identification", European Company Law Experts, February 2015, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568741*
- Roger Barker, "Ownership Structure and Shareholder Engagement: Reflections on the Role of Institutional Shareholders in the Financial Crisis", *Corporate Governance and the Global Financial Crisis – International Perspectives* (eds. William Sun, Jim Stewart, David Pollard), Cambridge 2011
- Susanne Kalss, "§ 67a", *Münchener Kommentar zum Aktiengesetz: Nachtrag §§67, 67a-67f, 87, 87a, 107, 111a-111c, 113, 162 infolge des ARUG II Band 1a/2a* (eds. Wulf Goette, Mathias Habersack, Susanne Kalss), 5. Auflage, C.H. Beck, München 2021
- Ulrich Noack, "Identifikation der Aktionäre, neue Rolle der Intermediäre – zur Umsetzung der Aktionärsrechte-Richtlinie II", *Neue Zeitschrift für Gesellschaftsrecht* 2017, p. 561-567

Prof. Jelena Lepetić, PhD
Associate Professor, Vice-Dean for International Cooperation, University of Belgrade, Faculty of Law

APPROVAL OF RELATED PARTY TRANSCATIONS BETWEEN COMPANIES IN THE GROUP

Summary

Transparency and approval of related party transactions, including those between the members of the group of companies, i.e., intra-group transactions, are regulated by the Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement. This Directive which is known as the Shareholders' Rights Directive II enables Member States to exclude or to allow companies to exclude transactions between the company and its subsidiaries from the prescribed requirements when certain conditions are met. After elabourating on the rules of the Shareholders' Rights Directive II, the author presents rules of the Montenegrin Law on Companies regulating approval of related party transactions and its application regarding intra-group transactions. Furthermore, the author gives examples of practical problems related to the application of these rules in the context of group of companies. In the final part, the author makes proposals for improvements of the relevant provisions of the Montenegrin Law on Companies with regard to the approval of intra-group transactions.

Key words: *related party transaction*s*, intra-group transactions, group of companies*, *personal interest*.

I Introduction

Directive (EU) 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement regulates related party transactions.[233] More precisely, in 2017 the European legislator decided to amend the Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies and to insert the set of new rules, including the ones regarding the related party transactions.[234] Having in mind the subject of the regulation of these two directives, the 2007 Directive is known as Shareholders' Right Directive I while the revised Directive from 2017 is referred as Shareholders' Right Directive II. In order to prevent the related party from taking the advantage on the detriment of the company and other shareholders, related party transactions need to be announced and approved by the general meeting or by the administrative or supervisory board whereas the shareholders might have a right to vote on the transaction after the approval by the administrative or supervisory board of the company as well.[235]

Although it is true that related party transactions may be unjustified and not ordinary[236] which is related to the practice of tunneling, these transactions need not to be detrimental in general. Namely, they may be a part of ordinary course of business undertaken to facilitate the contractual relationship

[233] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132, 20.5.2017, p. 1–25 (hereinafter: Shareholders' Rights Directive II).

[234] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17–24 (hereinafter: Shareholders' Rights Directive I).

[235] Directive (EU) 2017/828, Article 4 (1) and (2).

[236] Romashchenko Ivan, Related Party Transactions and Corporate Groups: *When Eastern Europe Meets the West,* Kluwer Law International, 2020, p. 154.

between members of the group of companies.[237] Moreover, prescribing rules in relation to the announcement and approval of the intra-group transactions is not the only strategy to combat with the harmful tunneling. The legislators may choose to encourage mergers and high ownership stakes or to provide for mechanisms for minority protection such as appraisal rights or mandatory bid rule instead.[238] These strategies may be combined as well. Anyway, the reason for which the related party transactions are being the subject of special attention is the detrimental effect which they may have on both the company and its shareholders. Having in mind the possibility that related party transactions may be justified and needed, the Shareholders' Right Directive II allows optional exemptions from the general rules which Member States may provide for in the national laws. Some of those exceptions are connected to the group of companies.

The new 2020 Montenegrin Law on Companies regulates related party transactions as well.[239] Nevertheless, it does not provide for majority of the available exemptions in the event of transactions between members of the group of companies which are permitted in accordance with the Shareholders' Rights Directive II. The result of the accepted solution in the Montenegrin company law is that most of the transactions entered between members of the group of companies have to undergo the procedure of approval in spite of the fact that they may be entered into in the ordinary course of business and concluded on normal market terms. In addition to these strict rules which are not favorable for intra-group transactions, practical problems arise because of the complicated and broad

---

[237] *Dammann Jens*, "Related Party Transactions and Intra-Group Transactions", The Law and Finance of Related Party Transactions (eds. Enriques L., Tröger T. H.), Cambridge University Press, 2019, 218 – 244, p. 218.

[238] *Ibid*, p. 222.

[239] The Law on Companies, Official Gazette of the Republic of Montenegro, No. 65/2020.

definition of personal interest as well. Namely, the Montenegrin Law on Companies sets the presumptions of the existence of personal interests in three different situations.[240] Determining whether the persons who ought to vote on the approval have or do not have personal interest in that transaction is a starting point in the process of the approval. Apart from the problem regarding the assessment whether the personal interest exists or not, the fact that the Montenegrin legislator did not provide for rules regarding the group of companies is not helpful either. Namely, controlling company which plans to enter into the transactions with its subsidiaries as well as the subsidiaries which plan to enter into transactions between themselves are faced to many practical problems and doubts regarding the application of the provisions on the related party transactions. The legal uncertainty surrounding these activities may deter companies from engaging into these transactions and thus become an obstacle when performing ordinary business activities. This may even be a reason not to invest in Montenegro or the reason for withdrawal of already made investments. Therefore, recommendations how to implement the new rules on related party transactions in the setting of group of companies should be useful.

This paper proceeds as follows. Part II explains the EU legal rules regarding the related party transactions. Part III describes the relevant provisions of the Montenegrin Law on Companies. Part IV presents the hypothetical case and four examples of how the provisions regarding the rebuttable presumption of existence of personal interest may be applied in the context of group of companies. Part IV contains final recommendations for amendments of the Montenegrin Law on Companies.

[240] The Law on Companies, Article 36 (2).

II Legal regime of related party transactions in the EU Company Law

Adequate safeguards should be provided to the company and its shareholders when the company enters into related party transactions because of the possible harmful effects which these transactions may cause them.[241] The Shareholders' Rights Directive II focuses on the *ex-ante* protection in these cases. Nevertheless, the rules apply only to the listed companies, i.e., the companies which have their registered office in a Member State and of which shares are traded at the regulated market which is situated or which operates within a Member State. More precisely, the provisions of the Shareholders' Rights Directive I, which is later on amended by the Shareholders' Rights Directive II, concern the exercise of shareholders' right to vote at the general meeting and shareholders' right to information which might be considered additional to it or as a precondition to the exercise of right to vote. The rules on related party transactions are part of the general legal framework provided for the benefit of shareholders primarily. Therefore, they are important part of the regulation on shareholders' rights. Although these rules protect the company and thus all other stakeholders as well, the interest of shareholders who are not related parties including minority shareholders has to be singled out taking into account the subject of regulation of the directives on shareholders' rights.

Apart from the rules set in these two legal instruments with regard to the shareholders' rights, there are others which are important for them as well. Most of those rules are embodied in the Directive (EU) 2017/1132 relating to certain aspects of company law (codification) – the rules related to the capital and restructuring while other are part of the Takeover

[241] The Shareholders' Rights Directive II, recital 42.

Directive.[242] Furthermore, particular regulation in relation to shareholders' rights exists for special entities – European Company (*Societas Europea – SE*) and European Cooperative Society (*Societas Cooperativa Europea – SCE*).[243] However, the law on corporate groups is not harmonized in the EU company law. Moreover, the Court of Justice of the European Union – CJEU did not create uniform rules on corporate group although there are some judgments linked to them.[244] In spite of the fact that these rules are needed from the perspective of minority shareholders and other stakeholders, especially creditors, all the drafts of the legal instruments related to the structure and managing of groups of companies were withdrawn. To be precise, the Draft Proposal of Ninth Directive, the Proposal for a Regulation embodying the Statute of European Company which included the rules on group of companies, and even the latest attempt manifested in the Proposal for a Directive on single-member private limited liability companies were withdrawn.[245] To conclude, the definition of group of companies in European company law does not exist.

---

[242] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.6.2017, p. 46–127. This Directive is amended in 2019 by the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1–44; Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12–23. See also Grundmann Stefan*, European Company Law – Organization, Finance and Capital Markets*, Cambridge/Antwerp/Portland, 2012, p. 279.

[243] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJ L 294, 10.11.2001, p. 1–21;* Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), *OJ L 207, 18.8.2003, p. 1–24.*

[244] *Krebs Peter, Jung Stefanie,* "European Group Law Reconsidered", European Business Law Review, 32(4), 2021, p. 612.

[245] Draft Proposal for a Ninth Council Directive pursuant to Article 54(3)(g) of the EEC Treaty relating to links between undertakings and in particular to groups; Proposal for a Council Regulation embodying a Statute for the European Company, COM/70/600final, OJ C 124, 10. 10. 1970, p. 1–55;

As opposed to the situation in this regard in the framework of European company law, the definition of group of companies is a part of European insolvency law. That definition is adopted from the accountancy law. According to the Regulation (EU) 2015/848 on insolvency proceedings, the group of companies is defined as a parent undertaking and all its subsidiaries while the parent undertaking is the one which directly or indirectly controls one or more subsidiaries.[246] An undertaking which prepares consolidated financial accounts in accordance with the Directive EU 34/2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings is presumed to be a parent undertaking.[247] Furthermore, there are many provisions on group of banking companies and financial institutions which will not be analyzed in this paper.[248] Anyway, when members of the group of companies enter into transactions between themselves, these transactions may be referred as intra-group transactions. Since the members of the group are related parties, these are the related party transactions. Shareholders' Rights Directive II contains the rules relating to the announcement and the approval of the related party

Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, COM/2014/0212 final – 2014/0120 (COD); Lepetić Jelena, Stečaj grupe privrednih društava, Beograd, 2019, p. 40. See more on the Proposal for a Ninth Directive in Jevremović Petrović Tatjana, Grupe privrednih društava, Beograd, 2014, p. 52 – 54.

[246] Regulation EU 848/2015, Article 2 (13) and (14). See more on this definition in Lepetić Jelena, 2019, p. 42 – 44.

[247] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, *OJ L* 182, 29.6.2013, p. 19–76.

[248] European Company Law Experts – ECLE *(Peter Böckli et al.)*, "A Proposal for the Reform of Group Law in Europe", European Business Organization Law Review, 18(1), 2017, p. 5.

transactions between the members of the corporate group. The Directive provides for the general rules and the possible exemptions.

A. General rules

Rules on transparency and approval of related party transactions are prescribed in the Article 9c of the Shareholders' Right Directive II. These transactions need to be publicly announced at the latest at the time of their conclusion. The announcement may be accompanied by the report on fairness and reasonableness of the transaction from the perspective of the company and the shareholders including the ones who are not related parties. The report has to contain the explanations and the methods which were used.[249]

The related party transactions need to be approved by the shareholders' general meeting or by administrative or supervisory board while the shareholder or director who have interest in the transaction may not vote or be included in the approval. Member States may even adopt a stricter position and require the approval by general meeting after the approval by the administrative or supervisory board. Nevertheless, the shareholder who is a related party may be allowed to vote if the Member State provides for the adequate safeguards to the company and shareholders.[250] This provision is considered unclear and redundant in legal literature and therefore it is not surprising that Germany, Austria, France, Italy and some other EU Member States did not provide for this exception when implementing the Directive.[251]

The related party definition is not provided for in the Shareholders' Rights Directive II. Namely, its meaning is the

[249] Shareholders' Rights Directive II, Article 9c (3).
[250] Shareholders' Rights Directive II, Article 9c (4).
[251] Davies Paul L. *et al.*, *Implementation of the SRD II Provisions on Related Party Transactions*, 2020, p. 33, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697257,(30.04.2022).

same as in the Regulation (EC) No 1606/2002, and therefore as in the International Accounting Standard (IAS) 24.[252] Thus, the accountancy concept became a part of the European company law. To put it in other words, the accountancy standard became valid for both accountancy and company law.[253] The Directive leaves to the Member States to define the material transaction (both "transaction" and "material"). This is the transaction which needs to be approved whereas the Directive establishes two indicators as well as the quantitative criteria which Member States should use when defining it. The parameters are the influence that the information on the transaction may have on the economic decisions of shareholders and the risk which the transaction takes to the company and the shareholders who are not involved in the transaction. The economic decisions of the shareholders are decisions relating to buying or selling the shares while the risk created is manifested in the negative effect on the share price.[254] The quantitative ratios which Member States may set when defining material transaction are, for example, the impact of the transaction on the financial position of the company, its revenues, assets, turnover.[255]

B. Possible exemptions

The Shareholders' Right Directive II provides for exemptions from the general rules on both announcement and approval of the related party transactions. The most important

[252] Directive (EU) 2017/828, Art. 1 (2) (h); Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, *OJ L* 243, 11.9.2002, p. 1–4.
[253] See *Hausen Jesper*, "Accounting Concepts in Company Law", European Company and Financial Law Review, 3, 2021, p. 402 – 403.
[254] "Related Party Transactions in the Revised Shareholders' Rights Directive: The EU Perspectives and Implementation in National Law", European Company Law Journal, 16(2), 2019, p. 44 – 49, p. 46.
[255] Shareholders' Rights Directive II, Article 9c (1).

one of which application is relevant, although it not related to the group of companies directly since its scope is much broader, is that the rules regarding the approval do not apply to transactions entered into in the ordinary course of business and concluded on normal market terms.[256] In these cases, the administrative and supervisory body need to establish an internal procedure for the periodical assessment whether these conditions are met. However, this exemption is optional – Member States may choose to apply the requirements regarding the approval to these transactions as well. Still, any of nine Member States included in the survey undertaken by Davies *et al.* did not prescribe the application of the general requirements to those transactions, whereas Germany and Italy left to the companies the possibility to insert this option.[257]

Furthermore, the Directive prescribes three exemptions which are directly related to the transactions in the context of group of companies. According to the Article 9c (6) (a) of the 2017 Directive, Member States may exclude or allow companies to exclude the transactions entered into between the company and its subsidiaries if three alternative requirements are met. The first requirement is that the subsidiary is wholly owned. Although the Directive does not explicitly state so, the company may be wholly owned not only directly but also indirectly through other subsidiaries and therefore this exemption may comprehend both of these situations.[258]

The second requirement is that no other related party of the controlling company has an interest in the subsidiary. Therefore, the situations when the subsidiary is not a wholly owned may also be exempted. Although these transactions as well as the previous may be excluded from the approval requirement, *Engert* and *Florstedt* suggest that EU made mistake of including the transactions between parent company

[256] Directive (EU) 2017/828, Article 9c (5).
[257] Davies Paul L. *et al.*, 2020, p. 33.
[258] The same interpretation is given by Davies *et al*. 2020, p. 34.

and subsidiaries which are owned wholly or in part (down-stream related party transactions) in the Directive at all.[259] Namely, these authors argue that the said transactions assume no risk or almost no risk of tunneling and thus are suitable of being a subject of *ex ante* approval only.[260] Moreover, they find transposing of IAS 24 in this part wrong because the accounting rules tend to prevent only the accounting manipulation and not the tunneling – in these transactions the resource stays in the reach of the management of the parent company which transfers it to its subsidiaries regardless of whether they are wholly or partially owned whereas they may direct to the subsidiary to pass the resource on.[261] Nevertheless, *Engsig Sørensen* argues in favor of including these transactions in the Directive in relation to the announcement since it may be needed for the protection of stakeholders of the parent company especially when the subsidiary is not wholly owned, while not mentioning the requirement of approval.[262] It may be concluded that the procedure on the approval in those transactions is too burdensome for the operation of the group of companies in comparison to the possible positive effects in terms of tunneling prevention. Having in mind that the costs prevail over the possible benefits, the approval should not be required.

The third exemption is applicable when the national law provides for the adequate protection of interest of both parties in the transaction as well as the interest of shareholders of the subsidiary including the minority shareholders. This is expected to be adopted only in Member States which have

[259] Engert Andreas, Florstedt Tim, *Which Related Party Transactions Should be Subject to Ex Ante Review? Evidence from Germany*, 2019, p. 4, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350356, 30.04.2022.
[260] *Ibid*.
[261] *Ibid*., p. 12 – 13.
[262] *Engsig Sørensen Karsten,* "The Legal Position of Parent Companies: A Top–Down Focus on Group Governance", European Business Organization Law Review, 22(3), 2021, p. 462 – 463.

detailed rules on group of companies. In addition to the mentioned exemptions, there are others which are not relevant in the context of group of companies and thus will not be the subject of analysis in this paper.

C. Exemption from the approval but not the announcement requirement

Although the requirement of the announcement is regularly followed by the requirement of the approval of the related party transaction, there is one exception to this rule which applies to the group of companies. Namely, according to the Article 9c (7) of Shareholders' Rights Directive II, the material transactions between the related party and the subsidiary of the company to which that party is related need to be publicly announced but not approved.[263] On the one hand, Germany, Austria and France opted to require only the announcement of these transactions while on the other hand, both the announcement and the approval are needed in Italy and Spain (the transactions need to be approved by the shareholders of the parent company which is listed).[264] The differentiation between the rules on the announcement and approval may be the result of accepting that these transactions are usual and that the procedure for the approval may be too demanding and costly whereas the disclosure alone is enough to deter the parent company from engaging into detrimental transactions. Namely, the transparency is at least in part based on the deterrence due to the reputational risks for the company.[265] Anyway, the announcement enables stakeholders of the parent company to become aware of these transactions.[266] Having in mind that the Article 9c (7) deals

[263] Davies Paul L. *et al.*, 2020, p. 26.
[264] *Ibid.,* p. 26 – 27.
[265] *Davies Paul,* "Related Party Transactions on the London Stock Exchange: What Works and What Does Not", Business Law Review, 43(1), 2022, p. 3.
[266] Engsig Sørensen Karsten, 2021, p. 462.

with transactions of the related party of the company and subsidiary of that company, it may be concluded that related parties transactions are not only the transactions between the company and the related party but also the transactions between its subsidiaries and parties related to it. This is also a general definition of related party transactions which include transfer of resources while excluding the transfer of corporate opportunities.[267]

The said provision might be interpreted in correlation with the following Article 9c (8) of the Shareholders' Right Directive II which states that transactions which have been concluded with the same related party in any 12-month period or in the same financial year which have not been subject of the requirements regarding the announcement and approval have to be aggregated for these purposes. *Andreas* and *Florstedt* offer an interesting interpretation that both the transactions of the company as well as transactions of its subsidiaries with related parties to the parent company should be aggregated for the purposes of that provision.[268] Nevertheless, the narrower interpretation which disregards the position of this provision in the Directive is also acceptable having in mind its wording.

III Related party transactions in Montenegrin Company Law

The notion of related parties is provided for in the part of the Law on Companies devoted to the special duties owned to the company.[269] One of these special duties is the duty to declare personal interest in the transactions or legal actions

[267] *Enriques Luca,* "Related Party transactions: Policy Options and Real-World Challenges (with a Critiques of the European Commission Proposal)", European Company and Financial Law Review, 16(1), 2015, p. 9 – 10.
[268] Engert Andreas, Florstedt Tim, 2019, p. 15.
[269] The Law on Companies, Article 32.

when this interest exists.[270] The material related party transaction is a transaction with/in case of personal interest. More precisely, both transactions and legal actions (e.g. actions undertaken before the court) need to be declared in case of personal interest. These are the transactions and legal actions entered into or undertaken by the company where a person owing special duties to the company has a personal interest in that transaction or legal action. There is a presumption that the person owing special duties to the company has a personal interest when this person or a person related to the person owing special duties to the company is a party in the transaction or when the legal action is undertaken towards one of them.[271] Therefore, the related parties are the parties related to the persons owing special duties to the company with regard to this provision. The persons owing special duties to the company are members of the company who are liable for obligations of the company, members with significant shareholdings and controlling shareholders, directors, members of the supervisory boards, representatives of the company, auditors, liquidators and other persons in accordance with the memorandum of incorporation or articles of association.[272]

In addition to the mentioned material related party transactions – transactions and legal actions in case of personal interest of the person owing special duties to the company, there is another one which is significantly more complex. These are the transactions in which the other contractual party or the party towards which the legal action is undertaken may be any third party – other than person owing special duties to the company or person related to the person owing special duties to the company.[273] In these cases, two conditions have to be met. The first requirement is that the

[270] The Law on Companies, Articles 36 – 39.
[271] The Law on Companies, Article 36 (2) (1 and 2).
[272] The Law on Companies, Article 31.
[273] The Law on Companies, Article 36 (2) (3).

third party is in the financial relationship with the person owing special duties to the company or the person related to the person owing special duties to the company. The other requirement is that it may be expected that the existence of this relationship may influence the behavior of the person with whom the third party is in a financial relationship. Such is, for example, a creditor-debtor relationship. However, any other relationship may be considered as financial relationship if the link between the economic interests of these persons may be determined. This broad definition should be applied very carefully since it may comprise many different relationships. Anyway, the presumption that the personal interest exists is rebuttable since the duty to declare personal interest is not breached if the persons owing special duties to the company prove that they did not know or ought to have known that the transaction is entered into or that the legal action is undertaken.[274] It may be concluded that related party transactions in the Montenegrin company law are the transactions entered between the companies regardless of whether they are listed or not, including the partnerships, on the one hand, and the persons owing special duties to these companies, parties related to them or third parties if certain requirements are met, on the other hand. Also, legal actions undertaken by the company towards these persons are included as well. Although the Shareholders' Rights Directive II set the mandatory rules on related party transactions only for listed companies, Member States may broaden the range of the companies regarding that application. The rules of the Directive are minimum harmonization rules (for example, France broadens legal regime of related party transactions to companies whose shares are not listed on a regulated market and to the limited liability companies).[275] Therefore, the Montenegrin Law is harmonized with the EU law in this part.

[274] The Law on Companies, Article 39.
[275] Davies Paul L. *et al.*, 2020, p. 17 – 18.

The Montenegrin concept of special duties and related party transactions is similar to the one provided for in the Serbian Law on Companies although some important differences exist. For example, the range of persons owing special duties to the company prescribed by the law is partially different as well as the range of presumptions of personal interest.[276] Namely, Serbian law prescribes narrower mandatory range of persons owing special duties to the company. More importantly, besides the already mentioned presumptions of existence of personal interest in the Montenegrin law, Serbian law prescribes one additional rebuttable presumption which is even more complex than the others.[277]

A. The rules on approval

The Montenegrin Law on Companies provides for rules on the approval of the transactions and legal actions with personal interest.[278] When the company at issue is a joint stock company with one-tier board of directors, the declaration of personal interest in the transaction should be made to the board of directors, whereas the decision on approval of the transaction shall be delivered by the directors not having the personal interest. When the board of directors is a two-tier, the report has to be delivered to the supervisory board. Only the members who do not have a personal interest in the transaction shall decide on the approval of that transaction. If all the members of the board of directors or supervisory board have personal interest or the quorum may not be reached due to the low number of directors who do not have a personal interest or in a case of a voting deadlock when the president of the board is not

[276] Law on Companies, Official Gazette of Republic of Serbia, No. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019 and 109/2021, Articles 61 and 65.
[277] See more on the special duty to declare personal interest in Serbian law in Lepetić Jelena, 2015b, p. 194 – 253.
[278] The Law on Companies, Article 37.

present or has to abstain from the voting, the decision has to be made by the shareholders' general meeting. The decision in that case has to be delivered by the majority of the present shareholders who do not have personal interest in the transaction. The rule regarding the competent body for the approval of transactions and legal actions where there is a personal interest of the person owing special duties to the company is a default rule since the company may prescribe that shareholders' general meeting is the only competent body for these approvals. The same rules apply for the limited liability companies. In case of partnerships and limited partnerships, the related party transaction has to be approved by the majority of partners with unlimited liability for obligations of the company without personal interest in the transaction which is the subject of the approval.

B. The exceptions

The Montenegrin legislator provides for exemptions from the general rules on approval. The approval is not needed in the case of single-member company where the only member has a personal interest in the transaction or where all the members have personal interest.[279] Only this exception is applicable to intra-group transactions. Therefore, if the parties in the transactions are controlling company and its wholly owned subsidiary the approval by the competent body of the subsidiary is not needed. Also, the approval is not needed if the wholly owned subsidiary enters into transaction with the related party of parent company or third party as long as the parent company has a personal interest in the transaction. When the subsidiary which is not wholly owned enters into the transaction in which the controlling company and other members of the subsidiary have personal interests, the approval is not needed either.

[279] The Law on Companies, Article 37 (5) (1).

Other available exemptions in the Montenegrin law are connected to the subscription of shares on the basis of pre-emptive rights and acquiring the treasury shares and therefore not specifically related to the context of group of companies. Furthermore, it should be emphasized that the Montenegrin law does allow to exclude the transactions entered into in the normal course of business and concluded on the normal market terms from the approval requirement.

As previously stated, the Montenegrin Law on Companies does not prescribe rules on group on companies. Namely, minority shareholders which are not related parties as well as creditors of the subsidiary are not protected by the special rules. Nevertheless, the approach of the Montenegrin legislator is not unique since it accepted the English model where the rules on related party transaction (and the wrongful trading rules) are considered sufficient and where no other rules on group of companies are provided.[280] It is thus not surprising that the third possible exemption in accordance with the Shareholders' Rights Directive II is not provided in the Montenegrin law.

IV Problems in reality

In order to show how difficult it is to apply these provisions in the context of group of companies, a hypothetical case shall be presented. Let us assume that the members of the group of companies are parent company (hereinafter: ParentCo) and its subsidiaries and that one of the subsidiaries is established in Montenegro (hereinafter: LocalCo). Namely, ParentCo indirectly controls LocalCo which is not a single member company whereas the exemptions from the approval are not applicable.

LocalCo plans to enter into transaction with its foreign controlling company ParentCo – Transaction 1. Moreover, it

[280] Krebs Peter, Jung Stefanie, 2021, p. 630.

plans to enter into transactions with other members of the group: Affiliate 1, Affiliate 2, and Affiliate 3 – Transactions 2, 3, and 4. All these companies are, either directly or indirectly controlled by ParentCo. All the transactions should be approved by the board of directors of the LocalCo in accordance with the rules on approval. One or more directors of the LocalCo are employed in the ParentCo – Director 1. Nevertheless, Director 1 is not also a director of the ParentCo. Two or more other directors of LocalCo are directors of other members of the group – Directors 2 and 3. However, Affiliates 1, 2 and 3 are not among the companies where Director 2 and 3 hold directorships. Several questions arise:

A. Should Director 1 declare personal interest in Transaction 1?
B. Should Director 1 declare personal interest in Transactions 2, 3 and 4?
C. Should Directors 2 and 3 declare personal interests in Transaction 1?
D. Should Directors 2 and 3 declare personal interests in Transactions 2, 3 and 4?

The answers to these questions are very important since breaching special duties may be followed by the severe consequences. The Montenegrin Law on Companies prescribes that all directors are persons owing special duties towards the company. One of these duties is a duty to declare personal interest in transactions in which one party is the company of which they are directors if they have personal interest in that transaction. If there is a personal interest, this interest needs to be declared to the board of directors. The report is a precondition for the approval of the transaction in case of personal interest. Namely, the report is needed for the approval of the transaction by the persons who do not have a personal interest in that transaction. Therefore, the main question is whether the personal interest exists in any of these cases. This interest may be direct or indirect, i.e., it may be expressed by the very own interest of that person or through

the interest of the persons who are related to the person owing a duty towards the company.

If the director of LocalCo who have a duty to declare personal interest breaches this duty, the twofold consequences will follow. The transaction may be annulled and the person owing special duty to declare personal interest together with related parties and third parties who have known or must have known about personal interest when the transaction was entered into may be jointly and severally liable for damages to the company.

However, the duty is not breached if the director proves that he/she did not know or need to have known that the transaction is entered into during the court proceedings or when the court determines that the transaction was in the interest of the company. The action may be filed within six months from the day when the committed breach is found out but not later than five years from the day when the breach was committed.[281] The company may waive the right to claim the annulment of the transaction and damages against directors when the duty to declare personal interest is breached but only after 18 months from the day of the committed breach. The decision to wave the right to the claim has to be delivered unanimously by the general meeting.[282]

If the company does not file an action against the person who did not act in accordance with the duty to declare personal interest, that action may be filed by its shareholders. This derivative action is filed in the name of the shareholders but on behalf of the company when the conditions prescribed by the law are met.[283] One of these conditions is submission of the request to the company to file a claim for the breach of duty by its shareholders. This action may be filed if the preliminary request is submitted to the company within the period of 6 months from the day when the committed breach is found out

[281] The Law on Companies, Article 48.
[282] The Law on Companies, Article 49.
[283] The Law on Companies, Article 51.

and not later than three years after the filing of the preliminary request.

Furthermore, even shareholders individually may file an action against the directors of LocalCo on their own name and on their own behalf and claim damages for the compensation of loss caused to them by the breach of duty towards the company.[284] This action may be filed within 6 months from the day when the committed breach is found out but not later than three years from the day when the breach was committed.

Finally, if the majority of directors are found to have a personal interest in the transactions and thus the quorum may not be reached, the shareholders without the personal interest will decide on the approval instead of the board of directors. Then, the paradox situation may occur – the shareholder with a small number of voting shares may decide not to give an approval without any valid reason except to defy the majority shareholder.[285] In these situations, there are no legal instruments for the protection of company since the shareholders having 20% or less voting rights are not considered persons owing special duties to the company.

A. Should director 1 declare personal interest in transaction 1?

Director 1 is a person owing special duties to LocalCo. It is clear that Director 1 is not a party in the planned transaction 1. Also, ParentCo is not a party related to Director 1 since Director 1 is not a director of ParentCo. However, Director 1 is employed in ParentCo which leads to the question whether Article 36 (2) (3) of the Law on Companies applies. This provision sets the presumption that there is a personal interest in the transaction in which the other contractual party may be any third party – other than person owing special duties to the company or person related to the person owing special duties

[284] The Law on Companies, Article 50.
[285] Groenland Irene C. P., 2019, 48.

to the company. ParentCo needs to be regarded as a third party in the further analyses.

The first condition for the application of that provision is the existence of financial relationship between ParentCo as a third party and Director 1 or a person related to Director 1. Since the relationship between ParentCo and Director 1 is of employment nature it is evident that the economic interests of these persons are connected. The salary to the employee is usually distributed from the profit of that company, whereas insolvency of the company would affect the employee. However, having in mind that Director 1 is not highly ranked employee in ParentCo, the existence of the financial relationship may not have an influence on the actions of ParentCo. Therefore, the second condition is not fulfilled. To conclude, the personal interest does not exist and therefore Director 1 does not have a duty to declare personal interest in Transaction 1.

B. Should director 1 declare personal interest in transactions 2, 3 and 4?

Director 1 is a person owing special duties to LocalCo. It is clear that Director 1 is not a party in the planned transactions 2, 3 and 4. Also, Director 1 is not a director of Affiliates 2, 3 and 4 which are the other parties in the transactions 2 and 3 besides LocalCo. Therefore, Director 1 is not a related party to the Affiliates 2, 3, and 4. However, Director 1 is employed in ParentCo. ParentCo controls Affiliates 2, 3 and 4 which leads to the question whether Article 36 (2) (3) of the Law on Companies applies. Affiliates 2, 3 and 4 need to be regarded as third parties in the further analyses.

The first condition for the application of that provision is the existence of financial relationship between Affiliates 2, 3 and 4 as third parties and Director 1 or a person related to Director 1. Affiliates 2, 3 and 4 are in financial relationship on the basis of control with ParentCo. However, ParentCo is not a related party to Director 1. Nevertheless, ParentCo is an

employer of Director 1. Even if we assume that the indirect financial relationship between Affiliates 2, 3 and 4 and Director 1 exists, that financial relationship may not influence on the actions of Affiliates 2, 3 and 4. Therefore, the conditions for the existence of the personal interests are not met. It may be concluded that Director 1 does not have a duty to declare personal interest in the Transactions 2, 3 and 4.

C. Should directors 2 and 3 declare personal interests in transaction 1?

Directors 2 and 3 are persons owing special duties towards LocalCo. Directors 2 and 3 are not parties in the transactions 1.

Directors 2 and 3 are not directors of ParentCo. Therefore, ParentCo is not a party related to Directors 2 and 3. However, Directors 2 and 3 are directors in the companies controlled directly or indirectly by ParentCo. Again, it has to be checked whether Article 36 (2) (3) applies – firstly whether there is a financial relationship between ParentCo as a third party and Directors 2 and 3 or persons related to Directors 2 and 3.

ParentCo is in financial relationship with the companies of which Directors 2 and 3 are directors since economic interest between these companies are connected. These companies are members of the same group of companies. Also, these companies are persons related to Directors 2 and 3 who own special duties towards LocalCo. Since ParentCo controls these companies, it is to be expected that the relationship including control may have an influence on the actions of the controlling and controlled company. It may be concluded that third party – ParentCo is in the financial relationship with persons related to Direct 2 and 3 (companies in the group) whereas the existence of that relationship may have an influence on ParentCo. To conclude, personal interest exists and Directors 2 and 3 have duty to declare personal interests in Transaction 1.

D. Should directors 2 and 3 declare personal interests in transactions 2, 3 and 4?

Directors 2 and 3 are persons owing special duties towards LocalCo. Directors 2 and 3 are not parties in the transaction. Directors 2 and 3 are not directors of Affiliates 2, 3 and 4. Therefore, Affiliates 2, 3 and 4 are not parties related to Directors 2 and 3. However, Directors 2 and 3 are directors of the companies controlled directly or indirectly by ParentCo – the same person who controls Affiliates 2, 3 and 4. Again, the assessment whether Article 36 (2) (3) of the Law on Companies applies has to be made. Firstly, it should be tested whether there is a financial relationship between Affiliates 2, 3 and 4 as third parties and Directors 2 and 3 who own duties towards LocalCo – the party in the transaction, or parties related to Directors 2 and 3. Since members of the same group of companies are related persons to Directors 2 and 3 the question is whether there is a financial relationship between Affiliates 2, 3 and 4 and companies which are members of the same group of companies whose members are Affiliates 2, 3 and 4 (related parties to Directors 2 and 3). It is evident that economic interest between these persons exists. Therefore, it has to be checked whether the existence of that financial relationship may influence the actions of Affiliates 2, 3 and 4. Since all the companies are controlled by the same person, the answer is affirmative. To conclude, the personal interest exists since both conditions are fulfilled and therefore Directors 2 and 3 have a duty to declare personal interest in Transactions 2, 3 and 4.

V Conclusion

As has been demonstrated by presenting the hypothetical case, entering into related party transaction with the Montenegrin company which is a member of international group of companies may be very challenging. The approval of these transactions, apart from the transactions in which the

only member has a personal interest or in which all the members have personal interest, has to be made by the competent body with the proper majority of persons not having personal interest in the transaction. The directors of the members of the group of companies are often employed in other members of the group or they perform activities in accordance with different type of contracts for other group members. That fact may become a nuisance when performing ordinary business operations and even prevent the approval of non-detrimental transactions since external minority shareholder might refuse to approve it.

Moreover, the Montenegrin Law on Companies does not provide for special rules for group of companies. However, having in mind that rules regarding the structure and functioning of the group of companies are not harmonized in the EU law, this is not surprising. Yet there is another option which may facilitate the operation of the group of companies of which member is founded in Montenegro. The Law on Companies should be amended so that the transactions entered into in the ordinary course of business and concluded on market terms are excluded following the example of many Member States of EU or to leave the possibility for companies to require the approval of these transactions as Germany and Italy did. Although there is a rule in the Montenegrin law which prescribes that there is no breach of duty when the transaction or legal action is in the interest of the company which presupposes that the transaction was concluded on the normal market terms, this has to be proven in the court proceedings. Furthermore, other exemptions which are provided for in the Shareholders' Rights Directive II with regard to the group of companies, except the one which requires the regulation of group of companies in more details, should be included as well.

Finally, the broad definition of financial relationship when establishing the presumption of personal interest should be reconsidered. The actual provision is very complex and hard to

implement. Therefore, it would be useful to include other examples in that provision and/or to exclude certain types of financial relationships.

Bibliography

- Dammann Jens, "Related Party Transactions and Intra-Group Transactions", The Law and Finance of Related Party Transactions (eds. Enriques L., Tröger T. H.), Cambridge University Press, 2019, 218 – 244.
- Davies Paul L. *et al.*, *Implementation of the SRD II Provisions on Related Party Transactions*, 2020. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697257.
- *Davies Paul*, "Related Party Transactions on the London Stock Exchange: What Works and What Does Not", Business Law Review, 43(1), 2022, p. 2 – 17.
- Engert Andreas, Florstedt Tim, *Which Related Party Transactions Should be Subject to Ex Ante Review? Evidence from Germany*, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350356 (30.4.2022).
- *Engsig Sørensen Karsten*, "The Legal Position of Parent Companies: A Top–Down Focus on Group Governance", European Business Organization Law Review, 22(3), 2021, p. 433 – 474.
- *Enriques Luca*, "Related Party transactions: Policy Options and Real-World Challenges (with a Critiques of the European Commission Proposal)", European Company and Financial Law Review, 16(1), 2015, p. 1 – 37.
- *European Company Law Experts – ECLE (Peter Böckli et al.)*, "A Proposal for the Reform of Group Law in Europe", European Business Organization Law Review, 18(1), 2017, p. 1 – 49.
- *Groenland Irene C. P.*, "Related Party Transactions in the Revised Shareholders' Rights Directive: The EU Perspectives

and Implementation in National Law", European Company Law Journal, 16(2), 2019, p. 44 – 49.
- Grundmann Stefan, *European Company Law – Organization, Finance and Capital Markets*, Cambridge/Antwerp/Portland, 2012.
- Jevremović Petrović Tatjana, *Grupe privrednih društava*, Beograd, 2014.
- *Krebs Peter*, *Jung Stefanie*, "European Group Law Reconsidered", European Business Law Review, 32(4), 2021, p. 609 – 648.
- *Lepetić Jelena*, "Povezana lica u poslovnom pravu", Pravo i privreda, 10–12, 2015a, p. 19 – 39.
- Lepetić Jelena, *Kompanijskopravni režim sukoba interesa*, Beograd, 2015b.
- Lepetić Jelena, *Stečaj grupe privrednih društava*, Beograd, 2019.
- Romashchenko Ivan, *Related Party Transactions and Corporate Groups: When Eastern Europe Meets the West*, Kluwer Law International, 2020.
- *Seehausen Jesper*, "Accounting Concepts in Company Law", European Company and Financial Law Review, 3, 2021, p. 398 – 427.

Andreja Mihailović, PhD
Teaching Assistant at Faculty of Law, University of Montenegro

THE CYBERSECURITY STRATEGY FOR THE DIGITAL DECADE: SHAPING EUROPE'S DIGITAL FUTURE

Summary

The paper examines the development of a resilient and sustainable EU cybersecurity ecosystem, the challenges of preventing malicious cyber activities, and initiatives to confront the existing polarization that undermines cybersecurity in Europe. The EU's Cybersecurity Strategy for the Digital Decade, as the cornerstone of European digital development, aims to raise the level of cyber resilience and trustworthiness of digital infrastructure across the Member States. Following forward from the previous strategies' progress, the presented strategy is closely associated with the Commission's Economic Recovery Plan, the Digital Single Market Strategy, and the Security Union Strategy 2020–2025, and represents a bold step further in strengthening Europe's digital and technological sovereignty. The strategy is built around three key pillars: resilience, technological sovereignty, and leadership; increasing operational capacity to respond to malicious cyber incidents; and intensifying cooperation to advance a global and open cyberspace. It is part of a broader effort to establish a rules-based balance of power in cyberspace as a prerequisite for international public security, shared prosperity and fundamental human rights.

Keywords: *The EU's Cybersecurity Strategy, cyber incidents, cybersecurity, digital development.*

I Introduction

Cybersecurity is another contentious idea in the modern world.[286] The most comprehensive overview of the different interpretations of the term was carried out by the European Agency for Cybersecurity (ENISA), that also came up with multiple recommendations for comparability: „Cybersecurity shall refer to the security of cyberspace, where cyberspace itself refers to the set of links and relationships between objects that are accessible through a generalized telecommunications network, and to the set of objects themselves where they present interfaces allowing their remote control, remote access to dana, or their participation in control actions within that cyberspace. In other words, cyberspace itself refers to the set of links and relationships between objects that are accessible through a generalized telecommunications network.“[287]

Presently, there are more connected devices than there are humans on the planet, and that figure is expected to grow to 25 billion by the year 2025[288]; of these, a significant proportion will be in Europe. The proliferation of online communities posed an additional threat to individuals, who were affected by this and people are frequently ignorant of the ramifications of these factors. Cyberthreats can be channeled at a diverse range of clients and organizations, stretching from government

---

[286] *Cavelty Myriam, Wenger Andreas*, “Cyber Security Meets Security Politics: Complex Technology, Fragmented Politics, and Networked Science”, Contemporary Security Policy 41, 2020.

[287] The European Agency for Cybersecurity (ENISA), find more at: https://www.enisa.europa.eu (Accessed: 10.04.2022.) was established in 2004 by the Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 OJ L 77 1–11, Brookson C., Cadzow S., Eckmaier R., Eschweiler J., Gerber B., Guarino A., Rannenberg K., Shamah J., Gorniak S., “Definition of Cybersecurity-Gaps and Overlaps in Standardisation” Heraklion, ENISA, 2015. *Collett Robert*, „Understanding cybersecurity capacity building and its relationship to norms and confidence building measures“, Journal of Cyber Policy, 6:3, 2021.

[288] The International Data Corporation forecast, Available at: https://www.idc.com/getdoc.jsp?containerId=prUS45213219 (10.04.2022.).

entities to the ordinary individual. Cyberthreats aimed at the information management of government agencies are often the high priority of these types of attacks, especially in places of public safety where the potential consequences always have the potential to be extremely damaging. Numerous corporate entities are vulnerable to hackers since the safety protection mechanisms that they have in place are either insufficient or inadequately strong. The intruders want to carry out their mission by seizing control of the organization's applications and databases, which might have serious repercussions for the business organization.[289]

II Shaping Europe's Digital Future

In his speech during the EU's "State of the Union" in 2017, the former President of the European Commission, Jean-Claude Juncker, stated that: "Cyber-attacks can be more dangerous than guns and tanks" in his speech during the EU's "State of the Union" in 2017, which underscored the extremely critical nature of this problem. There is still a general uptick in the population using the internet, and this increase can be seen in a range of settings and situations thanks to the proliferation of various types of equipment that can connect to the internet. Today, is more than clear that cybersecurity is an essential component of people in Europe's overall safety. The industry, governance, and citizens of the EU are more interdependent than they have ever been on the capacity of trustworthy and protecting online technologies and infrastructure. The areas of transportation, energy and health, electronics, banking, privacy, participatory governance and security are all largely dependent on information and related technology that are becoming seamlessly integrated.

[289] Carvalho Joao Vidal, Carvalho Sandro, Rocha, Álvaro, European strategy and legislation for cybersecurity: implications for Portugal, Cluster Comput no 23, 2020.

During the COVID-19 epidemic, forty percent of employees in the EU shifted to remote work, which is expected to have enduring repercussions on ordinary life. This expedited the process of digitizing organisation structure, which had traditionally been slow[290] and makes the system more susceptible to being attacked over the internet. Linked products are frequently distributed to consumers with risks that are already recognized, which hence increases the attack surface for four different types of malware cyber operations. The danger picture is made even more complex by geostrategic disputes around the open and worldwide Internet and the management of technology throughout the entire logistics network.[291] The expansion of cyber-attacks "against corporate or government IT systems" brought a "new dimension, as a promising new economic, political, and military weapon" to the evolution of information security.[292] Therefore, the EU Council defined the idea of "cybercrime" alongside "cybersecurity" in order to concentrate on the "regulatory process" for accomplishing "cyber resilience," as well as to connect the EU's strategy with the Council of Europe's "Budapest Convention" (no 185) on "cybercrime." In 2013, the EU established a Cybersecurity Strategy[293], which was followed in 2016 by the first EU "Directive on Security of Network and Information

[290] According to a survey in June 2020, 82% company leaders plan to allow employees to work remotely working some of the time; Available at: https://www.gartner.com/en/newsroom/press-releases/2020-07-14-gartner-survey-reveals-82-percent-of-company-leaders-plan-to-allow-employees-to-work-remotely-some-of-the-time (Accessed: 12.04.2022.).

[291] EC, *Joint Communication to the European Parliament and the Council: The EU's Cybersecurity Strategy for the Digital Decade*, Brussels, 2020.

[292] EU Council, *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World*, Brussels, S407/08, 11 December 2008.

[293] European Commission and High Representative Joint Communication, *Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, Brussels, 7 February 2013.

Systems" ("NIS Directive")[294], which unified EU Member States' laws.

The NIS draft featured many elements, the first being the establishment of specified timeframes for the notification of security events inside a layered system. It included a range of examples in which the observations from the infrastructure and services have to be provided within the specified periods at a time in order to ensure compliance with the requirement. The initial record that represents an event that occurs has to be sent in no later than twenty-four hours after the situation has been identified (Art. 20). Due to a major decision made by Parliament to add another layer, the already cumbersome, inefficient, and inappropriately onerous bureaucratic system has become even more complicated.[295] As a result, the EU established a legal and political architecture to overcome this limitation.[296] Shaping Europe's Digital Future, the Commission's Recovery Plan for Europe[297], and the Security Union Strategy 2020-2025[298] all make extensive use of the novel functional Cybersecurity Strategy for the Digital Decade that was utilized by the European Union (EU).

The European Union (EU) launched its new cybersecurity strategy in December 2020, with the goal of enhancing Europe's technology and digital sovereign control. The document outlines legislative measures that would better

[294] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, EU OJ L 194, 19 July 2016.

[295] *Bell M.*, „Cybersecurity: NIS2 - eco Position Paper“, ECO, Berlin, 25 November 2021.

[296] Lannon Erwan., EU Cybersecurity Capacity Building in the Mediterranean and the Middle East, IEMed Mediterranean Yearbook 2019, Available at: https://www.iemed.org/publication/eu-cybersecurity-capacity-building-in-the-mediterranean-and-the-middle-east/ (26.04.2022.)

[297] Europe’s moment: Repair and Prepare for the Next Generation, COM 98 final, 2020.

[298] The EU Security Union Strategy 2020-2025.

integrate cybersecurity into the EU's legal provisions on privacy, technologies, markets and digital services. Nevertheless, it falls short of cultivating a European cyberdiplomatic efforts oriented to both "strategic openness" and the preservation of the common market. To accomplish this, the EU's cyberdiplomacy needs to be more cohesive in its transnational, democratic, and economic/technological components.[299]

III Key priorities

The European Union Cybersecurity Strategy was developed as a reaction to the problems posed by international security competitiveness in virtual space as well as the expanded cybercrime panorama, particularly as a result of the COVID-19 outbreak. This empowers the European Union (EU) to maximize its preparedness and establish best practices in cyberspace; enable its capacity to detect, mitigate, and react appropriately to cyber intrusions; and expand its alliances in favor of a globalized and inclusive virtual world.[300]

In light of the accomplishments made in accordance with the preceding strategies, it includes specific ideas for the implementation of three fundamental factors (policy agendas, investment opportunities, and legal requirements). The three pillars of a secure and resilient cyberspace are:

1. Resilience, technical sovereignty, and leadership;
2. the operational capacity to prevent, deter, and respond;

[299] Bendiek Annegret, Kettemann Matthias C., „Revisiting the EU Cybersecurity Strategy: A Call for EU Cyber Diplomacy“, Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, no.16, 2021.

[300] EEAS, Cybersecurity: EU External Action, 2022, Available at: https://www.eeas.europa.eu/eeas/cybersecurity-eu-external-action_en (Accessed: 16.04.2022.)

3. collabouration to promote a global and open cyberspace.[301]

The first component of this strategy is to strengthen the institutional leadership, resilience, and technological autonomy of European private and governmental institutions. In the past few decades, the concept of resilience has been defined and understood in a plethora of different forms, most of which are contingent on the setting in which the phrase is utilized. The National Academy of Sciences (NAS) defined resilience as "the ability to prepare and plan for, absorb, recover from, and more successfully adapt to adverse events".[302] All the currently accepted definitions are interrelated to the essential characteristics, which include adjusting, planning, enduring, and recuperating by gaining knowledge from earlier setbacks.

Adaptation represents an adjustment in management strategy or modifying risk response plans in anticipation of system failures and imminent attacks.

Preparation encompasses the processes of analyzing, foreseeing, and organizing for any perceived attacks, including monitoring any main properties of the solutions that are at significant risk.

Withstanding refers to the ability to keep running commercial activities in dangerous situations without experiencing a drop in productivity or a reduction in function.

Recovery addresses the process of coming back from a setback to normal company operations, output and control.[303]

---

[301] European Commission. (2020b), 'New EU Cybersecurity Strategy and new rules to make physical and digital critical entities more resilient', Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2391 (Accessed: 04. 04., 2022)

[302] National Research Council, *Disaster Resilience: A National Imperative*, Washington, DC: The National Academies Press, 2012.

[303] Office of the Director of National Intelligence, *Cyber Resilience and Response: Public-Private Analytic Exchange Program*, 2018, Available at:

The Directive on Measures for a High Common Level of Cybersecurity Across the Union (NIS2) and the Critical Entities Resilience Directive (CER), both of which were issued with the EUCSS, are at the epicentre of the effort to foster higher resilience in the single market for cybersecurity.

The NIS2 Directive, which is the most important part of the new strategic approach, is focused on increasing the rates of information security for actors that are fundamental to the development sectors of the EU economic structure. This will be managed to accomplished by recognizing entities as critical and essential, diversifying sectors covered by the NIS2 Directive, facilitating standardized procedures, and mandating reporting obligations for market players. The Critical Entities Resilience (CER) Directive broadens and exacerbates the focus of the European Critical Infrastructure Directive of 2008. Energy, mobility, banking, financial market infrastructure, health, drinking water, waste water, digital infrastructure, public administration, and space were all encompassed. The presented directive entailed each Member State to formulate a comprehensive strategy for guaranteeing the resilience of critical units and to undertake vulnerability assessments. These assessment methods will therefore assist in the identification of a selected group of critical entities that would be subject to commitments intended to optimize their capacity to cope with non-cyber potential consequences, such as institution hazard analysis, managerial and operational indicators, and event warning systems.[304] In addition, the Commission advocates for the initiation of a "European Cyber Shield," which would enable for a greater data transmission among key parties and would provide an early indication on

https://www.dni.gov/files/PE/Documents/2018_Cyber-Resilience.pdf (28.04.2022.)

[304] EC, New EU Cybersecurity Strategy and new rules to make physical and digital critical entities more resilient, 2020, Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2391 (18.04.2022)

matters related to cybersecurity in order to identify potential dangers prior they cause any problems.

The expansion of operational capabilities to prevent, deter, and respond to cyber incidents is the primary emphasis of the second pillar of the EUCSS. Another of the key priority areas for boosting operational effectiveness is the building of a Joint Cyber Unit, also known as a JCU, with the purpose of accelerating the flow of information between the various cybersecurity units in the EU.[305] The Joint Security Unit is an important step toward completing the European system for the management of cybersecurity crises. Increasing collabouration is the third component of EU activities, and its goal is to further the cause of a global internet that is open to all. The European Commission places an emphasis on the necessity of bolstering the rule-based international order by utilizing the diplomatic might of the EU to promote European values all over the globe and to ensure that the new digital age reflects a European indelible mark.

IV The identification of cyberthreats

Cyberspace is the worldwide, digital, computer-based and interconnected ecosystem, and so it falls into the category of "public" and "air gapped" web. Cyberspace both actively or passively interlinks technologies, processes, and other facilities that are essential to the requirements of civilization. According to Kello[306] there are three territories that meet and interact in the wide landscape of cyberspace, and they are as follows: the world wide web, which is made up of base stations that are accessible via URL; the internet, which

[305] Leyen Ursula von der, „A Union that strives for more: My agenda for Europe“, Political Guidelines for the Next European Commission 2019-2024. Available at: https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf (Accessed: 14.04. 2022)

[306] *Kello, L.*, "The meaning of the cyber revolution: perils to theory and statecraft", International Security, Vol. 38, 2013.

is made up of devices that communicate to one another; and the "cyber-archipelago," which is mainly composed of software systems working apart from the internet and are located within a so-called air gap.[307] The term "cyberthreat" refers to any conceivable harmful intrusion that attempts to fraudulently process information, interrupt electronic tools, or delete the data. These goals can be accomplished in a number of ways. Various actors, such as computer hacking, leakers, terrorist groups, hostile nation-states, organized criminals, individual cybercriminals, and dissatisfied personnel, might be the cause of cyber attacks. Therefore, the identification of cyberthreats is the one of the frequent issue in discussions among specialists researching the topic of cyber security. Furthermore, the rapid prolifieration of potential cyberthreats multiplies their, already complex classification systems, but as the most common and comprehensive is the following categorization:

•Cybercrime (criminal activity committed online) - The term "cybercrime" refers to any illegal action that is performed with the assistance of computers, application servers, and communications networks. This is a relatively new subcategory of criminal behavior. It is inconceivable to put a figure on the scope of cybercrime or the number of potential threats it faces. The fact that cybercrime encompasses a wide variety of different types of cybercrime is a factor in respect of that domain. The Convention on Cybercrime, which is also documented as the Budapest Convention on Cybercrime or simply the Budapest Convention[308], is the very first multilateral agreement which aims to address crimes being committed using the Information and communication

[307] Parn Erika Anneli, Edwards, David, "Cyber threats confronting the digital built environment: Common data environment vulnerabilities and block chain deterrence", Engineering, Construction and Architectural Management, Vol. 26 No. 2, 2019.

[308] The Budapest Convention on Cybercrime, Availavle at: http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm (10.04.2022.)

technology (referred to collectively as "cybercrime") by finding ways to improve crime investigation approaches, synchronizing legal provisions, and continuing to increase international collabouration. The Convention is especially concerned with infringements of intellectual property law, offenses regarding child pornographic material, hate crimes, and infringements of computer networks. It does this by defining the offenses, which are as follows: illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offenses copyright - related and neighboring rights, and misdemeanors associated with child pornography.[309]

• Cyberterrorism (terrorism committed online) - Attacks against computer systems or networks are the platform through which terrorists aim to accomplish their political objectives. Cyber terrorism is characterized by the use of three distinct types of attack methods: 1. An offensive using coercive power, such as an attack against computer facilities or electrical lines. The direct collapse of the system, whether by the application through acts of sabotage, is referred to as the physical collapse of ICT resources. Simplest terms, communication and information systems have been among the top targets ever since the digital transformation bloombing began; 2. An electronic attack is an attack that is carried out with the assistance of electromagnetic high energy or electromagnetic pulse, which results in the overloading of the electrical breaker or broadband wireless signals; 3. An cyberattack on a computer network is often done by utilizing use of malicious code, which would abuse software vulnerabilities.

• Cyberwar represents a form of political danger. In light of the fact that criminal activity and cyberwarfare make use of the same means, methods, and tactics, it is important, in order to

[309] Arias, M. L., "The European Union Criminalizes Acts of Racism and Xenophobia Committed through Computer Systems“, Wayback Machine, 2011.

protect oneself from the interference of either, to identify the parties involved in the conflict and to establish their reasons for taking part in it (goals or intentions). When one issue of international law captures another, the challenge of whether or not anything defines a war might be addressed. Only in the case where a subject of international law carried out the attack with the aim of committing an act of hostility it can be considered as the act of cyberwar.[310]

V Building cybersecurity capacities

Nowadays, the area of cyber capacity building has evolved into a sophisticated community of developers, organizations, and initiatives that are responsible for the conception, execution, coordination, and investigation of the global exchange of cyber expertise. Nevertheless, compared to other areas of international collabouration, it is still in its infancy stage at this point. Although the initial efforts in this area date back to the late nineties, only the past two decades have indeed been crucial for the development of cyber capacity building. Though there are many definitions for cybersecurity capacity building, we will use the official definition from the EU's Operational Guidelines for the purposes of this paper, which states that "capacity building in the cyber domain aims to build functioning and accountable institutions to respond effectively to cybercrime and to strengthen a country's cyber resilience".[311] The scope and nature of cyber capacity building will never be fixed, and they are instead always being refined and expanded. The cyber capabilities required to combat cybercrime were among the first to receive benefits from various programs. When we analyze the cultural shift of different contexts, these

[310] *Nedeljković Slobodan, Forca Bozidar*, Evropska Strategija Bezbednosti i sajber pretnje – Značaj za Srbiju, Vojno delo, 3/2015.

[311] Patryk P., EC, *Directorate-General for International Cooperation and Development. Institute for Security Studies, Operational Guidance for the EUs International Cooperation on Cyber Capacity Building*, Paris, 2018.

projects found their way when intergovernmental criminal justice undertakings started receiving queries from their contemporaries to include cybercrimes and digital evidence to their content as well as provide counseling on cybercrime law making.[312]

Securing the capacities that have been established to make use of cyberspace is necessary in order to construct a reliable and durable cyber capability. This is extremely important for the accomplishment of a set of performance objectives since it lowers the dangers to information protection that are caused by entrance to and usage of virtual worlds. The bottleneck in effectiveness might be attributed to the absence of a conceptual approach for the procedure of integrating ICT into priority policy domains.

In their evaluation of the regulatory measures undertaken by the EU in the area of cybersecurity, several authors interpret the public-private partnership as becoming an essential element of the government's strategic approach (both at the domestic and the European Union scale) to transfer risk from the state to the private sector, which would have a significant positive impact on the economic resources available to the state. The transition of essential information infrastructure from the public sector to the private one was the impetus behind the development of the private-public partnership from an economic point of view.[313] The cultivation of knowledge and understanding through the dissemination of awareness and training is absolutely necessary for the achievement of excellent cyber hygiene and sustained cyber competency. The most difficult task is to establish a

[312] Collett Robert, Barmpaliou Nayia, *International Cyber Capacity Building: Global Trends And Scenarios*, Luxemburg, 2021.

[313] *Bures Oldrich, Carrapico Helena*, „Private Security Beyond Private Military and Security Companies: Exploring Diversity Within Private–Public Collaborations and Its Consequences for Security Governance“, Springer Science and Business Media, 2016.Available at: https://link.springer.com/content/pdf/10.1007%2Fs10611–016–9651–5.pdf, (Accessed: 04.04. 2022)

communications networks and institutional stability as accurately as possible, followed by the task of integrating these elements into the filesystem. This will allow for maximum utilization of innovation while also protecting its users from malicious software. Having these components in place makes it possible to use the web while exposing users to a decreased chance of harm from malware and other related needs.[314] The realm of cyberspace is both complex to understand and multidisciplinary so it requires the formulation of policies that are both collabourative and driven by knowledge. The participation of a broad range of stakeholders would therefore be particularly instrumental in achieving the main priorities of the Cybersecurity Strategy. On the other hand, this does not imply that stakeholders have to be consulted on every single problem at all times, only when a problem is too difficult for any one stakeholder group to solve, all of the relevant parties have to cooperate in order to reach the optimum solution.[315] Although the representation of (technical, economic, and institutional) skills and resources by the Member States illustrates the lack of a collective vision inside the EU, the regulatory evolution of an EU strategic plan has minimized the disparities among Member States' cybersecurity reform priorities. Due to the efforts made over the last two decades, a cohesive paradigm, both procedurally and substantively, has nearly been accomplished. By doing so, the EU is establishing a trusted and reliable infrastructure, which is a way to cultivate the EU Digital Single Market and the private organisations functioning inside it.[316]

---

[314] *Lilly Pijnenburg Muller*, „Cyber Security Capacity Building in Developing Countries: Challenges and Opportunities“, Norwegian Institute of International Affairs, Oslo, 2015.

[315] Léte B., *Implementing the EU Cybersecurity Strategy Recommendations From The European Cyber Agora, EU Cyber Agora*, Washington, 2021.

[316] Bruni Alessandro, „Promoting Coherence in the EU Cybersecurity Strategy “, Security and Law: Legal and Ethical Aspects of Public Security, Cyber Security and Critical Infrastructure Security, 2019.

VI Conclusion

In the past ten years, cybersecurity has rapidly evolved into a significant concern and is an important transversal framework in the EU. In today's world, it is debatable that the program takes into account both positive and negative factors, which frequently finds it challenging to estimate the amount of its real usefulness as well as its impact. Originally, due to the EU's inwardly focused perspective on the matter, the policy's primary emphasis was placed on cyber resilience and geopolitical autonomy. Manifestly, the EU's diplomatic narrative which might support it gives rise the method of developing a fully accessible, sustainable, and protected cyberspace in the digital century, in the world of globalization security, is unfolding. This proactive storyline can indeed facilitate the EU in directing the goal of establishing an open, free, and stable electronic communications infrastructure in the digital century.[317] The intent of "developing coherent EU international cyber policy and supporting EU basic values" places an emphasis on providing backing for the core principles that underpin the European Union. Nurturing cyberspace as a zone of openness and basic rights (particularly availability of information), free speech and the press are one of the foremost essential aspects of the European Union's (EU) international cyber agenda. Increasing web access ought to facilitate the advancement of revolutionary change and its adoption all around the world. Therefore, building a resilient, ecologically aware, and technologically advanced Europe requires cybersecurity to be a top concern. Because the production process in the EU is becoming based on computers and networks, hackers have the potential to have a significantly

[317] Agnes Kasper,Vernygora Vlad, „Política De Ciberseguridad De La Unión Europea (UE): ¿narrativa estratégica Propia De Una Ciber Potencia O Discurso Ambiguo Para El Mercado Común?“, Cuadernos Europeos De Deusto, no 65, 2021.

bigger effect on organisations and economies than they ever had earlier.

Strengthening an individual's cyber capabilities is of the utmost importance for fulfilling the aforementioned aims. Future activities will concern encouraging countries to acquire the skillsets adequate to recognize and manage data breaches and, as a result, to promote stability and development in the world. The European Union (EU) and its Member States are currently focusing their cyber capacity development action plans on acknowledging security breaches , with a strong focus on policies all over the core aspects of cyber defense. Specifically, they are empowering an ambitious long - term scheme, embracing policy measures, and enhancing the competence of the criminal justice process.

The policy argument has progressed tremendously, which has led to the establishment of many collabouration solutions as a direct outcome of these developments. However, the steps that governments take to systematize the feedback of several stakeholders are, in far too many jurisdictions, still unefficient. Despite this, the components necessary for consistent and methodical collabouration across different sectors in cyberspace are already at our disposal; however, they require improved coordination. Altering way of thinking and creating cyberrisc conciouns mindset is of the paramount importance in ensuring full inclusion among all key players which means further efforts and dedication in encouraganing a range of different sectors, including governement, the business, societal actors and academic community.

Bibliography

- Agnes K.,Vernygora V., „Política De Ciberseguridad De La Unión Europea (UE): ¿narrativa estratégica Propia De Una Ciber Potencia O Discurso Ambiguo Para El Mercado Común?“. Cuadernos Europeos De Deusto, no 65, 2021.

- Arias, M. L., "The European Union Criminalizes Acts of Racism and Xenophobia Committed through Computer Systems“, Wayback Machine, 2011.
- Bell M., „Cybersecurity: NIS2 - eco Position Paper“, ECO, Berlin, 25 November 2021.
- Bendiek A., Kettemann M. C., „Revisiting the EU Cybersecurity Strategy: A Call for EU Cyber Diplomacy“, Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, no.16, 2021.
- Bruni, A., „Promoting Coherence in the EU Cybersecurity Strategy“, Security and Law: Legal and Ethical Aspects of Public Security, Cyber Security and Critical Infrastructure Security, 2019.
- Bures O., Carrapico H., „Private Security Beyond Private Military and Security Companies: Exploring Diversity Within Private–Public Collaborations and Its Consequences for Security Governance“, Springer Science and Business Media, 2016, Available at: https://link. springer.com/content/pdf/10.1007%2Fs10611–016–9651–5.pdf, (Accessed: 04.04. 2022)
- Carvalho, J.V., Carvalho, S., Rocha, Á., „European strategy and legislation for cybersecurity: implications for Portugal“, Cluster Comput no 23, 2020.
- Cavelty D., Myriam C., Wenger A., “Cyber Security Meets Security Politics: Complex Technology, Fragmented Politics, and Networked Science”, Contemporary Security Policy 41, 2020.
- Collett R., Barmpaliou N., International Cyber Capacity Building: Global Trends And Scenarios, Luxemburg, 2021.
- Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, EU OJ L 194, 19 July 2016.
- EC, Joint Communication to the European Parliament and the Council: The EU's Cybersecurity Strategy for the Digital Decade, Brussels, 2020.

- EC, New EU Cybersecurity Strategy and new rules to make physical and digital critical entities more resilient, 2020, Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2391 (Accessed: 18.04.2022)
- EEAS, Cybersecurity: EU External Action, 2022, Available at: https://www.eeas.europa.eu/eeas/cybersecurity-eu-external-action_en (Accessed: 16.04.2022.)
- EU Council, Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, Brussels, S407/08, 11 December 2008.
- Europe's moment: Repair and Prepare for the Next Generation, COM 98 final, 2020.
- European Commission and High Representative Joint Communication, Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace, Brussels, 7 February 2013.
- European Commission, (2020b), „New EU Cybersecurity Strategy and new rules to make physical and digital critical entities more resilient", Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2391 (Accessed: 04. 04., 2022)
- Lannon E., EU Cybersecurity Capacity Building in the Mediterranean and the Middle East, IEMed Mediterranean Yearbook 2019, Available at: https://www.iemed.org/publication/eu-cybersecurity-capacity-building-in-the-mediterranean-and-the-middle-east/ (Accessed: 26.04.2022.)
- Lété B., Implementing the EU Cybersecurity Strategy Recommendations From The European Cyber Agora, EU Cyber Agora, Washington, 2021.
- Leyen U., „A Union that strives for more: My agenda for Europe", Political Guidelines for the Next European Commission 2019-2024. Available at: https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf (Accessed: 14.04. 2022)

- Lilly Pijnenburg Muller, Cyber Security Capacity Building in Developing Countries: Challenges and Opportunities, Norwegian Institute of International Affairs, Oslo, 2015.
- National Research Council, Disaster Resilience: A National Imperative, Washington, DC: The National Academies Press, 2012.
- Nedeljković S., Forca B., Evropska Strategija Bezbednosti i sajber pretnje – Značaj za Srbiju, Vojno delo, 3/2015.
- Office of the Director of National Intelligence, Cyber Resilience and Response: Public-Private Analytic Exchange Program, 2018, Available at: https://www.dni.gov/files/PE/Documents/2018_Cyber-Resilience.pdf (28.04.2022.)
- Parn, E.A. and Edwards, D., "Cyber threats confronting the digital built environment: Common data environment vulnerabilities and block chain deterrence", Engineering, Construction and Architectural Management, Vol. 26 No. 2, 2019.
- Patryk P., EC, Directorate-General for International Cooperation and Development. Institute for Security Studies, Operational Guidance for the EUs International Cooperation on Cyber Capacity Building, Paris, 2018.
- The Budapest Convention on Cybercrime, Availavle at: http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm (Acceseed: 10.04.2022.)
- The EU Security Union Strategy 2020-2025.
- The European Agency for Cybersecurity (ENISA), find more at: https://www.enisa.europa.eu (Accessed: 10.04.2022.) was established in 2004 by the Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 OJ L 77 1–11, Brookson C., Cadzow S., Eckmaier R., Eschweiler J., Gerber B., Guarino A., Rannenberg K., Shamah J., Gorniak S., "Definition of Cybersecurity-Gaps and Overlaps in Standardisation" Heraklion, ENISA, 2015. Collett R., „Understanding cybersecurity capacity building and its

relationship to norms and confidence building measures“, Journal of Cyber Policy, 6:3, 2021.
- The International Data Corporation forecast, Available at: https://www.idc.com/getdoc.jsp?containerId=prUS45213219 (Accessed: 10.04.2022.).

Ljiljana Jovanović, PhD
Center for Human Rights, Faculty of Law, University of Montenegro

INTEGRATION ON THE EUROPEAN UNION LABOUR MARKET WITH SMART MIGRATION MANAGEMENT: HIGHLY EDUCATED LABOUR FORCE AS A SPECIAL RESOURCE

Summary

One of the priority values of every society is human resources. Freedom of movement and freedom to choose one's place of residence, increase mobility and enable the migration of the population in order to create better living and working conditions. Today's legal heritage of European Union in the field (imm)migration regulates, among other things, the status of highly qualified personnel on the EU labour market. The new Pact on Migration and Asylum, together with the establishment of a Talent Base according to EU regulations, requires the adaptation of migrant workers to modern business conditions in the EU labour market. Digitization and flexibility in work cause the emergence of non-standard forms of work. The issues of interdependence of highly educated workforce with professional knowledge and skills, together with the trends in the labour market, are especially relevant in times of rising unemployment and changes in labour market needs. Economically strong countries are increasingly absorbing a highly skilled workforce, resulting in benefits for both the individual and society. Through the analysis of the labour market, the author emphasizes the importance of managing migration flows, the need to adjust higher education programs and the legal and administrative structure of non-EU countries. By adjusting these activities to the conditions on the EU labour market, it is expected that there will be a reduction in

unemployment in the countries that are in the process of joining the EU.

Key words: *labour market, migration, unemployment, highly educated workforce.*

I Introduction

Human migrations have always devised the structure of the international community, bringing a sense of dynamism to it. It is the natural need of people for a better life that significantly affects migratory movements. The relevant literature aims to delve into the phenomenon of migration from various scientific points of view.

Based on the theoretical elabourations, it may be generally inferred that 'international migration is a multi-disciplinary concept and it encompasses a number of disciplines such as Economics, Sociology, Geography, Culture, Law, Political Science, International Relations, Demography and Psychology. It has therefore become possible to identify a single unique theory on international migration'.[318]

According to Haas, the phenomenon of migration may be comprehended through the conceptualization of the migration process: as a function of aspirations and capabilities to migrate within given sets of perceived opportunity structures. On this basis, we can define human mobility as people's capability (freedom) to choose where to live – including the option to stay – rather than the act of moving itself. Moving and staying then become complementary manifestations of the same migratory agency.'[319]

Nowadays, the provisions of national and international regulations guarantee the human rights of migrants to every

[318] *Wickramasinghe A.A.I.N., Wimalaratana Wijitapure*, International Migration and Migration Theories, Social Affairs, 1 (5), 2016, pp.13-32,p.27.
[319] *De Haas, H.*, 'A theory of migration: the aspirations-capabilities framework,' Comparative Migration Studies 9 (8), 2021, pp. 2- 35, p.32.

individual. The contemporary international community at the global level shares the common values of freedom of movement. The protection of freedom of movement, as one of the freedoms of the human rights corpus[320], is stipulated and guaranteed by international acts. The Universal Declaration of Human Rights, an umbrella international act in this field, sets forth in Article 13: (1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country.

Migration has been a highly significant issue in the area of the European Union, particularly in the last few decades. The reasons for more intensive migration in the EU lie in the transition processes in a vast number of countries, as well as in increasing worldwide interconnection in the markets, technological change and globalization.'[321]

The Treaty on the European Union[322] sets, *inter alia*, the objectives aimed at fostering economic development, preserving peace, and protecting the rights, freedoms and interests of its citizens. The Preamble to the Treaty defines as one of its objectives the development of 'the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating.' As regards migration issues, the Treaty lays down certain rights of migrant workers (Art.48), solidarity between the Member States that is fair towards third-country nationals (Art.67) and the development of a common immigration policy (Art.79).

---

[320] General Assembly resolution 217 A (III), *Universal Declaration of Human Rights,* 10 December 1948, available at: https://www.un.org/en/udhrbook/pdf, (20.03.2022).

[321] *Kurekova, Lucia* (2011) 'Theories of Migration: Conceptual Review and Empirical Testing in the Context of the EU East West Flows', Paper Prepared for Interdisciplinary Conference on Migration Economic Change, Social Challenge, University Collage, London, 6-9 April 2011, available at: http://www.miglib.org.

[322] European Union, *Treaty on European Union*, Official Journal C 326, 26/10/2012, available at: https://EUR–LEX.europa.eu/legal/content/EN.

The Treaty of Lisbon[323], which came into force in 2009, offered a new perspective on the right to freedom of movement within the European Union and the possibility to work within the single market of the European Union. For the first time, the European Union claimed a legal subjectivity, and thus the possibility of concluding international agreements and gaining membership in international organizations.

The Treaty of Lisbon sets forth in Article 2, paragraph 2: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'[324]

Article 63a of the Treaty of Lisbon sets out: 1) The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in the Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by the Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of

[323] European Union, *Treaty of Lisbon,* Offical Journal of the European Union, C 306, Vol.50, 17 December 2007, available at: https://eur–lex.europa.eu/legal/content/EN, (26.03.2022).
[324] *Ibid.*

persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.'

Much of the earlier migration from poorer to richer European countries, such as the flow of southern European guest workers to Germany in the 1960s and 1970s, involved unskilled workers that provided cheap labour in construction, factory jobs, or low-paid service occupations. However, globalization and technical change have raised the relative demand for high-skilled workers, especially in countries with a comparative advantage in skill-intensive goods. As a consequence, worldwide migration to high-income countries has become more skill-biased in recent decades.[325]

In this regard, the author of this paper intends to outline a different approach to migration and its connection to other areas, including higher education and the labour market.

II Legal Instruments

The law of the European Union is a special *acquis* governing the relations between the EU Member States, whereby the states have transferred part of their authorities to the supranational level. Hence, the EU Member States are responsible for the approximation of the national legislation with the EU acquis. [326]

Modern European Union legislation in its regulations addresses a large number of issues related to migratory movements in the EU (entailing the rights of foreigner nationals with permanent residence and their status,

[325] *Dorn David, Zweimuller Josef,* "Labour Market Integration in Europe", IZA, Institute of Labour Economics, 2021, p.11.

[326] In Case 6/64 *Costa* v. ENEL [1964] ECR 585, the Court of Justice of the European Union took a position regarding the legal nature of the EEC, pointing out that the Member States 'have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves' and that, 'domestic legal provisions, however framed, cannot override the law stemming from the Treaty (...).'

employment, the residence of college students, researchers, residence and work of a highly qualified workforce).

For the purposes of this article, the author focused on the content of the[327] EU Blue Card Directive (EU) 2021/1883 and the New Pact on Migration and Asylum.[328]

Directives are legal acts of the European Union that prescribe legally binding objectives the Member States must meet. Member States are free to decide on the form and method of transposition of the Directive into national law, with due regard to the deadlines and the corresponding transposition results.

A. The EU Blue Card Directive (EU) 2021/1883

The legal basis for the adoption of Directive (EU) 2021/1883 is Article 79 of the Treaty on the Functioning of the EU,[329] which governs the EU common migration policy, for the purpose of the efficient management of migration flows, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment and Council Directive 2011/98/EU of 13 December 2011, which regulates an application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State.

[327] Available at: https://eur–lex.europa.eu/legal/content/EN, Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of employing highly qualified workers and repealing Council Directive 2009/50 / EC, Official Journal of the European Union, L 186/105, (Council Directive 2009/50/EC is to be repealed on 23 December 2023), 23.03.2022.

[328] European Commission, *A new pact on* migration *and* asylum, COM(2020) 609 final, available at: https://eur–lex.europa.eu/legal/content/en, 27.03.2022.

[329] European Union, *Consolidated version of the EU Treaty and the Treaty on the Functioning of the EU*, Official Journal of the European Union C 202, 7 June 2016.

Article 2 of Directive (EU) 2021/1883 sets out that: (a) 'third-country national' means any person who is not a citizen of the Union, within the meaning of Article 20(1) TFEU.'[330]

The EU Blue Card Directive (EU) 2021/1883, revises and enhances the existing regulations in this field and addresses the changes in the labour market based on higher education, by creating the Talent Base, as a new form of partnership between relevant actors. The Directive pertains to the conditions of entry, residence and employment of third-country nationals, for the purpose of recruiting highly qualified workers.

Article 2 (1) of the Directive specifies that: ' highly qualified employment' means the employment of a person who: (a) in the Member State concerned, is protected as an employee under national employment law or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, another person; (b) is paid for that work, and (c) has the required higher professional qualifications.

The Directive encompasses the criteria for obtaining the EU Blue Card, the period of its validity in the Member States, which may not be less than 24 months (Article 9 (2)), and the content of the EU Blue Card form (Article 9 (3)[331]. The method

[330] In compliance with Article 20 (1) of the Treaty on the Functioning of the European Union (TFEU), every person holding the nationality of a Member State shall be a citizen of the Union, and shall have the freedom to move and reside freely in the territory of the Member States; the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in his Member State of residence, under the same conditions as nationals of that State; the right to enjoy, in the territory of a third country in which the Member State of which they are not represented, the protection of the diplomatic and consular authorities of any Member State under the same conditions as nationals of that State; the right to petition the European Parliament, to apply to the European Ombudsman and to address the Union institutions and advisory bodies in any of the languages of the Treaty and to obtain a reply in the same language.

of the EU labour market access is set out in Article 15, and the mobility of the valid EU Blue Card holder is defined in Articles 20 and 21.

The Directive was adopted on the grounds of the European Commission's strategic commitments from 2010, entitled: 'Europe 2020: A strategy for smart, sustainable and inclusive growth', and 2014[332] conclusions on the need of creating conditions that would make the European area attractive to talent and skills, by streamlining the existing rules in the field of migration. The European Commission's commitment to more effective talent attraction was[333] further defined in the 2015 document 'The European Agenda on Migration'.[334] The need to revise Directive 2009/50/EC was put forward in 2016 in view of the importance of equalizing qualifications in non-EU countries, which would contribute to making their qualifications comparable to European qualifications.

This would be instrumental in attracting highly qualified researchers and experts from outside the EU, in order to ensure the skills the economy needed and vice versa, and it would make it easier for researchers and experts from the EU to work outside the EU. The revised EQF would improve the understanding of qualifications acquired abroad and it would facilitate the integration of migrants, newcomers and those already residing in the EU into the EU labour market. This is

---

[331] The conditions for obtaining the Blue Card: the applicant must not be a national of an EU Member State or a national of Iceland, Switzerland, Lichtenstein and Norway; high professional qualifications or eligibility for one of the regulated professions in the Member State for which the application is submitted; a valid work contract or a binding job offer hin the EU Member State for which the application is submitted.

[332] European Commisson, *Europe 2020, A Strategy for Smart, Sustainable and Inclusive Growth*, Com (2010) 2020, available at: https://eur-lex-52010dc2020./en/, 26.03.2022.

[333] European Council, *Strategic Agenda for the Union in times of change,* 2014, available at: https://www.consilium.europa.eu/media/, 02.04.2022.

[334] European Commisson, *A European Agenda on Migration,* com (2015)240 final, available at: https://eur–lex.europa.eu/legal/content/en.

in line with the efforts to design a smarter, well-managed legal migration policy.[335] The revision of the Blue Card Directive is particularly significant in this respect.[336] The revision of the Directive was also discussed in the Commission's Communication of 23 September 2020 'on a New Pact on Migration and Asylum', which states that the reform of the EU Blue Card 'must bring real EU added value in attracting skills through an effective and flexible EU-wide instrument.' [337]

B. New Pact on Migration and Asylum

The development of technologies, changes in the labour market, intensified migratory movements and the harmonization of higher education systems in Europe are some of the reasons behind the adoption of a New Pact on Migration and Asylum and the planned partnership between relevant actors for the creation of the Talent Base. In this regard, the need to attract highly qualified talents from third countries has been recognized in European economic and social structures. Thus, the Preamble to the Pact recalls the EU's aspiration for humane migration management, in line with the EU values.

Furthermore, Chapter 6.6 of the Pact, taking into account the needs of the EU labour market, provides for more active encouragement of labour mobility, while respecting the competencies of the Member States, as well as the establishment of the Talent Partnership, aimed at providing more efficient support to legal migration and mobility. In this

[335] European Commission, *European Agenda on Migration, Com (2015) 240 and Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe COM, 2016, p. 197.*

[336] European Parliament and Council, *Proposal for a Directive of the on the conditions of entry and residence of third -country nationals for the purposes of highly skilled employment*,COM(2016) 378, available at: https//: eur-lex.europa.eu/legal-content/EN/, 26.03.2022.

[337] European Commission, *A New Pact on Migration and Asylum*, COM (2020) 609 final, available at: https://eur-lex.europa.eu/legal-content/EN/, 26.03.2022.

respect, the document states that forging relevant partnerships in the Western Balkan countries should be set as a priority, by fostering capacity building in the area of knowledge and skills. Chapter 7 of the Pact envisages the inclusion of highly skilled workers - migrants in the labour market, who can contribute to 'reducing skills gaps and increasing the dynamism of the EU labour market.' [338]

In order to pursue an innovative approach to migration management, the European Commission, through the New Pact on Migration and Asylum:,(…) put an emphasis on increased cooperation with partner countries on legal pathways. This comes with a view to addressing emerging demographic shifts, labour market needs and skills shortages in different sectors. The Pact recognizes that, while activating and upskilling the domestic workforce is necessary, it will not sufficiently address all shortages in the labour market, highlighting the potential of foreign migrant workers[339], including in the COVID-19 context. 'The talent partnership initiative is supposed to provide direct support for mobility schemes as well as associated capacity building between designated partner countries and the EU Member States, with the goal of matching skills of workers from third countries with the labour market needs within the EU[340].

'At present, an increasingly large share of the international migration flow is made up of high-skilled migrants. Skills, as a term, are defined in various ways. In most cases, it is related to the highest level of education obtained by the migrant. Such an approach is sometimes

[338] European Commission, *A New Pact on Migration and Asylum*, COM (2020) 609 final, available at: https://eur-lex.europa.eu/legal-content/EN/, 02.04.2022.

[339] *Segeš Frelak, Justyna, Chirita, Oleg and Mananashvili, Sergo,* 'The Impact of COVID-19 on Talent Attraction: an Unexpected Opportunity for the EU?' ICMPD, Annual Report 2020; 2021, p. 15.

[340] *Schneider Jan,* 'Beyond Talent Partnerships: Bosting Legal Mobility under the New EU Migration Pact,' IEMed Mediterranean Yearbook, 2021, p.309.

criticized due to the particular prestige of schools or universities, and thus a different level of knowledge, skills and competencies obtained.'[341]

III En route to a Talent Base

The creation of the Talent Base is a long-term process, which requires special profiling of highly qualified knowledge and skills in order to boost employment and facilitate economic progress at the national and international level.

The prevailing opinion in the relevant scientific theory is that the concept of 'talent' is not a trait or skill a person already possesses. This notion is increasingly associated with the future development of an individual. In this sense, 'developed talents are potentials for future achievements that are based on actual abilities.'[342]

According to the views of the EU, the Western Balkans require a tailor-made approach, both due to their geographical location and to their future as an integral part of the EU: coordination can help to ensure they are well equipped as future Member States to respond constructively to shared challenges, developing their capacities and border procedures to bring them closer to the EU given their enlargement perspective.[343] 'Digital transformation will play a central role in relaunching and modernising the economies of the Western

[341] *Kubiciel-Lodzińska Sabina & Maj Jolanta,* 'High-Skilled vs. Low-Skilled Migrant Women: the Use of Competencies and Knowledge - Theoretical and Political Implications: an Example of the Elderly Care Sector in Poland, Journal of International Migration and Integration, 2(2), 2021, p.1553, available at: https://doi.org/10.1007/s12134-021-00813-5.

[342] *Meyer Kirsten,* 'Talents, abilities and educational Justice', Educational Philosophy and Theory, 2021,53 (8), p.801.

[343] European Commision, A New Pact on Migration and Asylum, COM(2020) 609 final, available at: https://eur–lex.europa.eu/legal/content/en, (04.04.2022).

Balkans in line with the digital agenda for the Western Balkans.'[344]

While the admission of economic migrants remains to be the competence of the Member State, an improved framework at the EU level could facilitate the matching of skills and talents with national needs. As part of the planned measures, the EU Talent Pool will be developed,[345] 'in the form of a recruitment platform allowing the employers' needs to meet skilled third-country nationals.'[346]

'Meeting the need for appropriate skills for dual transition and tackling demographic challenges can also be achieved through a strategic approach to legal migration aimed at attracting and retaining talent. To this end, the need to facilitate the recognition of the competencies of third-country nationals so that they can be involved in employment in the EU labour market is emphasized.'[347] As regards the Talent Partnership initiative, the Vice-President and Commissioner Margaritis Schinas suggested that 'well-managed, legal migration can bring great benefits to our society and the economy [and] play an important role in reducing the skills gap and boosting EU innovation potential. Talent Partnerships are

---

[344] European Commission, Digital Education Action Plan 2021-2027,p.18, available at: https://education.ec.europa.eu/focus-topics/digital-education action plan, (06.04.2022).

[345] *Guibert Lucie, Milova Maria, Daniela Movileanu,* 'The New Pact on Migration and Asylum: A Brief Summary and Next Steps, 89 Initiative, 2019, p.5.

[346] OECD-aBuilding and EU Talent Pool-A New Approach to Migration Management for Europe, 2019, Directive 2003/109/EC,2003 concerning the status of third-country nationals who are long-term residents and Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

[347]*Katsiaficas Caitlin*, *Segeš Frelak Justyna*, 'International migration Development,'COMMENTARY, ICMPD, International Centre for migration policy development, 2021, p.4.

a 'triple win' for all the parties involved. By doing so, Schinas directly referred to the labour market and economic interests of both the EU and its Member States as well as third countries and their individual citizens, respectively.'[348] The Talent Partnerships thus potentially represent a powerful instrument for cooperation between the EU and its key partner countries – to meet the labour market needs of both sides, as well as private sector priorities; to support the transition towards more inclusive, knowledge-based economies that are both digital and green; and, ultimately, to underpin the post-pandemic recovery'.[349]

A. Academic Migration

The period of academic mobility and migration, which commenced in the 1990s, was intensified by the introduction of study programmes and diplomas in the European area and the implementation of the principles of the Bologna Declaration. Due to the commitment of the European Union in the Lisbon Treaty, to be 'the most competitive economy' in the world, the global ranking of universities garnered special attention and 'was supported by, spreading belief that academic progress depended on a successful worldwide competition of the most excellent universities.'[350]

Fostering mobility from non-EU countries has been recognized by Article 3 of the Preamble to Directive (EU)

[348] *Schneider Jan,* 'Beyond Talent Partnerships: Bosting Legal Mobility under the New EU Migration Pact,' IEMed Mediterranean Yearbook, 2021, p. 319.

[349] *Segeš Frelak Justyna, Chirita Oleg and Mananashvili Serg,* 'The Impact of COVID -19 on Talent Attraction: An Unexpected opportunity for the EU,' Making Migration Better, Internatinal Centre for Migration Policy Development, 2020, p. 19.

[350] *Segeš Frelak Justyna, Chirita Oleg and Mananashvili Serg,* 'The Impact of COVID -19 on Talent Attraction: An Unexpected opportunity for the EU,'Making Migration Better, Internatinal Centre for Migration Policy Development, 2020, p.7.

2016/801, with the aim of '(...) of approximating national legislation on the conditions for entry and residence of third-country nationals. Immigration from outside the Union is one source of highly skilled people, and students and researchers are in particular increasingly sought after. They play an important role in forming the Union's key asset, human capital, and in ensuring smart, sustainable and inclusive growth, and therefore contribute to the achievement of the objectives of the Europe 2020 Strategy.'[351]

Ulric Teichle, in the part of the study which pertains to determining the typology of academic migration, distinguishes between early immigrants, doctoral immigrants, study mobile academics, doctoral mobile academics, and professional migrants. Another may be mentioned simply to show the variety of scopes: circulating for study: short term, circulating for work: short term, circulating for work: long term, migration for study: long term, and migration for work: long term'[352].

In the field of higher education, according to experts: 'By 2025 almost half of all job openings in the EU will require higher qualifications, usually awarded through academic and professional programmes at tertiary level. Skills developed through these programmes are generally considered to be drivers of productivity and innovation. Graduates have better chances of employment and higher earnings than people with only upper-secondary qualifications.' The objective to create more favorable conditions for the research and study of third-country nationals in the European Union has been pursued through the implementation of Directive 2016/801/EU of the European Parliament and the Council of 11 May 2016 on

[351] European Commission, *Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing,* Offical Journal of the European Union, L 132/25, 21 May 2016.

[352] *Teichler Ulric,* 'Academic Mobility and Migration: What We Know and What We Do Not Know',European Review, 23 (1), 2015, p.S27.

students and researchers. According to the European Commission, higher education is a key place where students acquire the skills they need in the future.' University education, which provides advanced knowledge and skills and enhanced research capacities, needs to keep step with rapid changes in a demanding labour market.[353] [354] [355]

In June 2016, the European Commission introduced the Action Plan on the integration of third country nationals – a major initiative that sought to add value at the EU level through structural support to Member States by providing them with a common policy framework for integrating third-country nationals.'[356]In this context, academic migrations play a significant role in facilitating the education process, as they contribute to matching the qualifications with knowledge, which is an important preparation of highly qualified migrant workers from third countries for the EU market.

B. Foreign Nationals Law[357]

The Foreign Nationals Law regulates the entry, exit, residence and work of foreign nationals in Montenegro. (Article 1). The residence of foreign nationals for schooling or

[353] European Commission, *A New Skills Agenda for Europe,* COM/2016/0381 final, available at: https://eur-lex.europa.eu/legal-content/EN/, 03.04.2022.

[354] European Commission, *Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing*,Offical Journal of the European Union, L 132/25, 21 May 2016.

[355] European Commision, *European Skills Agenda for sustainable competitiveness, social fairness and resilience,* COM (2020) 274 final, available at: https://eur–lex.europa.eu/legal/content/en, 04.04.2022.

[356] *Klara Foti* 'The role of the EU in integrating asylum-seekers and refugees: limitations and opportunities,'Transfer (25)1, 2019, p.126.

[357] Parliament of Montenegro, *Foreign Nationals Law,* Official Gazette of Montenegro, No. 12/2018 and 3/2019, available at: www.gov.me/dokumenta.

education, international exchange of pupils and students, and the temporary residence for specialization, professional training and practical instruction of foreign nationals are governed by Articles 47, 48 and 49. Article 50 of the Law regulates the temporary residence of foreign nationals for scientific research. A special chapter refers to the entry, exit, residence and work of EU citizens and their family members (Articles 160-186) and it is to be applied upon the accession of Montenegro to the European Union.

The provisions of the Law (Articles 187-191) pertain to the stay and work of foreign nationals with higher education qualifications and provisions related to the issuance of the EU Blue Card, the validity period, work on the basis of the EU Blue Card and the rights of the EU Blue Card holders, also to be applied upon the accession of Montenegro to the European Union.

Bearing in mind that Montenegro is in the process of joining the EU, the approximation of the Foreign Nationals Law with the acquis communautaire in the field of migration is necessary in order to create conditions for the free movement of workers and services. As an EU candidate country, Montenegro must align its regulatory framework with relevant EU law and ensure its full implementation. The Foreign Nationals Law aims to increase the possibilities of integration of third-country nationals, with permanent residence in Montenegro, in an effort to respect the economic and social cohesion, on which the EU rests.

IV Labour Market

The freedom of movement of workers within the EU is guaranteed by Article 45. of the Treaty on the functioning of the European Union (TFEU). Paragraph 2 of the same Article stipulates that: 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment,

remuneration and other conditions of work and employment[358].' The term 'worker' has been determined through the practice of the Court of Justice of the EU.

The position of the Court of Justice, which was the starting point for the later definition of the term worker, was presented by Vladimir Savković in a paper which cited Case -53/81 D.M. Levin v Staatssecretaris van Justitie (23 March 1982). According to Savković:,(…) although the classic definition of the term worker has not been provided in the case in question, it has been specified that the term worker is to be understood in accordance with the standards of Union law, and not in accordance with national standards in the field of labour legislation, as this would certainly lead to different application of Article 45 TFEU in the Member States.[359] Furthermore, Savković finds that the Court of Justice sought to define the concept of employment as broadly as possible, and thus the concept of a worker, as can be seen from the aforementioned position of the Court of Justice C-432/14 O v Bio Philippe Auguste SARL (1 October 2015), that employment is: 'any pursuit of activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.'[360]

The practice of the Court of Justice of the EU is particularly significant in the interpretation of the term 'worker' since there is no uniform determination of this term at the level of the European Union. Taking into account that, according to Perčević, 'there is Union legislation in the field of labour and social law, the question arises as to how the existing legislation at the European level would be applied. In this case, migrant workers would not be able to determine with certainty

[358] European Commission, *Consolidated version of the EU Treaty and the Treaty on the Functioning of the EU,* Official Journal of the European Union C 202, 7 June 2016.
[359] Savković Vladimir, *Pravo unutrašnjeg tržišta - privatnopravni aspekti,* [Internal Market Law - Private Law Aspect] Podgorica, 2019, p.77.
[360] *Ibid*., p. 77.

whether they also have the rights guaranteed by European Union law in the other Member States. Through the practice of the Court of Justice of the EU, it has been held that 'the Member States cannot apply national rules which are not in line with the European Union law to migrant workers, even in the areas which they consider essential for upholding their own social and economic policies.'[361]

Such a position of the Court of Justice guarantees that migrant workers shall have equal treatment on the territory of all EU Member States.

In the analysis of the European Union labour market, related to non-high-skilled immigrants and high-skilled immigrants, in the context of formal and non-formal education, the authors note, inter alia, that a clear difference in employment between non-high-skilled immigrants and high-skilled immigrants can be detected. Namely, the EU shows a tendency of greater admission of migrants with high qualifications, who can confer greater economic benefit to employers in the host country, especially in sectors where highly skilled labour is lacking. Furthermore, the authors of the analysis are of the opinion that:'admission is based on a set of criteria that identify competence with reference to formal education and the "market value" of the skills and competencies developed through formal and non-formal/informal learning, as well as that 'salary becomes a reductionist assessment criterion to make competences visible and select „high-skilled" individuals from among those who hold the minimum formal education credentials (often a higher education qualification) required in the host country. Skill is defined as the capacity to contribute to national economic success and generate direct revenue (create wealth) for the host

[361] *Peročević, Katarina*, Pojam 'radnika' u pravu Europske unije. Zbornik Pravnog fakulteta u Zagrebu, [The term 'worker' in the law of the European Union. Proceedings of the Faculty of Law in Zagreb] 67 (2), 2017, p. 324.

country.[362] [363] The employability of highly qualified and skilled labour is assessed by organizations willing to recruit and advance the individual through training, in order to meet the employer's expectations and be integrated into the labour market.' Item 4 of the Preamble to Directive 2019/1152[364] states, inter alia:' Labour markets have undergone far-reaching changes due to demographic developments and digitalisation leading to the creation of new forms of employment, which have enhanced innovation, job creation and labour market growth. '

Changes in the labour market can be seen in the ever-increasing need for digital skills, STEM occupations, as well as greater involvement of migrant workers, who can contribute to alleviating labour shortages. [365]

A. Highly skilled workforce within European Union labour market

Shaping education and training policies is necessary prerequisite for creation of dynamic and effective labour market. Understanding future skill needs is essential, planning and executing short and long term strategies according to it, particularly as labour markets undergo dynamic transformation driven by demographic change,

---

[362] *Souto-Otero Manuel, Villalba-Garcia Ernesto,* 'Migration and validation of non-formal and informal learning in Europe: Inclusion, exclusion or polarization in the recognition of skills?' International Review of Education, 61, 2015, pp. 600-601.

[363] *Risberg Annette, Romani Laurence*, 'Underemploying highly skilled migrants: An organizational logic protecting corporate 'normality,' Human relations, 75 (4), 2022, pp. 657 - 658.

[364] European Parliament and of the Council *Directive (EU) 2019/1152, on transparent and predictable working conditions in the European Union,* Offical Journal of the European Union, l 186, 11 July 2019, available at: https:// eur – lex.europa.eu/legal/content/en, 26.03.2022.

[365] Grath Mc John*, Report on Labour Shortages and Surpluses*, ELA (European Labour Authority), 2021, https://www.ela.europa.eu/2021, 26.03.2022.

digitization, extensive value chains and increased complexity in work organization. Progress has been slow, still noticeable lately, despite challenges imposed by COVID 19 pandemic. The European labour market is also challenged by changes in the demographic composition of the labour force as well as increased work complexities and processes. War in Ukraine is additional grave challenge in this and every other context regarding Europe.

Skill shortages and skill mismatch are major concerns for policy-makers. With mass job destruction and sectoral restructuring following the recent economic crisis, four in 10 EU employers had difficulty finding people with the right skills, while unemployment rates peaked. Rapid digitalization and technological skills obsolescence have also raised concerns about the extent to which the EU workforce is adequately prepared for the fourth industrial revolution. Yet, despite worries of increasing skill shortages and gaps, about 39 per cent of adult EU employees are over skilled and trapped in low quality jobs.[366] This fact is truly concerning, clearly indicating that education policies do not comply with labour market needs. The problem is more pronounced in other European countries, especially in Eastern Europe. It requires proactive attitude and well-planned actions towards its derogation.

Future employment trends by occupation will be based on employment in sectors as well as changes inside the sectors. Technological developments, and particularly the fourth industrial revolution and automation, are seen to have strong impact on employment and demand for higher-level occupations. Automated processes, robots and artificial intelligence can replace routine and data processing jobs and tasks, impacting both - blue and white-collar jobs. The introduction of robots/advanced machines can eventually replace some jobs but simultaneously may create new ones with pertinent specialized skills and higher qualification

[366] Insights into skill shortages and skill mismatch (2018), European Centre for the Development of Vocational Training.

demands. According to CEDEFOP[367] changing work content and increased task complexity will result in growth of the occupational group of ***legislators, senior officials and managers, professionals and technicians and associate professionals*** (ISCO 1, 2 and 3).

Adjustment is almost basic prerequisite for European job seekers nowadays. This often implies retraining, and of course constant improvement. Formal and informal training is necessity within constant changing and evolving market. Not all workers who accept a job that does not match their qualification are unfit for their jobs nor do they lack the need for continuing skill development. As the ESJS (European skills and jobs survey) data show, four of 10 overqualified workers still admit to having considerable scope to improve their skills to become fully proficient in their jobs. Enterprises that hire overqualified workers are also expected to enjoy positive productivity gains from the extra creativity and innovation that the overqualified may bring to their jobs, relative to their lesser educated colleagues.[368] Nevertheless, most of the overqualified remain in dead-end jobs, with limited opportunities to continue to improve their skills or to progress in their careers. While 31% of those in jobs matched to their qualifications had been promoted since the time they started, this was true of only 22% of the overqualified, according to the survey data. From this analysis it is clear that only multifaceted policy solutions can mitigate overqualification. Some overqualified workers will eventually progress with age towards more suitable workplaces but, to avoid the continued underuse of their skills from becoming ingrained, proactive and clear policy measures should be promoted, those which ensure adequate use of this very important resource which is qualified workforce.

---

[367] European Centre for the Development of Vocational Training– CEDEFOP, available at: https://www.cedefop.europa.eu/, 26.03.2022.

[368] *Kampelmann S.,Rycx F.*, „The impact of educational mismatch on firm productivity," Economics of Education Review, 31 (6) 2012, p.925.

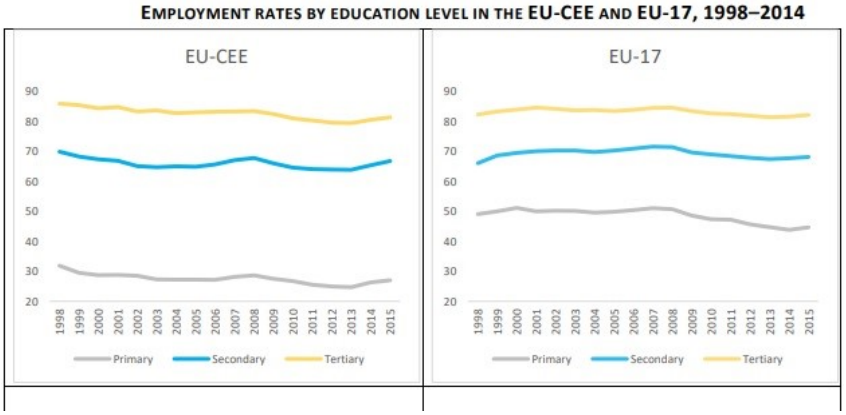
Through the blue card directive, which was officially adopted on October 7 2021, the EU aims to attract as well as retain qualified workers, in particular those that are needed in the sectors that are facing skills shortages. The Commission welcomed the agreement reached by the European Parliament and the Council on new rules for the entry and residence of highly skilled workers from outside the EU under the revised Blue Card Directive. The new scheme introduces efficient rules for attracting highly skilled workers to the EU, including more flexible admission conditions, enhanced rights and the possibility to move and work more easily between EU Member States. Agreement on the revised Blue Card is a key objective of the New Pact on Migration and Asylum. The Council of the European Union has adopted a directive that establishes the entry and residence conditions for highly skilled and qualified non-European nationals who plan to live and work in the EU.

It is a fact that migrant workers already make an important contribution to the EU's economy. Also, it is undeniable that European Union´s shrinking, aging society demands constant effort to attract skills and talent from abroad. *Blue Card* is a key element of the New Pact on Migration and Asylum that allows EU to normalize migration policy. New rules will make it easier to work and move within the EU and will recognize the potential of highly skilled workers from diverse backgrounds, including beneficiaries of international protection.

In order to stimulate its own economic growth and make the most of its green and digital transformation, EU have to be able to attract the best talent. The blue card consolidates the EU's position as a top global destination for highly-qualified workers, with the flexibility, mobility and family reunification opportunities it provides. EU aim to harmonize the residence and entry conditions for highly skilled and qualified workers as well as increase its attractiveness. In particular, the newly adopted rules establish more inclusive admission criteria, facilitate family reunification and intra-EU mobility, grant a

high level of access to the labour market, simplify the procedures for recognized workers, and extend the scope to include non-EU family members of EU citizens and beneficiaries of international protection.

Employment rates are strongly, and increasingly, related to education level, mainly because the employment rates among people with a primary-only education have declined the most. Differences between education levels are particularly high in CEE countries (CEE South (Romania and Bulgaria); CEE Continental (Slovenia, Slovakia, Hungary, Czech Republic, Poland and Croatia); CEE North (Estonia, Latvia and Lithuania), where the employment rates of low-educated workers are still very low. In the EU17, employment rates among individuals with secondary education increased in all countries except Ireland and the United Kingdom (before Brexit), while in the CEE countries they declined on average by 2.9 percentage points. Finally, employment rates of tertiary educated individuals declined in the EU-17, while they rose in the CEE-North.[369]

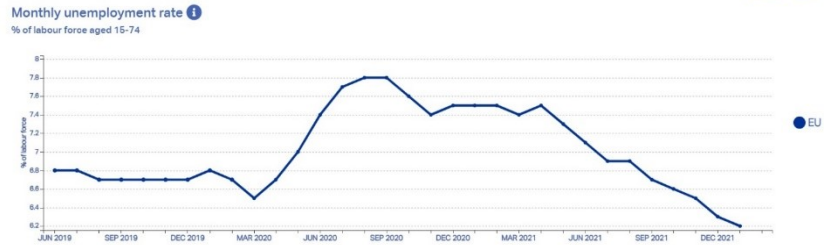


Source: WORLDBANK

When we take into consideration current EU labour market data, we can see clear downtrend in unemployment graph from

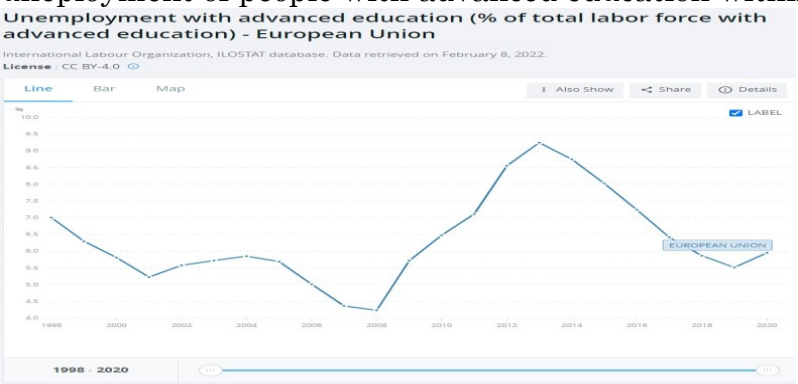
[369] Skills and Europe's Labor Market; How Technological Change and Other Drivers of Skill Demand and Supply are shaping Europe's Labor market (2018), World Bank report on the European Union.

september 2020. Unemployment decreased from 7.8% in september 2021. to 6.2% in january 2022. European Economy bounced back after tough first COVID 19 year. New Pact on Migration and Asylum will strengthen this recovery thus helping the stabilization of the whole European labour market.



Source: EUROSTAT

Similar trend shaped shown on graph which represent uneployment of people with advanced education within EU.



As for the trend of growth in the employment of highly qualified workers, Kotulovski cites the 2019 Eurostat survey in her study, which points to the growth in the number of employed older and highly qualified workers as the main drivers of employment growth, noting that: "European Union Labour Market research points to increased participation in this market, growth in the employment rate, and a decline in unemployment, all of which reduce the risks of poverty and social exclusion".[370]

[370] *Kotulovski Karla,* „Direktiva (EU) 2019/1152 o transparentnim i predvidivim radnim uvjetima u Europskoj uniji – univerzalna zaštita za sve

V Concluding Remarks

Through its long-term migration policy, the European Union respects the principles of human rights in the area of freedom of movement, fair solidarity toward third-country nationals and a common approach to migration in its territory. In this regard, it humanizes the living and working conditions of third-country nationals and upholds the mobility of highly skilled labour.

The analysis of the relevant literature and appropriate indicators indicates that scientific and technological progress has brought about changes in the structure of the EU labour market. Modern technologies with tendencies of further development require appropriate highly qualified knowledge and skills that will bring economic progress to the individual and society as a whole. As migrants' rights have been enhanced through the revision of the relevant directives, the concept of dignified work, as a principle of the European Union's migratory policies, will take on a new dimension in the area of attracting and retaining highly qualified third-country nationals. The New Pact on Migration and Asylum provides an opportunity to foster cooperation in launching Talent Partnerships through dialogue between the third country and the EU Member State, as a long-term commitment to investing in education. Pursuant to the Directive, the Blue Card holders are given better access to the EU labour market, greater mobility on EU territory, adaptability to changes in the labour market, family reunification, as well as a position equal to that of national permit holders. The Pact recognizes Western Balkan countries as a priority for capacity building in the area of knowledge and skills. The new occupations shaped by digitalisation, technological advancement and the changed

postojeće i buduće oblike zapošljavanja“, (Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union – universal protection for all existing and future forms of employment) Zagrebačka pravna revija, 10 (1), 2021, p.59.

structure of the EU market open up the opportunity for the creation of new non-standard jobs that encourage migratory movements.

Upon examining the aforesaid provisions of the European law in the field of attracting highly qualified labour, we may infer that smart migration management lies in the EU's central commitment to high qualifications and skills, recognized in the modern labour market. Migration management policies within the EU incline towards better conditions for a highly skilled workforce. The analysis of employability in the labour market suggests that employment rates are strongly related to the level of education, i.e. that highly educated staff find employment in the EU market faster. The increasingly demanding labour market rests on new, cutting-edge knowledge, skills and innovation, acquired through higher education, as the most important determinant of productivity and long-term sustainable economic progress.

The European Union meets its strategic commitments to mobility from non-EU countries as an important human resource in ensuring smart, sustainable and inclusive growth. In this regard, academic mobility between third countries and the EU gives a strong impetus to the process of matching knowledge and skills in the field of higher education.

The Foreign Nationals Law stipulates the conditions of entry of migrant workers and governs their stay on the territory of Montenegro. In the context of the provision of working conditions for highly qualified foreign nationals, the Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment has been fully transposed into national law, whereas the provisions laying down the conditions for the employment of highly qualified foreign nationals in Montenegro can only be applied upon the accession of Montenegro to the European Union. In view of the changes in the structure of the labour market, the amendment to the Foreign Nationals Law should enable the chapter to

which the Council's Directive 2009/50/EC has been transposed to be amended so as to allow the application of the relevant provisions of the law before Montenegro joins the European Union.

Furthermore, in order to create favourable conditions for residence and work of foreign nationals in Montenegro, Directive (EU) 2016/801 of the European Parliament and the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and *au pairing* should be fully transposed. In this sense, the Foreign Nationals Law should be amended in the part relating to mobility within the European Union, the validity of authorizations for researchers, short-term and long-term mobility of researchers and members of their families, student mobility, safeguards and sanctions in cases of mobility, as well as in the chapters containing provisions on cooperation between contact points and statistics. By creating reciprocal conditions in the national labour market through adapted administrative capacities and procedures, the opportunity for attracting highly qualified foreign nationals arises.

It follows from all of the above that higher education, adapted to the new needs of the labour market, is recognized as the potential and a common value of the European Union Member States and third countries, with the aim of increasing the employment rate and achieving economic progress at the national and European Union level.

Bibliography

- *De Haas, H.*, ,,A theory of migration: the aspirations-capabilities framework," Comparative Migration Studies 9 (8), 2021.

- *Dorn David, Zweimuller Josef,* ,,Labour Market Integration in Europe", IZA, Institute of Labour Economics, 2021.
- *Foti Klara,*,,The role of the EU in integrating asylum-seekers and refugees: limitations and opportunities," Transfer (25)1, 2019.
- *Guibert Lucie, Milova Maria, Daniela Movileanu,* ,,The New Pact on Migration and Asylum: A Brief Summary and Next Steps, 89 Initiative, 2019.
- Grath Mc John, *Report on Labour Shortages and Surpluses*, ELA (European Labour Authority), 2021, https://www.ela.europa.eu/2021.
- *Kampelmann S.,Rycx F.*, ,,The impact of educational mismatch on firm productivity," Economics of Education Review, 31 (6) 2012.
- *Katsiaficas Caitlin*, *Segeš Frelak Justyna*, ,,International migration Development,"COMMENTARY, ICMPD, International Centre for migration policy development, 2021.
- *Kubiciel-Lodzińska Sabina & Maj Jolanta,* ,,High-Skilled vs. Low-Skilled Migrant Women: the Use of Competencies and Knowledge - Theoretical and Political Implications: an Example of the Elderly Care Sector in Poland, Journal of International Migration and Integration, 2 (2), 2021.
- *Kurekova, Lucia* (2011) ,,Theories of Migration: Conceptual Review and Empirical Testing in the Context of the EU East West Flows", Paper Prepared for Interdisciplinary Conference on Migration Economic Change, Social Challenge, University Collage, London, 6-9 April 2011.
- *Kotulovski Karla,* ,,Direktiva (EU) 2019/1152 o transparentnim i predvidivim radnim uvjetima u Europskoj

uniji – univerzalna zaštita za sve postojeće i buduće oblike zapošljavanja", (Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union – universal protection for all existing and future forms of employment), Zagrebačka pravna revija, 10 (1), 2021.

- *Meyer Kirsten,* ,,Talents, abilities and educational Justice," Educational Philosophy and Theory, 53 (8), 2021.
- *Segeš Frelak, Justyna, Chirita, Oleg and Mananashvili, Sergo,* ,,The Impact of COVID-19 on Talent Attraction: an Unexpected Opportunity for the EU?" ICMPD, Annual Report 2020; 2021.
- *Segeš Frelak Justyna, Chirita Oleg and Mananashvili Serg,* ,,The Impact of COVID -19 on Talent Attraction: An Unexpected opportunity for the EU," Making Migration Better, Internatinal Centre for Migration Policy Development, 2020.
- *Schneider Jan,* ,,Beyond Talent Partnerships: Bosting Legal Mobility under the New EU Migration Pact," IEMed Mediterranean Yearbook, 2021.
- Savković Vladimir, *Pravo unutrašnjeg tržišta - privatnopravni aspekti,* Podgorica, 2019.
- *Peročević Katarina*, ,,Pojam "radnika" u pravu Europske unije," Zbornik Pravnog fakulteta u Zagrebu, 67 (2), 2017.
- *Risberg Annette, Romani Laurence*, ,,Underemploying highly skilled migrants: An organizational logic protecting corporate 'normality," Human relations, 75 (4), 2022.
- *Souto-Otero Manuel, Villalba-Garcia Ernesto,* ,,Migration and validation of non-formal and informal learning in Europe: Inclusion, exclusion or polarization in the recognition of skills?" International Review of Education, 61, 2015.
- *Teichler Ulric,* ,,Academic Mobility and Migration: What We Know and What We Do Not Know," European Review, 23 (1), 2015.

Wickramasinghe A.A.I.N., Wimalaratana Wijitapure,

International Migration and Migration Theories, Social Affairs, 1 (5), 2016.

- WEB SITE:
- European Centre for the Development of Vocational Training - CEDEFOP, https://www.cedefop.europa.eu/.
- European Commision, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020, https://eur-lex-52010DC2020./EN/,2020; *A European Agenda on Migration and European Migration Program,* COM (2015) 240 and Towards a reform of the Common European Asylum System and the expansion of legal opportunities to come to Europe, COM (2016) 197, Digital Education Action Plan 2021-2027, https://education.ec.europa.eu/focus-topics/digital-education action plan/. *A New Skills Agenda for Europe,* COM/2016/0381 final; *Skills Agenda for sustainable competitiveness, social fairness and resilience,* COM (2020) 274 final; *A New Pact on Migration and Asylum,* COM(2020) 609 final, 2016, https://eur-lex.europa.eu/legal-content/EN/,
- European Parliament and of the Council, *Strategic Agenda for the Union in Times of Change,* 2014, https://www.consilium.europa.eu/media/.
- European Union, *Treaty on European Union*, Official Journal C 326, 26/10/2012, *Treaty of Lisbon,* Offical Journal of the European Union, C 306, Vol.50, 17 December 2007.,*Consolidated version of the EU Treaty and the Treaty on the Functioning of the EU*, Official Journal of the European Union C 202, 7 June 2016, https://eur-lex.europa.eu/legal-content/EN/.
- General Assembly resolution 217 A (III), *Universal Declaration of Human Rights,* 10 December 1948, https://www.un.org/en/udhrbook/pdf.
- Skupština Crne Gore, *Zakon o strancima,* ,,Službeni list Crne Gore“, br. 12/2018 i 3/2019, (Parliament of Montenegro, Law on Foreigners, "Official Gazette of Montenegro", no. 12/2018 and 3/2019), www.gov.me/dokumenta.

LLM Milena Aćimić Remiković, PhD candidate
Teaching Assistant at Faculty of Law University of Montenegro

GENDER MAINSTREAMING ON THE MONTENEGRIN LABOUR MARKET: CHALLENGES AND PERSPECTIVES ON THE ROAD TOWARDS THE EUROPEAN UNION

Summary

Women's economic independence represents conditio sine qua non for gender equality and respect for women's rights. Women's entry into the labour market is the most important point of the centuries-old struggle of women for equality and equal opportunities, as the most credible indicator of women's emancipation and the real degree of gender equality in society. The analysis of the situation in the labour market in Montenegro provides a clear picture of a higher unemployment rate of women compared to men, difficulties in employment, financial inequality, a significantly lower economic power of women as well as a noticeably greater wage gap, the effect of glass ceiling in promotion, and frequent exposure to discrimination of women in the field of work. The economic empowerment of women and their participation in the labour market is a fundamental value of the European Union, which must be realized in Montenegro, as one of its priorities within the European integration policy. The aim of this paper is to analyze the gender dimension of the labour market in Montenegro and the European Union, with a special emphasis on the challenges and perspectives of the integration process in the subject area.

Key words: *labour market, Montenegro, European Union, gender policy, integration process.*

I Introduction

It took a whole century for the adoption of the International Labour Organization's Convention on Women and Work for women to become a force in the labour market that destroys all established gender prejudices. Women are presidents, prime ministers, CEOs of companies, trade union leaders, and entrepreneurs. However, progress in eliminating gender differences has stopped, and in some parts of the world it is reversing, so this situation should cause justified concern.[371]

Much ink has been spent to show that the global economic system is fiercely rooted in gendered stereotypes and the privileging of male macroeconomic policies. The labour market exudes more than obvious gender inequality and discrimination that underpins structural inequalities that are detrimental to women. Billions of women still do not have the same legal rights as men, and nearly 2.4 billion women of working age around the world still do not have equal economic opportunities. The facts indicate that a disproportionate majority of the poor in the world are women. Moreover, women in certain parts of the world are denied human rights and access to important economic and social resources.[372]

[371] For more information read: A quantum leap for gender equality: For a better Future of Work For All, International Labour Organization, 2019: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_674831.pdf

[372] Women, Business and the Law 2022, World Bank Group: The World Bank estimates that, globally, differences between men's and women's total expected lifetime earnings is $172.3 trillion, equivalent to twice the world gross domestic product. As such, adopting laws that strengthen women's rights and opportunities is an essential first step towards a more resilient and inclusive world. Women continue to face major challenges that threaten to widen gender gaps and entrench existing inequalities. They earn less than men for the same work and face a greater risk of violence in their homes.

The COVID-19 pandemic had an undeniably enormous impact on people's lives and the functioning of economies. Although, of course, people's health was and remains the main concern, the economic consequences are unavoidable and as such worth mentioning, especially in terms of the impact of the crisis caused by the pandemic on the entire world economy and employment, as well as its asymmetric effects that hit the most vulnerable workforce, primarily women.[373] Facts from current and past crises indicate that women are those who are disproportionately affected by crises.[374] They continue to face major challenges threatening to further support and reinforce existing stereotypical gender differences. It is stated in "Women, Business and Law 2022" that women earn less than men for the same job, which ultimately leads to a greater risk of violence in their homes. Also, there is a well-founded fear that the global community, due to the ongoing nature of the pandemic, will reverse the progress that has been made to include women in the workforce, and that their position in the labour market will not progress further.[375] Many authors write about the existing problems in the labour market that particularly affect women and behind which gender stereotypes are hidden. Due to the closure of pre-school and school institutions, many women devoted themselves to taking care of children, which is much more difficult and falls more on the back of women than men.[376] A much higher percentage of women left their paid jobs in order to devote themselves to

[373] *Fana Marta, Torrejon Sergio, Fernandez-Macias Enrique*, "Employment impact of Covid-19 crisis: from short term effects to long term prospects", Journal of Industrial and Business Economics, 2020, 47: 391–410.

[374] *Akrofi Mark M., Mudasiru Mahama, and Chinedu M. Nevo*, "Nexus between the Gendered SocioEconomic Impacts of COVID-19 and Climate Change: Implications for Pandemic Recovery." SN Social Sciences 1 (8), 2021, pg. 198.

[375] Women, Business and the Law 2022, World Bank Group.

[376] *Collins Caitlyn, Liana Christine Landivar, Leah Ruppanner, and William J. Scarborough*, "COVID-19 andthe Gender Gap in Work Hours", Gender, Work & Organization 28 (S1), 2020, pg. 101–112.

children. Even in those situations where women did not have to leave their jobs, women were exposed to much more stress than men, juggling between professional and family life during the pandemic.[377] All this time, a large number of authors have been alarmingly emphasizing the consequences of such situations, which surely leads to the increasing exposure of women to violence.[378] Making it impossible for a woman to earn money and be economically independent means leaving her without basic human rights because the less equal women are in society, men are more likely to be violent[379], and due to economic dependence of women, they will most often not even report the violence perpetrated against them[380]. According to the Report of the United Nations in Montenegro "Rapid assessment of the social impact of the COVID-19 epidemic in Montenegro", in the period from March 16 to June 1, 2020, the

[377] Goldin Claudia, *"Assessing Five Statements about the Economic Impact of COVID-19 on Women",* Technical Report, National Bureau of Economic Research, Cambridge, MA, 2021.

[378] More about it*:* Bundervoet Tom, Maria E. Davalos, and Natalia Garcia*, "The Short-Term Impacts of COVID-19 on Households in Developing Countries: An Overview Based on a Harmonized Data Set of High-Frequency Surveys",* Policy Research Working Paper 9582, World Bank, Washington, DC, 2021; Cucagna Emilia, and Javier Romero*,"The Gendered Impacts of COVID-19 on Labor Markets in Latin America and the Caribbean"* Policy Brief, Gender Information Lab for Latin America and the Caribbean, World Bank, Washington, DC, 2021; De Paz Nieves Carmen, Isis Gaddis, and Miriam Muller, *"Gender and COVID-19: What Have We Learned, One Year Later?"* Policy Research Working Paper 9709, World Bank, Washington, DC, 2021; Kugler Maurice, Mariana Viollaz, Daniel Duque, Isis Gaddis, David Newhouse, Amparo Palacios-Lopez, and Michael Weber, *"How Did the COVID-19 Crisis Affect Different Types of Workers in the Developing World?"*, Jobs Working Paper 60, World Bank, Washington, DC, 2021.

[379] *Yodanis Carrie*, "Gender Inequality, Violence against Women and Fear: A cross-national Test of Feminist Theory of Violence against Women", Journal of Interpersonal Violence 19 (6), 2004, pg. 655-675.

[380] *Hien Denise and Ruglass Lesia,* "Interpersonal partner violence and women in the United States: An overview of prevalence rates, psychiatric correlates and consequences and barriers to help seeking", International Journal of Law and Psychiatry, 32(1), 2009, pg. 48–55.

Safe Women's House from Podgorica received as many as 46 percentage points more calls than in same period last year, while they received 60 percentage points more victims of gender-based violence in May 2020 than in the same month of the previous year.[381]

Montenegrin society is very male-centric and organized according to the principle of the primacy of masculinity. It is still halfway from tradition to integration into the European Union, and the path from the collapse of real socialism was followed by marginalization, discrimination and almost complete suppression of women from public life. In societies with a patriarchal and cultural heritage, such as other countries of the Western Balkans, stereotypical understandings of male and female roles and the division of social work between the sexes are still inherited, according to which the man earns and supports the family, while the woman takes care of the house, husband and children.[382] As these gender stereotypes especially come to the surface during crises, as it could be seen from the example of the transition in the early nineties, which showed that the economic and social changes of post-socialist societies affected women the most[383], it seems that the crisis created by the pandemic represents the most important time to spend ink on the topic of the position of women in the labour market as the best indicator of real equality between women and men. Polish scientist Barbara Lobodzinska believes that it was during the transition that the accumulated problems of women manifested. Those problems

[381] *Report available on: https://montenegro.un.org/sites/default/files/2020-09/Izvještaj%20o%20brzoj%20estjecije%20social%20impact%20epidemije%20COVID-a-19%20u%20Crnoj%20Gori%2C%20Apri%20–%20Jun%20 2020.pdf*

[382] More about the gender division of social work: *Gorana Đorić*, "Roditeljstvo kao izvor ekonomske nejednakosti muškaraca i žena", Ljudska prava za žene (Vilić S. K, Petrušić N, Žunić N. i Đorić G), Odbor za građansku inicijativu, Niš, 2004, ISBN 86-83561-07-0, pg. 39.

[383] Read more: Gender in Transition, 2007, UNDP and London School of Economics and Political Science. http://www.developmentandtransition.net

had been transmitted from the time of socialism, which encouraged the traditional patriarchal exploitation of women, discrimination, economical dependence and gender subordination.[384] Domestic sociologists dealing with the position of women point to the fact that the transition does not represent a break with old patterns, but that the old misconceptions and the unsuccessful model of women's emancipation in former socialist societies are transferred to the modern stage of transitional movements towards capitalism[385], and this is also transferred to the working sphere of life, which is visible through the types of occupations that women had through history.[386]

Economic and social changes in the world in the previous period created opportunities for women's employment and their access to well-paid jobs, so the British sociologist Anthony Giddens said that the equalization of women and men in this sense represents a true global revolution in everyday life, the consequences of which are felt everywhere in the world, in all areas, from work to politics.[387] For decades, the international community has prioritized women's rights, with a special emphasis on gender equality in the labour market. In this sense, it is worth mentioning the activity of international organizations through The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[388], The

[384] *Lobodzinska Barbara*, "Women's Employment or Return to Family Values in Central-Eastern Europe", Journal of Comparative Family Studies, Vol. 27, No. 3, 1996, pg. 519-544.

[385] *Milić Anđelka*, "Žene u bivšoj Jugoslaviji- drugačiji pogled na učinke socijalizma u promjeni društvenog položaja žena", Društvo rizika: Promjene, nejednakosti i socijalni problem u današnjoj Srbiji (eds. Vujovic Sreten, and others).

[386] *Ibid*, p. 188.

[387] Giddens Anthony, *Runaway World*, Belgrade: Stubovi kulture, 2005.

[388] In Article 11 of the Convention, which refers to employment, certain rights of women are guaranteed and the obligation of the state in this area is defined in order to enable the use of these rights, which include: the right to work as an inalienable right, equal employment conditions for women and men, freedom choice of profession and employment, right to promotion

Millennium Development Goals and Sustainable Development Goals which constantly emphasize and reaffirm the need to achieve gender equality in all spheres. Despite all the efforts on the normative level, women's participation in the labour market is still not at a satisfactory level, i.e. a level at which we can talk about the factual equality of women and men.

The long-term consequences of the crisis caused by the COVID-19 pandemic on the social and economic situation of women cannot yet be established with certainty. However, based on the above said, as well as the available research results, it seems that in the long run, an even greater increase in poverty, unpaid work, a decrease in the level of education and health care, as well as an increase in violence can be expected and affecting women disproportionately. Therefore, this paper aims to draw attention to the current situation in the labour market and to analyze the integration of gender policy into the Montenegrin labour market, emphasizing the challenges and perspectives in the process of adapting Montenegro to the European integration process. All of this in order to create adequate conditions for employment and overcoming the gap between the normative and actual economic and social position of women in our society, especially at this specific moment in which we as a society find ourselves.

at work, equal opportunities for advancement at work, right to training and improvement, equal benefits and treatment for equal work, etc. The signatory states of the CEDAW convention (and member states of the European Union and Montenegro) are obliged to eliminate discrimination against women during employment, ensure equal rights of women and men in the field of work and employment, prevent discrimination due to marital status and maternity, and prohibit dismissal due to labor rights, maternity leave and marital status, provision of maternity leave, etc.
Text of the Convention available at: https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.

II Analysis of the European Union labour market: gender dimension

A. Key Labour Market Indicators

No Member State has achieved full gender equality and progress is evidently slow. Member States on average scored 67.4 out of 100 in the EU Gender Equality Index 2019, a score which has improved by just 5.4 points since 2005.[389]
While the gender gap in education is being closed with more women with higher education, gender gaps in employment, pay, care, power and pensions persist. Women are still underrepresented in higher-paid professions.[390] The gender pay gap in the EU stands at 14.1% and has only changed minimally over the last decade. It means that women earn 14.1% on average less per hour than men. This equals almost two months of salary.[391] The gender pay gap demonstrates very slow progress diminishing to 13% in 2020 as compared to 15.8% in 2010. The full-time equivalent employment gender gap amounting to 17.1% in 2020, largely reflecting the prevalence of women among part-time workers (29.1% of employed women compared to 7.8% of men in 2020). Furthermore, women continue to leave the workforce at higher rates than men do after having children or due to other care responsibilities. In 2020, 13.8% of women, as opposed to 1.2% of men, were inactive because they were looking after children or incapacitated

[389] European Institute for Gender Equality (EIGE): https://eige.europa.eu/gender-equality-index/2019.
[390] PISA report 2019, http://www.oecd.org/pisa/PISA%202018%20Insights%20and%20Interpretations%20FINAL%20PDF.pdf; European Commission, 'Women in the Digital Age – Final Report', 2018; and World Economic Forum Global Gender Gap Report 2020' – see infographics.
[391] Information available on:https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en, and more information about gender gap on: https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/equalpayday_factsheet.pdf

adults. Around half (47.6%) of women, aged 25-54, outside the labour force were in this situation in 2020 in the EU (excluding Germany) due to personal or family responsibilities. In contrast, the corresponding share for men amounted to 7.5 %.[392] Women remain the primary caregivers to children and are mainly responsible for household chores. Overall, women work more when combining the amount of time dedicated to unpaid labour (day-to-day, domestic duties, including care), personal activities and leisure time.[393]

According to the European Commission Report on Gender Equality in the European Union from 2022[394], the impact of the pandemic caused by the COVID-19 virus on the position of women continues to manifest itself in various forms. The disproportionate impact of the crisis on women threatens to disable the years-long process of achieving gender equality. The report cites female employment at 66.2% in 2020 compared to 60.6% in 2010, while there is a slight drop attributed to COVID-19 of 0.9% compared to 2019.

B. Legal framework

Through historical retrospect, the policy of the European Community from the very beginning had an emphasized economic character and was primarily focused on economic issues, while especially after the establishment of the European Union, social issues also entered the sphere of interest when it played an important role in the institutionalization of the concept of social inclusion, which promotes social cohesion within the framework of joint social

[392] Data available in the Report: https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2022_printable_en.pdf

[393] Data available on: https://stats.oecd.org/Index.aspx?_datasetcode=TIME_USE

[394] The Report available on: https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2022_printable_en.pdf

policy programs of the member countries. The European social model implies that without adequate use of women's resources it is not possible to achieve balanced economic development. Due to that, encouraging women through special measures for greater inclusion in the market economy is vital.

Acquis Communautaire in the field of gender equality represents an extensive body of norms of primary and secondary legislation of the European Union. Regulating this issue implies a comprehensive approach through primary and secondary legislation, strategies, gender mainstreaming, policies and financial support of action programs. The principle of gender equality is incorporated into all treaties establishing the European Union and represents one of its fundamental values[395]. The principle of equal treatment of women and men was ensured by the treaties establishing the European Economic Community as early as 1957, while the Treaty of Amsterdam included the principle of equal treatment and the prohibition of discrimination based on gender. In parallel, the rich practice of the European Court of Justice has been developing ever since, with the European Commission monitoring the implementation of legislation. It is important to mention that gender equality is legally regulated differently in member states, and a large number of legal acts have been adopted at the level of the European Union, primarily directives related to the field of gender equality, most often in matters of labour and social protection. Directives always set certain goals that must be achieved in the member states of the European Union, and the practice of the European Court of Justice contributes greatly to this. Therefore, the European Union creates a policy of gender equality through numerous directives and through *soft law* which includes resolutions, recommendations and acts published by the European Council, the European Commission and the European Parliament.

[395] See Articles 2 and 3(3) TEU, Articles 8, 10, 19 and 157 TFEU and Articles 21 and 23 of the EU Charter of Fundamental Rights.

The principle of gender equality is also included in the basic rights of employees within various programs, funds and financial instruments. As a fundamental value of the European Union, gender equality is also included in the text of the Stabilization and Association Agreement. The European Union monitors and supports compliance with the Copenhagen criteria in the field of gender equality and assists in the harmonization and implementation of legislation in the countries of the Western Balkans, including Montenegro, through the provision of IPA financial assistance.

a) List of some gender equality legislation (excluding directives) regarding equality between sexes and the position of women in the labour market in particular

- Treaty of Rome (1957) - The Treaty incorporates the principle of equal pay for equal work for the same job between women and men in each Member State;
- Council Resolution of 12 July 1982 on the promotion of equal opportunities for women;
- 84/635/EEC Council Recommendation on the promotion of positive action for women (1984);
- 92/131/EEC Council Recommendation on the promotion of the dignity of women and men at work (1991);
- Council Resolution of 27 March 1995 on the balanced participation of women and men in decision-making;
- European Commission Communication on Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities (1996) - Gender Mainstreaming is indicated as a strategy for the promotion of gender equality in all Commission policies and activates the implementation of specific measures;
- Council recommendation 96/694 of 2nd December 1996 on the balanced participation of women and men in the decision-making process;
- Articles 2 and 3 Treaty of Amsterdam (1997) - The Treaty strengthens the legal basis for Community action in favor of gender equality;

- Council Resolution of 4 December 1997 concerning the report on the state of woman's health in the European Community;
- European Parliament Resolution on gender mainstreaming in the European Parliament (2003) - It suggests the guidelines for implementing gender mainstreaming in the Committees' and delegation's policy work.
- Treaty on the functioning of the European Union (2007) articles 8, 9, 19 and 157.
- Treaty of Lisbon (2009) - article 2 adds the non-discrimination principle and equality between women and men to the values of the European Union and in article 3 it promotes equality between women and men;
- Charter of Fundamental Rights (2010) - Article 21 states non-discrimination based on any ground, including sex and article 23 affirms equality between women and men.[396]

b) Directives

The directives of the European Union are of particular importance in this area, which are transposed into national legislation and represent the most important legal instrument both for the member states of the European Union and for countries that are in the process of joining the European Union. The area of gender equality is not an area in which there are many directives, but the field of their influence has expanded as the demands on member states have increased.

Directive 75/117/EEC[397]

The Equal Pay Directive aims to approximate the laws of the member states related to the application of the principle of equal pay for women and men. The principle established in Article 119 of the Treaty establishing the Community means that for the same work or work of equal value, any gender-

[396] Legislations available on: https://eur-lex.europa.eu/homepage.html.

[397] Directive available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975L0117:EN:HTML

based discrimination is removed concerning all types and conditions of remuneration. The job classification system, if used, must be based on the same criteria for women and men and exclude the possibility of discrimination on the basis of sex.

Directive 76/207/EEC[398]

This directive refers to Article 235 of the Treaty establishing the European Economic Community and establishes the principle of equal treatment of women and men with regard to access to employment, promotion, professional training and working conditions. This principle implies ensuring non-discrimination on the basis of gender, especially by mentioning marital or family status. Therefore, there will be no discrimination based on gender in the conditions, criteria for selection and access to all jobs or positions, regardless of the sector or branch of activity and levels of the professional hierarchy.

Directive 79/7/EEC[399]

This directive, like the previous one, refers to Article 135 of the Treaty establishing the European Economic Community and refers to the gradual application of the principle of equal treatment of women and men in relation to the issue of social security. The principle of equal treatment means that there is no direct or indirect discrimination on the basis of gender, especially in relation to marital or family status, and especially in terms of the scope and conditions of access to insurance, the obligation to set aside the contribution and its amount, then in

[398] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31976L0207&from=EN
[399] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31979L0007&from=EN

the calculation, including the increase for the spouse and dependents, as well as the conditions that determine the duration and retention of the right to assistance.

Directive 86/613/EEC[400]

The directive on the application of equal treatment of women and men engaged in an activity, including agriculture, in the capacity of a self-employed person and in the protection of self-employed women during pregnancy and maternity refers to Articles 100 and 235 of the Treaty on the Establishment of the Community, and the purpose is to ensure the application of the principle of equal treatment of women and men as self-employed when it comes to aspects not covered by previous directives.

Directive 92/85/EEC[401]

The directive on the introduction of measures to encourage the improvement of safety and health at work for employed pregnant women, mothers in labour and nursing mothers is based on Article 118a of the Founding Agreement. The purpose of this directive is to implement measures to encourage the improvement of safety and health at work for pregnant, maternity and nursing mothers.

[400] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31986L0613&from=GA

[401] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31992L0085&from=hr

Directive 96/34/EC[402]

This directive on the framework agreement on parental leave concluded by the Union of European Confederations of Industry and Employers and the European Center for Enterprises with Public Participation and the European Trade Union Confederation aims to give legal force to the framework agreement on parental leave. The purpose of this agreement is to facilitate the reconciliation of parental and professional responsibilities for working parents and it applies to both women and men who have an employment contract.

Directive 97/80/EC[403]

This directive on the burden of proof aims to provide measures that member states take to apply the principle of equal treatment in cases of discrimination based on sex. The goal is to provide all persons who are considered injured with satisfaction through the courts.

Directive 97/81/EC[404]

The directive on part-time work was adopted with the intention of applying the Framework Agreement signed by the Union of European Confederations of Industry and Employers, the European Center for Enterprises with Public Participation in the European Confederation of Trade Unions. The purpose of this agreement is to remove discrimination against part-time

[402] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996L0034&from=EN
[403] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0080&from=EN
[404] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997L0081&from=HR

workers, improve the quality of part-time work and contribute to a flexible organization of working hours that takes into account the needs of employers and workers.

Directive 2000/78/EC[405]

This directive does not refer directly and exclusively to gender equality, but to equal treatment in employment and selection of profession, which establishes a general framework for combating discrimination based on religion or belief, disability, age or sexual orientation. The principle of equal treatment is considered the absence of any direct or indirect discrimination for any reason. The directive applies to all persons in the public and private sector in terms of conditions for access to employment or professions, selection criteria and conditions for employment, at all levels and all types of professional orientations.

Directive 2002/73/EC[406]

This directive amends Directive 76/207/EEC on the application of equal treatment for women and men in access to employment, professional training and promotion and working conditions. This directive is of great importance because it introduces for the first time at the level of the European Union mandatory legislation that defines sexual harassment and its recognition as a form of discrimination based on gender. Also, significant provisions concern the strengthening of the protection of women on maternity leave and the extension of protection to parents who adopt children, and measures are

[405] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0078&from=HR

[406] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0073&from=en

defined to improve the protection at work of pregnant women, mothers in labour and nursing mothers.

Directive 2004/113/EC[407]

This directive establishes a framework for combating gender discrimination in terms of the possibility of obtaining and purchasing goods, i.e. providing services for the effective application of the principle of equal treatment of women and men. The directive defines discrimination, harassment and sexual harassment.

Directive 2006/54/EC[408]

The codified directive brings together some of the earlier directives on matters of employment and vocational training, the burden of proof and equal pay and pensions. It was adopted in order to improve the transparency and accessibility of the European secondary legislation on gender equality, which has been changed and improved over time.

Directive 2010/41/EU[409]

Directive 2010/41/EU on the application of the principle of equal treatment between women and men engaged in an activity in a self-employed capacity is repealing Council Directive 86/613/EEC. Directive 2010/41 gives the right to equal treatment between women and men engaged in an

[407] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0113&from=EN
[408] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0054&from=HR
[409] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0041&from=FR

activity in a self-employed capacity. It establishes the right to maternity allowances for at least 14 weeks. This Directive also gives access to any services supplying temporary replacements existing at the national level.

Directive 2019/1158/EU[410]

Directive 2019/1158/EU introduced paternity leave which is compensated at least at the national sick pay level so the Fathers/second parents have the right to take at least 10 working days of paternity leave around the time of the child's birth. It establishes 5 working days per year of careers' leave for each worker providing personal care or support to a relative or person living in the same household and it also gives a right to request flexible working arrangements.

C. European Union Strategy for Gender Equality 2020-2025

In addition to the legal framework, strategies, action plans and programs, as well as gender mainstreaming are of great importance in the field of gender equality in the European Union. In this sense, it is worth mentioning following:

- Lisbon Strategy, Council of Europe (2000) - Lisbon Strategy includes the goal of obtaining within ten years new objectives for women in employment;
- EU Roadmap for Equality between women and men for 2006-2010 - It outlines priorities such as equal economic independence for women and men and reconciliation of private and professional life etc;
- First European Pact for Gender Equality (2006) - Promoting the employment of women and a better balance of private and professional life, closing gender

[410] Directive available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1158&from=EN

gaps and combating gender stereotypes in the labour market;

- Communication "Non-discrimination and equal opportunities: A renewed Commitments" (2008) - This document reinforces the European Union's approach to fighting discrimination on the grounds of race or ethnicity, religion or belief, disability, sex, gender, etc.;
- Strategy for Equality between Women and Men for 2010-2015[411]- The Strategy prioritizes an increase of female labour-market participation, reducing the gender pay gap, promoting gender equality in decision-making, etc;
- European Pact for Gender Equality 2011-2020[412]- closing gender gaps, promoting better work and life balance for women and combating all forms of violence against women;
- Strategic Engagement for Gender Equality 2016-2019[413]- it continues to corroborate the European Pact for Gender Equality through a reference framework for increased effort at all levels;
- 2022 Report on Gender Equality in the EU[414];
- 2021 Report on Gender Equality in the EU[415]
- The H2020 Program Guidance on Gender Equality in Horizon 2020- the main interesting and innovative aspect is that gender equality entered the field of science

[411] Available on: https://op.europa.eu/en/publication-detail/-/publication/c58de824-e42a-48ce-8d36-a16f30ef701b/language-en

[412] Available on: https://eur-lex.europa.eu/LexUriServ/LexUri Serv.do?uri=COM:2010:0491:FIN:EN:PDF

[413] Available on: https://op.europa.eu/en/publication-detail/-/publication/24968221-eb81-11e5-8a81-01aa75ed71a1/language-en/format-PDF/source-115826869

[414] Available on: https://ec.europa.eu/info/sites/default/files/aid development cooperation fundamental rights/2022 report on gender equality in the eu en.pdf

[415] Available on: https://ec.europa.eu/info/sites/default/files/aid development cooperation fundamental rights/annual report ge 2021 printable en 0.pdf

and research in a strong way (for example, gender balance in research teams and decision making bodies is required).

While the European Union is a global leader in gender equality and has made significant progress in the last decades, gender-based violence and stereotypes continue to persist even in the member states. To address this, the EU Gender Equality Strategy 2020-2025[416] sets out key actions for the next 5 years and commits to ensuring that the Commission will include an equality perspective in all EU policy areas. It has set the following goals: stopping the spread of gender stereotypes, ending gender differences in the labour market, achieving equal participation of women and men in various areas of the economy, combating differences in income and pensions based on gender, ending gender differences in care and work in the home and achieving gender balance in decision-making and politics, as well as stopping gender-based violence.

III Analysis of the Montenegrin labour market: gender dimension

A. Key Labour Market Indicators

According to "Labour Markets in the Western Balkans: 2019 and 2020", the Montenegrin labour market is characterized by low rates of activity and employment, as well as high rates of unemployment, especially among vulnerable populations such as women or young people. Long-term unemployment is the highest among other economies in the region.[417]

All research conducted on the topic of the position of women in Montenegro testifies to the factually worse position of women compared to men, although, legally speaking, women

[416] Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN

[417] Labor Markets in the Western Balkans: 2019 and 2020, pg. 44.

enjoy the same rights as men. It seems, however, that gender stereotypes deeply rooted in our region prevent factual equality between the sexes.

The gender equality index was calculated for the first time in 2019 with an index value of 55 out of a maximum of 100, so Montenegro achieved a lower result than the European Union average, where the index value is 67.4. The index value indicates that the full-time equivalent employment rate in Montenegro is 37.3% for women and 50.5% for men. This means that there is a gender gap of 13.2 percentage points. For the sake of comparison, in the member states of the European Union, this gender gap amounts to 16 percentage points. For employment by gender, a value of 19.5 was calculated for women and 5.8 for men, which means that the gender difference in this domain is 13.7 percentage points.[418] Employed women face a range of discriminatory practices in the workplace, while motherhood continues to be one of the most common obstacles to career advancement or employment in general. In an NGO research survey, women state that they are asked at job interviews about their marital status (64.1%), how many children they have (45%) and whether they plan to have children (35.6%).[419] Women are often pushed into low-paid sectors and occupations despite increasing levels of education, as evidenced by the pay gap (women receive 14% to 16% less pay than men for the same job).[420] A look at the statistical data in the field of women's participation in the labour market shows that from 2009 to 2019, women were more numerous among graduate students, but that in the period from 2016, there were much more of them among the unemployed. Therefore, women in Montenegro are more educated but less present in the labour market. Education is

[418] Gender equality index, 2019.
[419] Center for Women's Rights, Gender-Based Discrimination in the Field of Work and Employment, 2019 (Centar za ženska prava, Rodno- zasnovana diskriminacija u oblasti rada i zapošljavanja, 2019).
[420] Monstat, Žene i muškarci u Crnoj Gori, 2018 and 2020.

precisely the only domain in which women have surpassed men.

There is both horizontal and vertical segregation, which can be seen in the example of the education sector, where the majority of employees are women (76.6%), while only a small number of women are appointed to positions where decisions are made (out of 234 directors, 88 are women), and the situation is similar with all other sectors where there are mostly men in management positions.[421] Therefore, there is a strong presence of institutional disrespect for equality in economic and social relations and a significantly higher rate of unemployment among women, discrimination against women during employment and advancement at work, and the "glass ceiling" effect that women in Montenegrin society face.[422]

B. Legal framework

Montenegro has established a legal framework for the implementation of gender equality through the introduction of the principle of gender equality in the Constitution of Montenegro[423], by passing the Law on Gender Equality[424], the Law on the Protector of Human Rights[425], as well as the Law on Prohibition of Discrimination[426]. By ratifying numerous international treaties and documents, as well as by obtaining the status of a candidate for membership in the European Union, Montenegro undertook to implement international

[421] *Ibid*, 2018, p. 58.
[422] More about the workforce in Montenegro: Monstat, Anketa o radnoj snazi, 2017.
[423] Constitution of Montenegro („Official Gazette of Montenegro“ 1/2007, 38/2013 - Amendments I-XVI).
[424] Law on Gender Equality („Official Gazette of Montenegro“ 046/07, 073/10, 040/11, 035/15).
[425] Law on the Defender of Human Rights („Official Gazette of Montenegro“ 42/2011, 32/2014).
[426] Law on Prohibition of Discrimination („Official Gazette of Montenegro“ 46/2010, 40/2011, 18/2014, 42/2017).

standards in this area and to realize the goals that reduce gender discrimination, set in legislative and strategic documents and adopted by the European Commission and the Council of Europe. Also, a number of other laws partly relate to the issue of gender equality as well as to the issue of the prohibition of discrimination based on gender: the Law on Protection from Domestic Violence[427], the Law on Free Legal Aid[428], the Labour Law[429], the Law on Employment and Exercising Insurance Rights from unemployment[430], and many others.

Apart from the constitutional proclamation of gender equality and the prohibition of discrimination, the most significant move in the field of norms was the adoption of the Law on Gender Equality. It more closely regulates the way of securing and exercising rights based on gender equality, measures to eliminate discrimination and create equal opportunities for the participation of women and men. The law defines concepts and terms from this area, the obligations of state authorities and entities from the private sector and the law itself is the basis for all other legal provisions that regulate the area of gender equality. It is significant that this law also introduces the obligation to equip all normative and implementation instruments and strategies by increasing the capacity of all institutions for the implementation of gender equality policies.

[427] Law on Protection from Domestic Violence („Official Gazette of Montenegeo“ 46/2010, 40/2011-1).
[428] Law on Free Legal Aid (“Official Gazette of Montenegro” 20/2011).
[429] Labour Law (“Official Gazette of Montenegro” 74/2019 i 8/2021).
[430] Law on Empoyment and Exercising Insurance Rights from unemploymet („Official Gazette of Montenegro“ 14/2010, 40/2011 - drugi zakon, 45/2012, 61/2013 i 20/2015).

C. The national strategy of gender equality in Montenegro 2021-2025

The national strategy of gender equality in Montenegro 2021-2025[431] is aligned with the European Union Strategy for Gender Equality 2020-2025. Also, the National Strategy has fully integrated all the provisions of the main documents of the United Nations in the field of gender equality, such as CEDAW and the Beijing Platform for Action. The national strategy is the fourth strategic document in a row, which intends to establish a better framework for achieving gender equality in Montenegro. The low level of gender equality in Montenegro is recognized as a central problem in the strategy, so the main goal is to raise that level by 2025. A very important part of the strategy is the identification of the causes of inequality between women and men in Montenegro, namely:

- insufficient efficiency and effectiveness in the protection of women of institutional mechanisms for the implementation and supervision of the implementation of gender equality policies;
- gender stereotypes, prejudices and the traditional division of roles between women and men, which is still present in all segments of Montenegrin society;
- insufficient level of woman's participation in areas that allow equal access to resources and benefit from the use of resources.
- The strategy has determined three operational goals through which it seeks to solve the causes of gender inequality, respecting the recommendations and opinions of relevant international institutions:
- operational goal 1: improve the application of the existing normative framework for the implementation of the policy of gender equality and protection against

431 https://www.zzzcg.me/wp-content/uploads/2022/02/Nacionalna-strategija-rodne-ravnopravnosti-2021-2025.-godine-sa-Akcionim-planom-2021-2022.-godine.pdf

discrimination based on sex and gender through measures aimed at strengthening the capacity of institutional mechanisms for the implementation of legal provisions for protection against discrimination;
- operational objective 2: improve the fields of education, culture and media in order to reduce the level of stereotypes and prejudices against women;
- operational objective 3: increase the level of woman's participation in areas that enable access to resources and the benefits of using resources.

IV Challenges and perspectives

As a candidate for membership in the European Union, Montenegro has undertaken to realize the goals in the subject area that are set in the legislative and strategic documents adopted by the European Commission and the Council of Europe. In this regard, the National Gender Equality Strategy is aligned with the policies of the European Union in this area and the EU Gender Equality Strategy. Also, within the Plan of Accession of Montenegro to the European Union for the period from 2020-2022[432], within Chapter 19, which refers to social policy and employment in the field of anti-discrimination and equal opportunities, the adoption of a new strategic document in the field of gender equality is foreseen, and this request was fulfilled by the adoption of the National Strategy. Chapter 23 Action Plan[433], contains a recommendation that concrete steps should be taken to ensure the application of gender equality in practice, including the strengthening of supervisory bodies and more efficient response of law enforcement authorities to possible violations, as well as through greater awareness raising and support measures, especially in employment and public representation a woman.

[432] https://www.eu.me/wpfd_file/program-pristupuga-crne-gore-evropskoj-uniji-2020-2022/
[433] Akcioni plan za poglavlje 23.

The European Commission has repeatedly drawn attention to the implementation of public policies in the field of gender equality in its reports on the progress of Montenegro in the process of accession to the European Union, where modest progress has been visibly achieved. In the Report from 2020[434], it is stated that the legislative framework for protection against discrimination based on gender is of limited influence due to weak implementation of measures. According to the opinion of the European Commission, the Montenegrin state authorities give priority to gender equality to an insufficient extent. In the same Report, it is stated that despite the equality of women and men in employment and social policy and the measures taken, women are still subject to discrimination in the labour market, which results in lower participation and lower rates of income generation. The CEDAW Committee has also repeatedly noted concerns regarding the position of women on the labour market in Montenegro due to the concentration of women in lower-paid jobs, as well as their frequent engagement through fixed-term contracts that are easy to terminate. In that regard, women in Montenegro are often left without the right to paid maternity leave and without the possibility of returning to work after giving birth. The Report from 2019[435] states that Montenegro does not implement the CEDAW recommendations for combating stereotypes and discriminatory practices because issues such as differences in employment and wages, sexual harassment at the workplace, unpaid work and other issues related to this, have mostly remained unresolved. In accordance with the recommendations of the European Commission, Montenegro must focus on the implementation of active measures on the

[434] Commission Staff Working Document, Montenegro 2020 Report: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0353&from=EN

[435] Commission Staff Working Document, Montenegro 2019 Report: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019SC0217&from=EN

labour market that will be specially adapted to women and on legislative and other measures that will enable gender balance between private and business life.

The comparison of the state of gender equality between Montenegro and the member states of European Union is made possible through the Gender Equality Index, which was developed by the European Institute for Gender Equality (EIGE) and which has been applied in the countries of the European Union since 2013. It was already mentioned that the overall state of gender equality, again for the sake of comparison, in Montenegro is 55, which is significantly less than the average in the 28 member states of the European Union with an index value of 67.4, proving that Sweden has the highest degree of gender equality with 83.8, while Greece has the lowest degree with 52.2. Apart from Greece, Romania and Hungary have a lower gender equality index than Montenegro.[436]

From the analysis of the Gender Equality Index and the National Strategy, clear conclusions are drawn about the position of women in the labour market. With more and more educated women, the participation of women in the workforce is also increasing. However, they are generally in lower-paid occupations and do not advance through the decision-making hierarchy at the same rate as men. There is a significant difference in the earnings of women and men. Also, the duration of a woman's working life is shorter. As in many other parts of the world, which was especially shown by the crisis caused by the COVID-19 pandemic, women in Montenegro are much more burdened with housework and caring for or supporting family members. Unpaid work is unevenly distributed between the sexes, so women, the elderly and the disabled belong to a much larger extent (42%) than men

[436] Data available on: https://www.statista.com/statistics/1209683/the-eu-gender-equality-index-by-country/

(24%).[437] Thus, men in Montenegro have much more free time at their disposal, engaging in various sports, cultural and recreational activities. Speaking in this sense, perhaps some courage is needed to state the difference in the quality of life between women and men (it is safer to say that the quality of life of women and men is - *different*, but perhaps it is more realistic to say that the quality of life of women is - *worse*).

In order to eliminate the aforementioned, and in accordance with the Directives of the European Parliament and the Council on the balance between the work and private life of parents and guardians, Montenegro introduced parental leave instead of just maternity leave. In this way, the aim was to encourage men to participate as much as possible in raising children, and at the same time to contribute to the reduction of gender stereotypes that exist in our society and are related to parental roles. Article 127 of the Labour Law defines the right to parental leave that can be used by both parents to take care of the child. Although this novelty is commendable and in accordance with the legislation of the European Union, the question arises whether it is sufficient to achieve its purpose, i.e. the goal for which it was introduced, and whether is it used in real life and as well as how many men actually use this legal >>possibility<<, not an >>obligation<<? Judging by the data of the Tax Administration, which was obtained for the purposes of drafting the National Strategy for Gender Equality, in 2019, 486 fathers used parental leave, while in 2020 that number was 385.[438] When it comes to society's attitude towards this issue, the research of the UNPD in Montenegro on the gender mainstreaming in 2020 is helpful.[439] In this research, it is

[437] Rodna mapa Crne Gore, UNDP, Austrian Development Agency and Ministry of Human and Minority Rights, 2020, www.rodnamapa.me

[438] Financial draft of the gender equality strategy in Montenegro 2021-2025, p. 50.

[439] Gender mainstreaming - Gender equality in Montenegro and assessment of the application of the principle of gender equality in public authorities - IPSOS Strategic Marketing, UNDP, January 2020, p. 25 (Gender

stated that 3/5 of those surveyed said they believed that fathers should use their right to parental leave more often than what is currently the case, with this percentage rising to 70% among women aged 30 to 44. Given that the Labour Law does not prescribe the father's obligation to use parental leave, this greatly reduces the effectiveness of this measure, and in the fight against gender stereotypes and better balancing the private and professional life of parents, we should perhaps think about ensuring that fathers have a legal obligation to use parental leave in a certain period after the birth of the child.
It would be significant if this paper could mention the number of cases of gender-based discrimination in the labour market, but in Montenegro there is no unified database of such cases before state authorities, especially when it comes to judicial instances. The only available data is from the Protector of Human Rights and Freedoms, which in the period from 2016-2019 received 30 out of a total of 109 complaints related to maternity, and 8 related to work and employment.[440] Even though as early as 2014, the Rulebook on the content and manner of keeping separate records on cases of reported discrimination[441] provided for the existence of the database, it has not yet been established.

Judging by the factual situation in the labour market in Montenegro, gender equality is at a low level. This directly disrupts the perspective of Montenegro to reach the level of human rights protection to which it has committed itself through numerous international treaties and through the integration process into the European Union. The analysis of the legal framework concludes that Montenegro has largely harmonized domestic legislation with European legislation. Legally speaking, women and men in Montenegro are

mainstreaming- Rodna ravnopravnost u Crnoj Gori i ocjena primjene načela rodne ravnopravnosti u institucijama javne vlasti).

[440] National strategy for gender equality in Montenegro 2021-2025, p. 32.

[441] Pravilnik o sadržaju i načinu vođenja posebne evidencije o slučajevima prijavljene diskriminacije ("Sl.list Crne Gore" br. 50/14).

completely equal and have equal rights and opportunities when it comes to the labour market. It seems that the answer to the problem should be sought in the application of the law, the existence of stereotypes that especially surfaced during the crisis caused by the pandemic, and the insufficient empowerment of women in this field. Montenegro lacks the integration of gender policies in practice.[442] In this sense, the application of the existing normative framework should be improved in order to implement an effective policy of gender equality and protection against discrimination based on gender. That is why it is especially important to work on the elimination of gender stereotypes, and a good normative framework represents a good basis for raising the entire public world about it. The road is long, and a good normative framework is only the first step, while gender mainstreaming tools are the next, but not less important steps on the way to reaching the goal of full gender equality.

It is important to mention that, nevertheless, gender mainstreaming in the European Union has its limits, and that it is not 100% effective. According to some authors and theoreticians, the reasons lie in the divided implementation among the member states due to the different understanding of the terms and concepts of gender, gender equality and gender mainstreaming in general.[443] In addition, the greatest influence on the implementation of gender mainstreaming strategies and programs is the national history of the member states that joined the European Union in different times,

[442] See also: *Gordana Gasmi*, "Strateško-pravni okviri EU o ravnopravnosti polova- značaj za Srbiju", Stvarni pravni život, 59 (1), 2015, pg. 141.

[443] Read more: *Rees Teresa*, "Reflections on the uneven development of gender mainstreaming in Europe", International Feminist Journal of Politics, 7 (4), 2005, pg. 555-574;

Crespi Isabella, "Gender differences and equality issues in Europe: critical aspects of gender mainstreaming policies", International Review of Sociology, 19, 2009, pg. 171-188.

Crespi Isabella, *Gender mainstreaming and family policy in Europe: perspectives, researches and debates*, Edizioni Universita di Macerata, 2007.

conditions and circumstances.[444] All of this greatly complicates the implementation of gender strategies, and the various indexes of gender equality among the member states of the European Union are not surprising. In the light of the current crisis, a review of the previous ones is of crucial importance, so some authors emphasize the impact of the economic crisis on the implementation of these strategies and programs, calling out the bad austerity policies of the European Union that had a negative impact on gender equality policies because gender impact has never been taken into account, while this should be fundamental in the gender perspective.[445] Therefore, it is commendable to highlight the efforts of the European Union to ensure that the assessment of gender impact in the crisis caused by the COVID-19 pandemic is not omitted, but that it is one of the primary reasons for research. Montenegro must follow that path and do everything necessary so that the crisis has as little impact as possible on the position of women on the labour market and to prevent the consolidation of gender stereotypes that have a habit of gaining even more strength in such crisis situations.

There is no doubt that the issue of gender equality is one of the most important issues for Montenegro on its way to the European Union, so Montenegro worked on harmonizing the legislation in the field of gender equality and gender policies with the European one. However, the fact that the gap between the legislation and its application in practice is also present in the members of the European Union should not be ignored. It

---

[444] Read more: Barbier Jean Claude, *The road to Social Europe: A contemporary approach to political cultures and diversity in Europe*, Routledge, London, 2013;
Lomazzi Vera, "Gender role attitudes in Italy: 1988-2008, A path-dependency story of traditionalism", European Society 19 (4), 2017, pg. 370-395.

[445] Read more: *Briskin Linda*, "Austerity, union policy and gender equality bargaining", Transfer: European Review of Labor and Research, 20 (1), 2014, pg. 115-133.

is obvious that a good legal framework is insufficient to achieve gender equality in real life. This challenge is faced by all European countries, not only Montenegro, and the path to full gender equality is evidently really slow.

V Conclusion

The economic crisis caused by the COVID-19 pandemic clearly represents a threat to the position of women in the labour market, but at the same time, it is also an opportunity to look again and never more actively and in detail at this topic. It is also a great time to direct this well- rooted problem towards its realization, enabling active employment with a special emphasis on vulnerable categories, primarily women.
The aspiration of every democratic society is equal opportunities and chances for all members of the social community. No modern society should tolerate the divisions that social exclusion leads to. This assumes that women and men have equal conditions for the recognition and realization of human rights, for contribution at every level, without discrimination based on gender. The creation of conditions for the equality of women and men is the cornerstone of a democratic civil society, and that stone should be placed precisely on the economic equality of the sexes, from which every other equality begins. Therefore, one of the most important, if not the most important, an indicator of gender equality is the position of women in the labour market- the possibility of equal chances for inclusion and the possibility of equal chances for positioning and remuneration in the labour market.

From the analysis of the labour market in Montenegro and the European Union, the gap between legislation and policies and their *de facto* application is evident. In this regard, it is clear that the problems are not found in the normative framework, but much deeper, in firmly rooted gender stereotypes, especially emphasized in countries with

patriarchal and traditional patterns of behavior in which women are assigned a subordinate role in both private and public life. These gender stereotypes in the crisis caused by the COVID-19 pandemic are slowly but surely destroying the strongest foundations of democratic modern societies, so no country is spared from these problems in real life, because "traditional gender roles and stereotypes continue to have a strong influence on the division of roles between women and men in the home, in the workplace and in society at large, with women depicted as running the house and caring for children while men are depicted as wage-earners and protectors"[446]. It seems that the solution to the problem is right there - in its deep and solid roots. If this problem is not cut at the root, and the gap between the norm and its *de facto* application is not being removed, it will not be possible to talk about the success of the adopted laws on gender equality and the integration of gender policies in the labour market, both in Montenegro and in the European Union.

Bibliography

- *Akrofi Mark M., Mudasiru Mahama, and Chinedu M. Nevo*, "Nexus between the Gendered SocioEconomic Impacts of COVID-19 and Climate Change: Implications for Pandemic Recovery." SN Social Sciences 1 (8), 2021, pg. 198.
- Barbier Jean Claude, *The road to Social Europe: A contemporary approach to political cultures and diversity in Europe*, Routledge, London, 2013.
- *Briskin Linda*, "Austerity, union policy and gender equality bargaining", Transfer: European Review of Labor and Research, 20 (1), 2014, pg. 115-133.
- Bundervoet Tom, Maria E. Davalos, and Natalia Garcia, *"The Short-Term Impacts of COVID-19 on Households in Developing Countries: An Overview Based on a Harmonized*

[446] Report on Eliminating Gender Stereotypes in the EU, the European Parliament:http://eige.europa.eu/content/gender-stereotypes.

Data Set of High-Frequency Surveys", Policy Research Working Paper 9582, World Bank, Washington, DC, 2021.

- *Collins Caitlyn, Liana Christine Landivar, Leah Ruppanner, and William J. Scarborough*, "COVID-19 andthe Gender Gap in Work Hours", Gender, Work & Organization 28 (S1), 2020, pg. 101–112.
- *Crespi Isabella*, "Gender differences and equality issues in Europe: critical aspects of gender mainstreaming policies", International Review of Sociology, 19, 2009, pg. 171-188.
- Crespi Isabella, *Gender mainstreaming and family policy in Europe: perspectives, researches and debates*, Edizioni Universita di Macerata, 2007.
- Cucagna Emilia, and Javier Romero*,"The Gendered Impacts of COVID-19 on Labor Markets in Latin America and the Caribbean"* Policy Brief, Gender Information Lab for Latin America and the Caribbean, World Bank, Washington, DC, 2021.
- De Paz Nieves Carmen, Isis Gaddis, and Miriam Muller, *"Gender and COVID-19: What Have We Learned, One Year Later?"* Policy Research Working Paper 9709, World Bank, Washington, DC, 2021.
- *Fana Marta, Torrejon Sergio, Fernandez-Macias Enrique*, "Employment impact of Covid-19 crisis: from short term effects to long term prospects", Journal of Industrial and Business Economics, 47, 2020, pg. 391–410.
- Giddens Anthony, *Runaway World*, Belgrade: Stubovi kulture, 2005.
- Goldin Claudia, *"Assessing Five Statements about the Economic Impact of COVID-19 on Women",* Technical Report, National Bureau of Economic Research, Cambridge, MA, 2021.
- *Gorana Đorić*, "Roditeljstvo kao izvor ekonomske nejednakosti muškaraca i žena", Ljudska prava za žene (Vilić S. K, Petrušić N, Žunić N. i Đorić G), Odbor za građansku inicijativu, Niš, 2004, ISBN 86-83561-07-0.

- *Gordana Gasmi*, "Strateško-pravni okviri EU o ravnopravnosti polova- značaj za Srbiju", Stvarni pravni život, 59 (1), 2015, pg. 123-142.
- *Hien Denise and Ruglass Lesia,* "Interpersonal partner violence and women in the United States: An overview of prevalence rates, psychiatric correlates and consequences and barriers to help seeking", International Journal of Law and Psychiatry, 32(1), 2009, pg. 48–55.
- Kugler Maurice, Mariana Viollaz, Daniel Duque, Isis Gaddis, David Newhouse, Amparo Palacios-Lopez, and Michael Weber, *"How Did the COVID-19 Crisis Affect Different Types of Workers in the Developing World?"*, Jobs Working Paper 60, World Bank, Washington, DC, 2021.
- *Lobodzinska Barbara*, "Women's Employment or Return to Family Values in Central-Eastern Europe", Journal of Comparative Family Studies, Vol. 27, No. 3, 1996, pg. 519-544.
- *Lomazzi Vera*, "Gender role attitudes in Italy: 1988-2008, A path-dependency story of traditionalism", European Society 19 (4), 2017, pg. 370-395.
- *Milić Anđelka*, "Žene u bivšoj Jugoslaviji- drugačiji pogled na učinke socijalizma u promjeni društvenog položaja žena", Društvo rizika: Promjene, nejednakosti i socijalni problem u današnjoj Srbiji (eds. Vujovic Sreten, and others).
- *Rees Teresa*, "Reflections on the uneven development of gender mainstreaming in Europe", International Feminist Journal of Politics, 7 (4), 2005, pg. 555-574.
- *Yodanis Carrie*, "Gender Inequality, Violence against Women and Fear: A cross-national Test of Feminist Theory of Violence against Women", Journal of Interpersonal Violence 19 (6), 2004, pg. 655-675.

LLM Milana Tomić, PhD student
Teaching Assistant, University of Montenegro, Faculty of Law

EU CHOICE OF LAW RULES FOR ONLINE CONTRACTS

Summary

Information Technology is a great challenge for the legislator, given that it usually transcends the borders of sovereign states. The use of the Internet has increased the number of international agreements. This paper examines the peculiarities of contracts for the sale of goods concluded via the Internet and examines how they influence on the rules for determining the applicable law. Namely, in EU there is a single regime for determining which particular body of national law is to be applied to disputes of this nature. This regime is embodied in EC Regulation No 593/2008 on the law applicable to contractual obligations (Rome I). This paper will analyze provisions of Rome I Regulation relating to consumers contracts (B2C) and contracts concluded between businesses (B2B). Further, it shall examine whether the solutions provided by this Regulation solve the problems in interpreting the law in this field. In conclusion, it is construed that the Information Technology is constantly evolving, so it is not possible for the lawmaker to predict in advance all the situations that may occur in practice. Therefore, the law shall be adaptable, flexible and technologically neutral to regulate e-commerce.

Key words: *e-commerce, choice of law, Rome I Regulation, on-line contracts.*

I Introduction

"*Internet is the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy that we have ever had.…* [447]

Proliferation of personal computers, increased connectivity and wide availability, made internet useful tool for contract law.[448] The use of the Internet has led to an increase in the number of contracts with foreign element, both consumer (B2C)[449] and business (B2B)[450] contracts. This caused two issues: jurisdictional issue - which court is competent to decide the case and the issue regarding the applicable law that should be applied to a case.

In this paper we will analyse the complex issues of determining the applicable law in the contracts for the sale of goods concluded online, which can have far-reaching consequences for the rights and obligations of the parties. Firstly, we will determine the peculiarities related with online contracts. Then we shall examine the influence they had on the choice of law rules in EU and to what extent existing rules can be applied to online contracts.

II Peculiarities of online contracts

First, it should be considered whether, and to what extent, existing contract law can be applied to contracts concluded via the Internet. At the international level the position has been taken that there is no need to adopt a new contract law that would regulate e-commerce; it is sufficient that law makes it

[447] Murray Andrew, *The Regulation of Cyberspace Control in the Online Environment, Routledge- Cavendish, 2007, p.* 233. citing Eric Schmidt CEO of Google

[448] *Fafinski Stefan*," Access Denied: Computer Misuse in an Era of Technological Change" (2006) 70 J. Crim. L. 424.

[449] B2C - business to consumer contract.

[450] B2B – business to business contract.

clear that legal transactions concluded online (via digital signature, messages, confirmation, receipt etc.) are valid and enforceable as well as contracts concluded offline.

This approach has also been taken by the United Nations Commission on International Trade Law (hereinafter: "UNCITRAL"), a body in charge for harmonizing and unifying the law governing e-commerce at the global level. Namely, UNCITRAL has established principles which enable that all contracts and legal transactions are valid and have equal legal status, regardless of the form in which they are concluded. According to UNCITRAL, the basic principles of e-commerce are: non-discrimination, technological neutrality and functional equivalence.

In EU the most important sources of law for e-commerce are Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), which entered into force on 17 July 2000 and Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and the Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, which entered into application on 1 January 2022.
Article 9 of Directive on electronic commerce provides the duty of the Member States to ensure that their legal system allows contracts to be concluded by electronic means. Moreover, they should particularly ensure that legal requirements applicable to contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their being made by electronic means.

Further, Article 10 obliges the e-commerce websites to clearly, comprehensibly and unambiguously and prior to the order is placed by the recipient of the service, provide following information:

(a) the different technical steps to follow to conclude the contract;
(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;
(d) the languages offered for the conclusion of the contract.

Also, service provider has to indicate any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

It is important to mention that rules provided in Article 10 can be subject to different agreement between contracting parties, only if one party is not a consumer (only in B2B contracts)

In further text we shall examine whether EU choice of law rules can be applied when it comes to contracts concluded online.

A. Conclusion of contract

Firstly, we shall make a distinction between contracts concluded via exchange of e-mails and interactive websites. The individual contracts concluded online are negotiated and concluded separately, whereas, interactive websites represent virtual markets and a framework for linking supply and demand, where products are displayed and through which contracts are concluded.[451]

We shall then discuss whether an interactive website represents an offer or an invitation to treat.

[451] Data-based platforms can apply personalized rating schemes that not only discriminate on the basis of prices, but also exploit (exploit, abuse) consumer habits. Platforms collect personal data from their users, ie customers, their shopping habits and thus increase demand.

If we assume that the interactive website represents an offer, then the acceptance of the offer occurs when the customer orders the item by pressing the "order" button.[452] This understanding is supported by the fact that when a customer on the Internet presses a button agreeing to the terms of use of the website, submits his personal data, address and payment card information and then presses the button *"Order",* then he has reasonable expectations that his actions represent acceptance of the offer and that the goods will be delivered to him, and the subsequent notification of the seller that arrives by e-mail is only a confirmation of the conclusion of the contract. Namely, from the point of view of the buyer, the whole contract is based on the conditions of the seller, so there is no reason for the seller to subsequently agree on the contract.

In the opinion of the author, this interpretation could be accepted if it is a type of contract in which the customer downloads digital products (software, music, e-books) on the website for which he pays the price.[453] This is mainly because not just the conclusion, but also the performance of the contract is online.

On the other hand, if the website is an invitation to treat, then the consumer clicks on the button to make an offer, which may or may not be accepted by the website owner or seller. [454]

---

[452] The first position draws a parallel with the vending machine, and accordingly the display of goods on interactive sites, from which the buyer can directly order the goods, is an offer. The offer is made when the owner of the machine says that she is ready to receive the money, and the acceptance of the offer occurs when the buyer invests his money in the machine.

[453] *Donal Nolan*, "Offer and Acceptance in the Electronic Age", Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties*, Oxford University Press, 2010, 61-87.

[454] This view makes an analogy between a website and a shop window, so "displaying" goods on a website is an invitation to make an offer. This paragraph is supported by Article 14, paragraph 2 of the UN Convention on the International Sale of Goods, which stipulates that data on the price and range of goods listed by traders on their website are not considered an offer, but an invitation to offer. Also, Article 11 of the UN Convention on the Use

There is a fear that this interpretation favors the seller, who may withdraw from the contract at any time before the goods are delivered.[455] However, one may argue that it protects sellers from obvious errors in price, which can inevitably occur.

Art.11 UN Convention on the Use of Electronic Communications in International Contracts (CUECIC) 2005, takes the position that interactive website is invitation to treat, and states:

"[a] proposal to conclude a contract made through one or more electronic communications not addressed to one or more specific parties, but which is generally accessible to parties making use of information systems (including proposals that make use of interactive applications for the placement of orders through such information systems), is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance".

B. Time and place of the conclusion

There are significant differences between legal systems in what is considered to be the place and time of concluding a contract. [456] Fundamental rule of the contract law is that a contract is formed upon acceptance of the offer. However, we shall discuss when acceptance takes effect, when it is sent by

of Electronic Communications in International Agreements stipulates that a proposal to conclude a contract through one or more electronic communications which is not addressed to one or more specific parties but is generally available to parties using information systems, including proposals using interactive applications for placing orders through such information systems shall be considered a call for tenders, unless it clearly indicates the intention of the proposing party to commit in the event of acceptance.

[455] Murray Andrew, *Information Technology Law*, Oxford University Press, 2019, 502.

[456] Kitić Dušan, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Union u Beogradu, Javno preduzeće Službeni glasnik, Beograd, 2017, 208.

the offeree- as per the postal rule or when it is received by the offeror- as per the receipt rule.

There are two reasons why this question is important. First, the contract is considered concluded and binding at the time of acceptance of the offer. Secondly, if the acceptance of the offer was sent from one country and received in another country, this issue will be important for determining the competent court and the applicable law for the contract.[457]

Article 11 of E-commerce Directive provides that in cases where the recipient of the service places his order through technological means, the following principles apply: - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means, - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them. Further, this article obliges the service providers in Member States to make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

This problem is especially visible if we consider the difference in provisions about the time and place of dispatch and receipt of data messages which are provided by very important international instruments CISG and UNCITRAL Model Law.

On the one hand, Article 18 of CISG, similarly as the Article 11 of E-commerce Directive, adopts the theory of acceptance and stipulates that the acceptance of an offer has legal effect from the moment the statement of consent reaches the offeree.

"Acceptance of an offer is defined as a statement made by or other conduct of the offeree indicating assent to an offer. Silence or inactivity does not in itself amount to acceptance. An acceptance of an offer becomes effective at the moment the

[457] *Chissick Michael and Veysey Guy* ,"The perils of on-line contracting" Computer and. Telecommunications Law Review, 6(5), 2000, 122.

indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

On the other hand, UNCITRAL Model Law on which most national E-commerce Codes are based, provides in Article 15 that the dispatch of a data message occurs when it enters an information system outside the control of the person who sent the data message, unless otherwise agreed by the parties. Further, it stipulates the way on which the time of receipt of a data message is determined: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:(i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

Unless otherwise agreed, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. If the originator or the addressee has more than one place of business, the place of

business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business; If, on the other hand, the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.[458]

C. Authentication of the contracting parties

In online shopping, there are problems with proving legal capacity of the person who concluded the contract, which leaves the space for abuse.[459] Namely, the parties cannot see each other and this can create difficulties in determining whether the person on the other side of the computer has legal or business capacity.

Therefore, EU adopted Regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market, which came into effect on 1 July 2016 and established an EU-wide legal framework for electronic signatures and other trust services.

D. Validity of consent

To be able to answer the question if there is valid consent, it is necessary to distinguish between two types of contracts that can be concluded through interactive websites: *"browsewrap"* and *"clickwrap"*.

"Clickwrap" are online contracts which use the analogy between the signature and the click on the button *"I agree"* or *"I accept"*. Clicking on the button meets the criteria for a signature, i.e., it can be considered that it expresses the intention to confirm the authenticity of the text of the contract and the intention of the person to be bound by the contract. A

[458] Article 15 of the UNCITRAL the Model Law

[459] Savković Vladimir, *Zaključenje ugovora u elektronskoj formi – osnovi prava elektronske trgovine*, Pravni fakultet - Univerzitet Crne Gore, Podgorica, 2013, 15.

click on a button is the technological equivalent of a signature and satisfies the signature criteria, if the inscription on the button unequivocally indicates consent. However, the authors *Rowland, Kohl and Charlesworth* warn that there is a problem in this interpretation, because such a signature is not personalized and it is not possible to determine with certainty person who signed it, i.e., whether the person who pressed the button „*I agree*" has legal capacity.[460]

Another way is that the buyer received a reasonable notification about the provisions of the contract, i.e., that there is an objective possibility that he knew and had to know about those provisions. These agreements are generally found behind links to which users agree by virtue of their conduct, such as browsing/downloading software, therefore they are called *"browsewrap*" contracts. Perhaps the defining aspect of *"browsewrap*" is that the user need not take affirmative action regarding the terms to complete the relevant transaction.[461]

The fact that the website provides that by taking certain actions (e.g., by continuing to search the site) the visitor agrees to the terms of use, suggests that the website represents an offer, while remaining on the site is an acceptance of the offer. The procedure for concluding this type of contract relies on the actions of the visitor, i.e., the acceptance of the offer takes place at the time and place of its use of the website as prescribed by the terms of use.[462]

The problem with this type of contract is that users are often unaware that they are concluding a contract with their actions, i.e., they are not familiar with the provisions of the contract. The General Terms and Conditions can be accessed

---

[460] Rowland Diane, Kohl Uta and Charlesworth Andrew, *Information Technology Law, Routledge*, 2017, 22.

[461] *Mann R.J & Seibeneicher T*, „Just One Click: The reality of Internet Retail Contracting" (2008) 108 Columbia Law Review, 984.

[462] *MacDonald Elizabeth*,"When is a contract formed by the browsewrap process?" International Journal of Law and Information Technology, 2011, 286.

via a link written in small print at the bottom of the website and they consist of a large number of pages and numerous provisions, so the average user would not pay attention to the provision choosing the applicable law.

Therefore, it is the obligation of the contracting party in whose favor these provisions have been agreed (website owner) to take all steps to make them known to the other party before concluding the contract.[463]What constitutes a reasonable notice depends on the circumstances of the particular case, so if the provision at the front of the contract is clearly stated, it will constitute a reasonable notice,[464] while on the other hand if it is pointed out without reference it will not constitute a reasonable notice. If it is a provision of a contract that is not common to that type of contract, then the party is required to make a greater effort to acquaint the other party with that provision.

As Lord Denning pointed out in English case *Spurling v Bradshaw*[465]: "the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document, with a red hand pointing to [them] before notice would be held to be sufficient." This "red hand rule" as it has come to be known was reiterated by Dillon LJ who declared in *Interfoto Picture Library v Stiletto Visual Programmes*[466] that "if one condition …is particularly onerous or unusual, the party seeking to enforce it must show that particular condition was fairly brought to the attention of the other party".

[463] Parker v South Eastern Rwys (1877) 2 CPD 416 and Thornton v Shoe Lane Parking [1971] 2 Q.B 163.
[464] Thompson v London, Midland & Scottish Rwy Co [1930] KB 41.
[465] [1956] 1 WLR 461, 466.
[466] [1989] QB 433, 439.

E. Incorporation by reference

Contracts concluded via the Internet are also characterized by the frequent use of the incorporation of contractual provisions by reference. The term incorporation of contractual provisions by reference is used to explain situations where one document on a website refers to another document, also on a website, containing contractual provisions, so as not to repeat those provisions itself.

Thus, the provisions of the contract that form an integral part of that contract are often contained in another document, which is referred to by a link on the website. The second document contains the provisions of the contract, and among them the clause on the choice of applicable law, so the question arises which of its provisions are binding on buyers, or whether in this case there is the consent of the other party.[467]

III Choice of Law Rules in EU

The Rome I Regulation[468] represents a single regime in EU for determining which particular body of national law is to be applied to contracts. Its provisions are flexible and technologically neutral, what enables them to be applied to all contracts with international element, including ones concluded online.

It is important to emphasize that Rome I Regulation broadly mirrors the provisions in Brussels I. Therefore, case law of CJEU regarding interpretations of the Brussels Regulation, can, in most cases be used for the interpretation of

[467] Murray Andrew, *Information Technology Law*, Oxford University Press, 2019, 502.

[468] The original 1980 Rome Convention on the law applicable to contractual obligations ("the Rome Convention") which applies to contracts concluded by 17 December 2009; and EC Regulation No 593/2008 on the law applicable to contractual obligations (Rome I) which applies to contracts concluded after that date.

ambiguities in Rome I. However, we shall note that Rome I has broader scope, because Art.2 provides universal application and that any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

To put it in other words, the operation of Rome I Regulation may entail the application of the law of a non-EU Member State to a contractual dispute, irrespective of the connection of the parties to the dispute with any Member State.

A. Contractual autonomy

Rome I Regulation affirms the principle of contractual autonomy. Article 3(1) provides that a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract. Therefore, this article provides possibility that different aspects of a contract can be governed by different laws.

Parties can specifically select the law that will apply only to certain aspects of the contract, what opens up the possibility that under the provisions of Rome I, the law applicable to the remaining part of the contract might be the law of some other country.[469]

B. Applicable law in the absence of contractual choice

In the absence of agreement between the parties, article 4 of Rome I provides rules for determining law applicable for the contract. Here, we will only mention the provision relevant for e-commerce embodied in article 4(1) which stipulates that a contract for the sale of goods shall be governed by the law of

[469] Kostić-Mandić Maja, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Crne Gore, 2017, 315.

the country where the seller has his habitual residence. [470] The contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.[471]

Habitual residence is defined in Article 19 of Regulation which provides that in for the company, its habitual residence is the place of central administration; in the case of a natural person acting in the ordinary course of his business activity, his habitual place of residence shall be his principal place of business; in cases where a contract is concluded in the course of the operations of a branch, agency or any other establishment, or such a branch/ agency/establishment is responsible for performing the contract, the place where the branch/agency/establishment is located shall be treated as the place of habitual residence.

Art.4(2) provides that in ambiguous cases (i.e., cases governed by more than one or none of these heads) the applicable law will be that of "the country where the party required to effect the characteristic performance of the contract has his habitual residence." Characteristic performance is interpreted as a non-monetary obligation, which, in effect, points to the law of the seller/service provider's habitual residence. Arts.4(4) and (5) go on to provide that if the applicable law still cannot be determined in the light of these rules, then it will be the law of the country that is most closely connected to the contract.

C. Limits of contractual autonomy

Choice of law clause in a contract will be upheld for most purposes, but in some cases mandatory laws of the Member State will take priority over relevant aspects of the applicable law, which was agreed by the parties. That will be the case if the contract comes within the scope of any public, criminal or

[470] Art.4(1)(a) of the Rome I Regulation.
[471] Art.4(1)(b) of the Rome I Regulation.

other mandatory laws of a state, which cannot be excluded by the "applicable law" as designated by the choice of law clause.

Therefore, Art.3 (3) of Rome I stipulates that where all the other elements relevant to the situation at the time of the choice are located in a country other than the country whose laws have been chosen, the choice of the parties shall not prejudice the application of provisions of law of that other country which cannot be derogated from by agreement.

This article is designed to prevent a party from resorting to such choice of law clauses in order to evade the regulatory requirements of a state with which a contract is closely connected by choosing the laws of another state, especially in circumstances where these regulatory requirements are there to protect a weaker contractual party such as a consumer.[472] Therefore, provisions about consumer contracts will be elabourated in further text.

Also, Article 9 imposes further restrictions on the principle of contractual autonomy by enabling choice of law provisions in contracts to be overridden by mandatory regulatory provisions introduced by a state which are necessary for safeguarding the state's public interests such as its political, social or economic organization. These rules will be applied irrespective of the law otherwise applicable to the contract under this Regulation. Article 9 affirms the superiority of regulatory law – such as rules on competition, banking, insurance and investment rules– which are unaffected by the applicable contract law[473]

D. Consumer contracts

E-commerce has enabled consumers to have access to different markets across the world, from their homes. Special legal regime for the consumer contracts is provided because of

[472] Rowland Diane, Kohl Uta and Charlesworth Andrew, *Information Technology Law, Routledge*, 2017, 265.

[473] Rowland Diane, Kohl Uta and Charlesworth Andrew, *Information Technology Law, Routledge*, 2017, 267.

the necessity to protect weaker party, which regime will be applied if following requirements are met:

Firstly, one party should be natural person who concludes the contract for a purpose that can be regarded as being outside his trade or profession i.e., consumer[474]. Secondly, the other party to the contract (i.e., the trader) must be acting in the exercise of his trade or profession and either the trader is pursuing his commercial or professional activities in the country where the consumer has his habitual residence[475] as por the non-consumer by any means directs such commercial or professional activities to that country or to several countries including that country.[476]

If the requirements set out above are fulfilled Article 6(1) provides that the applicable law will be that of the country where the consumer is habitually resident. Further, Art 6(2) stipulates that the choice of law clauses in consumer contracts to be upheld by the courts, as long as the clause does not have the effect of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which in the absence of choice would have been applicable on the basis of Art 6(1).

We should note that it is not very clear when the conditions for consumer contracts will be fulfilled. There are ambiguities in interpretation of the term *"directing the activities"* from the article Art. 6(1)(b). Namely, whether the availability of the website can be considered as directing the activities (especially having in mind that a website can direct activities all over the world).

[474] Stanivuković Maja, „Ugovori sa potrošačima sa inostranim elementom – merodavno pravo i nadležnost", Zbornik radova Pravnog fakulteta u Novom Sadu, vol. 37 br. 3, Novi Sad 2003, 255.

[475] Art. 6(1)(a) of the Rome I Regulation.

[476] Art. 6(1)(b) of the Rome I Regulation.

The CJEU in *Peter Pammer*[477] case took position that the mere use of a website by an online business to attract customers did not in itself signify that this site was directed to other Member States. Additional evidence had to be adduced which disclosed an intention on its part to establish commercial relations with consumers in these other Member State. Obvious examples of evidence that might establish such an intention are expressly mentioning the targeted member State(s) on the website of the business or paying search engines to advertise the goods/services in such Member States. Other factors which according to the ECJ might also point to an intention by a business to target its activities at Member States include: the international nature of the activities undertaken by the business; the use of telephone numbers with international dialing codes; the use of country-based top-level domain names other than that of the country in which the business is actually domiciled; the mention of an international clientele composed of customers domiciled in various Member states particularly the inclusion of reviews written by such customers; use of language/currency other than that generally used in country of domicile of the business.

IV Conclusion

Every innovative technological development will bring new challenges. It is not possible to create "a future-proof"[478] law against technological advancements. Given that technology is constantly evolving and advancing, it is inevitable for rules to become obsolete or inappropriate after a while. Therefore, compliance with new technologies should be

[477] Joined Cases c-585/08, C-144/09, Peter Pammer v Reederei Karl Schluter GmbH & co KG and Hoetel Alpenhof GesmbH v Oliver Heller (7 December 2010) ECLI:EU: C:2010:740.

[478] Hedley Steve, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (2nd edn Routledge 2007) 37.

seen as a permanent culture change, rather than the „job that can be done and then forgotten about."

However, in this paper we argued that existing rules embodied in Rome I Regulation are flexible enough to determine applicable law for contracts concluded online, and that they correspond with technological reality. Also, we noted that legislative reform in this field has responded to some challenges imposed by technological development, but the most significant issue in this field remained law enforcement, especially because of the remote nature.

The Information Technology is constantly evolving, so it is not possible for the lawmaker to predict in advance all the situations that may occur in practice. Therefore, the law has to be technologically neutral, dynamic, adaptable, relevant and evolving in order to address such issues.

Bibliography

- *Chissick Michael and Veysey Guy* ,"The perils of on-line contracting" Computer and. Telecommunications Law Review, 6(5), 2000, 122.
- *Donal Nolan*, "Offer and Acceptance in the Electronic Age", Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties*, Oxford University Press, 2010, 61-87.
- *Fafinski Stefan*," Access Denied: Computer Misuse in an Era of Technological Change" (2006) 70 J. Crim. L. 424.
- Hedley Steve, *The Law of Electronic Commerce and the Internet in the UK and Ireland*, 2nd ed Routledge, 2007.
- Kitić Dušan, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Union u Beogradu, Javno preduzeće Službeni glasnik, Beograd, 2017.
- Kostić-Mandić Maja, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Crne Gore, 2017.
- *MacDonald Elizabeth*,"When is a contract formed by the browsewrap process?" International Journal of Law and InformationTechnology, 2011.

- *Maja Stanivuković,* „Ugovori sa potrošačima sa inostranim elementom – merodavno pravo i nadležnost", Zbornik radova Pravnog fakulteta u Novom Sadu, vol. 37 br. 3, Novi Sad 2003, 255.
- *Mann R.J & Seibeneicher T*, „Just One Click: The reality of Internet Retail Contracting" (2008) 108 Columbia Law Review, 984.
- Murray Andrew, *Information Technology Law*, Oxford University Press, 2019, 502.
- Murray Andrew, *The Regulation of Cyberspace Control in the Online Environment, Routledge- Cavendish, 2007, p.* 233.
- Rowland Diane, Kohl Uta and Charlesworth Andrew, *Information Technology Law, Routledge*, 2017.
- Savković Vladimir, *Zaključenje ugovora u elektronskoj formi – osnovi prava elektronske trgovine*, Pravni fakultet - Univerzitet Crne Gore, Podgorica, 2013.

- LEGISLATURE

- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
- The original 1980 Rome Convention on the law applicable to contractual obligations ("the Rome Convention") which applies to contracts concluded by 17 December 2009; and EC Regulation No 593/2008 on the law applicable to contractual obligations (Rome I).
- UN Convention on the International Sale of Goods (Vienna, 1980) (CISG)
- UN Convention on the Use of Electronic Communications in International Contracts (New York, 2005).
- UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998.

Nikolina Tomović, LLM student
Teaching Assistant at Faculty of Law, University of Montenegro

THE STORY OF THE NATIONAL AIRLINE - A CIRCLE OF STATE AID THAT WILL NEVER BE CLOSED?

Summary

It has been ten years since the opening of negotiations between Montenegro and the European Union, and Chapter 8 - Competition Law was opened last, in mid-2020. Before this chapter was opened, Montenegro has largely undertaken some of the activities in the direction of harmonization of national legislation with the law of the European Union and sought to strengthen its administrative capacity. One of the main objections of the European Commission both before and after the opening of the chapter is the case of the national airline, Montenegro Airlines, which has been granted a significant financial assistance on several occasions. This paper will provide a systematic overview of the provisions of EU law related to state aid, as well as their implementation in Montenegrin law, including the main activities of the Agency for the Protection of Competition in terms of its decision-making in controversial case of state aid to the, now former company, Montenegro Airlines, for which the Agency ruled that it had received unlawful state aid. As the national airline went to bankruptcy, it is almost certain that the unlawful state aid will never be repaid. The paper will present the consequences of such a decision on the development of the state aid mechanism in Montenegro, but will also seek to highlight some of the further steps that are expected in order to fulfill the closing benchmarks for the chapter of competition.

Key words*: State Aid, Montenegro Airlines, Competition Law, Montenegro, EU.*

I Introduction

Competition law and policy of the protection of freedom of competition in the market are considered to be some of the most characteristic features of the European Union, whose regulations and institutions pay significant attention to the regulation and consistent implementation of the idea of a free and competitive European single market. Covered by competition policy, control of state aid granted at EU level is one of the most interesting issues in this area, as well as one of the most important for all member states, so it is also for Montenegro as a first runner-up for the next EU member state. Together with other tasks of competition policy, such as monitoring and regulation of monopolies, concentrations and various restrictive activities carried out by market competitors,[479] the task of state aid control aims to prevent and discourage all market participants from adversely affecting freedom of competition and distorting the natural course of market action. Observed through tangible market changes, these goals seek to stand in the way of market anomalies that are detrimental to market competition and quality supply to consumers of various products and services, such as higher prices, poorer product range, deteriorating product and service quality, which ultimately affects both the satisfaction of consumers and the overall economic growth and productivity of the company.[480]

When it comes to the current position of news on state aid in Montenegro, it seems that the case of the former national airline, Montenegro Airlines, continues to provoke great attention and discussion, although the Montenegrin government eventually shut it down in late 2020, after several (debatable) attempts to save the company.

---

[479] *Savić Božić Dijana*, "Politika zaštite konkurencije u Evropskoj uniji", Časopis za poslovnu teoriju i praksu, no. 21-22 2019, pp. 215-224;

[480] Stojković Milica, *Pravo konkurencije u sudskoj praksi Evropske unije*, Univerzitet Privredna akademija, Novi Sad, 2017, p. 27;

II State aid in the European Union

As defined by the provisions of the founding treaties of the European Union, state aid can be understood as any aid granted by a member state or from state funds in any form, where incompatible with the internal market of the Union, and therefore prohibited for member states, is considered any such aid which distorts or threatens to distort competition by favoring a particular company or the production of certain goods.[481] In addition to the listed forms of permitted state aid (*compatible with the internal market*)[482], as well as other forms that can be found to be compatible with the internal market[483], adding those aid covered by the *de minimis* aid limit[484], all remaining state aid falls under general prohibition established in art. 107 of the Treaty on the Functioning of the European Union (*further: TFEU*).

For a closer definition of the concept of state aid, a set of criteria is often used, i.e. parameters against which it is determined whether specific aid to a company ultimately corresponds to the concept of state aid, and the same criteria serve to facilitate understanding of state aid in general. First of all, the aid itself must be granted *by the state*, directly or indirectly, but unquestionably from state resources; the aid thus granted must create a certain *market advantage* for the

[481] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012), Art. 107 (1);
[482] TFEU, Art. 107 (2);
[483] TFEU, Art. 107 (3);
[484] De minimis state aid is aid that the state may grant to a company in the prescribed accounting period up to the prescribed amount of money. If the aid exceeds the prescribed limit, then it is state aid of great value and it is subject to general rules on its control. De minimis aid is one of the exceptions to the general prohibition on state aid, however, its application is limited and reduced to an exclusive number of exhaustively listed cases. For more, see: *Jovanović Nebojša*, „De minimis state aid", Law and Economy 2021, Vol. 59, iss. 2, pp. 87-106;

company to which it is granted and which carries out a particular economic activity, in relation to all other market participants; further consequences of such aid must be reflected in the *impact* it has on the exchange of goods and services on the market, thus leading to *distortions of competition* due to the favoring and encouragement of individual economic entities by the state as a separate entity.[485]

In order to establish state aid which is prohibited in the European Union, in addition to the previously set criteria, it is necessary that the concrete aid *affects trade between member states*, i.e. that it has a union aspect and significance. Further, for the existence of state aid in the sense of EU law, *the influence* that an economic entity has on the market because of the aid thus obtained is crucial, therefore, its real consequences and action are considered, not the reasons and goals for which it was granted.[486] When it comes to the forms in which state aid can be granted, they are not relevant to the extent that it can be determined that the aid meets the aforementioned criteria, with the mechanisms themselves being reflected in more favorable lending, exemption from paying various taxes, giving subsidies and the like.

It is important that this is a benefit / advantage that the company would not gain by operating normally in the market, but because of the granted aid.[487] An advantage itself does not have to be reflected in the forms of providing direct support to the development of a certain economic entity by providing funds for the improvement of its infrastructure, technological

---

[485] Begović Boris, Pavić Vladimir, Popović Dušan, *Uvod u pravo konkurencije*, 3rd edition, Belgrade, 2019, p. 108; A similar method of determining the concept of state aid by criteria, and not by definition, was used in the Law on State Aid Control of Montenegro ("Official Gazette" of Montenegro No. 012/18, Art. 2);

[486] Meškić Zlatan, Samardžić Darko, *Pravo Evropske unije I*, Sarajevo, 2012, p. 396; Misita Nevenko, *Evropska unija - pravo konkurencije*, Sarajevo 2012, p. 193;

[487] Meškić, Samardžić, p. 396;

equipment, development of new products and similar. Such an advantage can be reflected, and is often reflected, in providing assistance to save a company from liquidation or bankruptcy proceedings, when the survival and continued operations of the company are at stake. Such state aid is prohibited if it distorts freedom of competition in the market, i.e. if state action strengthens the position of one company in the market in relation to others that do not receive state aid. The limit of such (non)distortion of competition is the turning point in determining the (in)permissibility of state aid granted in each specific case. The case of the former Montenegro's national airline, Montenegro Airlines, appears as a (unfortunately) good example through which we can perceive different forms of financial assistance that can help us distinguish between permitted and impermissible forms of aid, but also to take a closer look at some of the circumstances in which it is considered that state aid exists.

III State aid regulation in Montenegro

Montenegro is a party to the Stabilization and Association Agreement with the EU (*further: the SAA*),[488] according to which any state aid that distorts or threatens to distort competition by favoring certain undertakings or certain products is incompatible with the proper functioning of the Agreement and therefore prohibited as it may affect trade between the European Communities and Montenegro. Among other obligations arising from the SAA, Montenegro was obliged to establish an operationally independent body that will be empowered to authorize state aid schemes and individual aid grants, as well as to order the recovery of state

[488] Stabilisation and Association Agreement between the European Communities and their Member States and Montenegro, OJ L 108, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010A0429(01)-20150201&from=EN

aid that has been unlawfully granted.[489] These tasks are entrusted to the Agency for Protection of Competition, which has been in charge of state aid issues since 2018, as it was previously decided by the separate Commission for Control of State Support and Aid,[490] which appeared to be non-effective and lacked independence.[491]

The operation and functioning of the Agency are regulated by the Law on Protection of Competition,[492] while the segment of state aid is additionally regulated by the Law on Control of State Aid,[493] both of which are aligned with the EU state aid and competition *acquis*. Generally speaking, Montenegro's legislative framework is largely in line with the EU standards and the SAA, as well as with Art. 107 and 108 TFEU on state aid. However, the main objection concerned the implementation of established procedures, especially the enforcement capacity of the Agency, which remains significantly insufficient, according to the wording of the last European Commission's report on Montenegro.[494]

Several main reviews in the Commission's report are focused on the Agency's actions in cases of assistance to Montenegro Airlines, especially in light of the Agency's recent negative opinion on the allocation of funds to this company under a *lex specialis*, Law on Investment in Consolidation and Development of Montenegro Airlines, which was supposed to provide for up to EUR 155 million in state funding to the airline. In the mid of last year, the Agency finally declared that

---

[489] Art. 73 (4) of the SAA;
[490] For the functioning of the Comission, see: *Turković Bisera*, "Policy study - State Aid in Montenegro", Podgorica, July 2012. p. 21;
[491] Jocović Mijat, *Competition Law in Montenegro*, Kluwer Law International, 2021, p.33;
[492] Law on Protection of Competition, "Official Gazette" of Montenegro No. 44/2012, 13/2018, 145/2021;
[493] Law on Control of State Aid, "Official Gazette" of Montenegro No. 012/18;
[494] Montenegro 2021 Report, European Commision, p. 77-79, available at: https://ec.europa.eu/neighbourhood-enlargement/montenegro-report-2021_en

unlawful state aid had been granted in this case, and that the mentioned *lex specialis* was not in accordance with the Law on Control of State Aid.

As it was one of the Commission's recommendations for Montenegro, to provide the Agency with funds and information to close the case of Montenegro Airlines and monitor the establishment of a new national airline[495], Air Montenegro, this decision can be seen as a positive outcome in the sense of the Agency's functioning. However, this decision has been waited for almost two years and it is certain that the unlawfully granted aid will never be repaid, which calls into question the ultimate efficiency and effectiveness of this decision. Certainly, we will have the opportunity to see how this will be reflected in the next report and opinion of Montenegro's EU path regarding its competition policy.

IV The story behind the former national airline

The story where the favorable position of the former national airline begin leads us to the year 2009 and its first individual aids in the form of subsidy, followed by the individual aids in the form of excise taxes written-off, totaling almost 2 million euros.[496] At the time, the company was already recognized as operating in a sizeable loss and having very high level of indebtedness, which all led to another debt-forgiveness in 2011, in amount of 3.2 million euro. One of the first serious red-flags was the request of the Ministry of Transport and Maritime Affairs to the Agency (in that time: Commission) to provide an approval for the loan-guarantee to Montenegro Airlines for 9.6 million euro. The Commission rejected this request, stating that the reported loan-guarantee was not considered a state aid and Montenegro Airlines received the guarantee. However, as the company was already recording

[495] Chapter 8 – Competition policy, https://www.eu.me/en/poglavlje-8-konkurencija/,25.04.2022.
[496] Turković, p. 30;

debt growth and it did not seem as if the loan could be repaid from future operating, this Commission's decision was treated as speculative.

Restructuring plan that followed in 2012 provided Montenegro Airlines with the cca 36 million euros of assistance from state in the period 2012-2015, money which was supposed to cover some of the debt to suppliers, the previously mentioned guarantee for loans, as well as the company's debt toward the state for unpaid taxes.[497] As it will occur later, the Restructuring plan did not resolve anything substantially for the airline, it only bought it time to survive for several more years.[498] The trouble begins when the Montenegrin government decides to grant additional state aid to the Montenegro Airlines in 2018 and 2019, without receiving a green light from the Agency. The company first received cca 7.2 million euros during the 2018 and another 5.5 million euros in 2019. The issue was that the company had already received the aid through the restructuring plan and was not eligible for new state aid according to the "*one-time, last-time"* principle, especially bearing in mind that both new aids were not foreseen in the restructuring plan.

According to "*one-time, last-time*" principle, in order to prevent firms from being unfairly assisted when they can only survive thanks to repeated state support, restructuring aid should be granted only once and repeated state interventions should not be permitted, as they give rise to distortions of competition that are contrary to the common interest.[499]

---

[497] Turković, p. 31-32;

[498] *Gajin Dragan*, "How State Aid Control Grounded Another Flag Carrier: The Case of Montenegro Airlines", Kluwer Competition Law Blog, March 2021, p. 2, available at: http://competitionlawblog.kluwercompetitionlaw.com/2021/03/03/how-state-aid-control-grounded-another-flag-carrier-the-case-of-montenegro-airlines/ 26.04.2022.

[499] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249 of 31.7.2014, para 70, available at:

Therefore, these new rounds of direct grants gave rise to the national state aid authority (Agency) to start the investigation procedure on permisibility of these aids.[500] The Agency determined that this state aid should not have been granted[501], as less than ten years have passed since the granting of aid[502] approved by the Restructuring Plan of Montenegro Airlines and that the Plan does not contain sufficiently valid reasons for the existence of unforeseen circumstances due to which the aid could have been granted.[503] Moreover, the state aid provider, the Ministry of Transport and Maritime Affairs of Montenegro was obliged to submit a request to the Agency for the assessment of compliance with the Law on State Aid Control before granting state aid and it did not do so.

Finally, the Agency ruled that the state aid was inconsistent with the Law and obliged the Company to return uncoordinated state aid, in the amount of about 12.7 million euros, with interest calculated for the period from the aid to the date of the decision on recovery. At the time of rendering of the decision, the Government already announced that it will not

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC1001%2801%29

[500] *Radovanović Raško, Tasić Anja*, "The State of the Montenegrin State Aid Control Regime", Issue 7.8 of the CEE Legal Matters Magazine p .75, 2020. available at: https://ceelegalmatters.com/montenegro/14982-the-state-of-the-montenegrin-state-aid-control-regime

[501] Decision of the Agency for Protection of Competition from April 2021, available at: http://www.azzk.me/dp/images/docs/Montenengro_Airlines_2018_i_2019_apr.pdf

[502] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, para 71;

[503] Guidelines provide for a several exceptions to the rule that an undertaking in difficulty cannot receive restructuring aid, i.e., be rescued more than one time in a ten-year period. Among other, deviation from the rule will be possible in exceptional and unforeseeable circumstances for which the beneficiary is not responsible. However, the Agency concluded that such circumstances did not exist in the present case and that none of the exemption cases was applicable.

provide any new state aid to the company, which meant a death-verdict for its further operating, as the company went bankrupt shortly before the decision, with an existing debt of over 100 million euros. However, this was not the last attempt of the Government to save the national airline, as it planned to give the state aid to Montenegro Airlines by way of a lex specialis in 2019, which actually led to final state aid punch for the airline.

A. The Lex MA

In the end of 2019, Montenegrin Parliament adopted the Law on Investment in Consolidation and Development of Montenegro Airlines (the "Lex MA"), with the intention to once more boost the struggling company with approximately 155 milion euros. Distribution of this immodest sum of money was planed for the long list of company's obligations: paying the taxes and contributions the carrier owed to the state, the carrier's debt to the company operating the Montenegrin airports, the debt to the air traffic control, for a loan the company took from a commercial bank, for paying the debt to suppliers, for the company's working capital in 2020, as well as for purchase of new aircraft and the restoration of aircraft engines.[504]

Shortly afterwards, the Agency began to examine the Lex MA, its compliance with state aid provisions and whether it would not constitute state aid. In its first opinion, the Agency stated that it had not been provided with adequate information for the final decision and that the draft law on MA and the MA Financial Consolidation Plan were not sufficient to make a decision.[505] In addition, there were concerns about the

[504] Gajin, p. 3;

[505] *Vučković Bojan, Smiljanić Veljko*, "The Montenegrin Competition Agency Starts an In-Depth Investigation on Latest Rounds of Airline State Aid", 2020. available at: https://www.karanovicpartners.com/news/

company's financial viability and return of the state investment. The Government, however, sought to demonstrate that the planned financial support did not constitute state aid, by providing an economic analysis which proposed that the Lex MA was in line with the market economy investor principle (*further: the MEOP*).[506]

The MEOP is considered one of the main instruments developed to identify investment decisions by a state-owned firm that represents incompatible aids. According to the MEOP, if it can be shown that the investment by the state would also be made by a private investor under comparable market conditions, that aid would not be considered state aid.[507] In order for this principle to be followed, a set of criteria should be met, starting with the profitability of such an investment. It is expected that every private investor strive to increase his profit, therefore, if the planned state investment disregards any prospect of profitability, it is considered a state aid and does not pass the MEOP.[508] On the other side, public policy considerations, state motive for the transaction, social or regional policy aspects of the investment are not decisive indicator and are not relevant for the MEOP,[509] as an private

montenegrin-competition-agency-investigation-airline-state-aid/ 26.04.2022.

[506] *Andrijašević Bisera*, "The Montenegrin Government announces the end of the granting of State aid to the national airline company (Lex MA)", e-Competitions December 2020, Art. N° 98589, p. 1;

[507] *Heimer Alberto*, "State aid control: recent developments and some remaining challenges", EU state aid Law (eds. Pier L. Parcu, Giorgio Monti, and Marco Botta), ElgarOnline 2020, p. 56;

[508] *Karim Rezaul*, "The EU Market Economy Investor Principle: A Good Paradigm", University of Birmingham, 2014, pp. 1-30, p. 7;

[509] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016/C 262/01, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05), p. 17;

investor does not consider such aspects when deciding on an investment.[510]

The Agency was not in doubt whether the Lex MA would provide the company with financial support that would meet the requirements to be considered state aid, the set of criteria that was discussed previously *(aid granted from the state resources, which creates a market advantage for the company in relation to all other participants on the market, affects trade between EU member states and has an influence on competition).* In fact, the Agency's main focus was on examining the MEOP and the profitability of such an investment. As it was not possible to test the planned aid through the use of market data[511], the state had to apply assessment methods and determine the difference between positive and negative cash flows over the lifetime of the investment.[512] Finally, the Agency and the Government diverged in their interpretation of which parts of the investment should be taken into account in the profitability calculation in order to test the MEOP. At this stage of proceedings, the Agency was not convinced that the planned aid meets the MEOP and it prevailed its opinion that, in fact, it was state aid.

[510] *Andrijašević Bisera*, "The Montenegrin Competition Authority opens investigations into the compatibility with State aid rules of aid granted to an airline company in the view of the COVID-19 pandemic (Lex MA)", e-Competitions September 2020, Art. N° 97482, p. 3;

[511] Application of the MEOP depends on the availability of the specific market data. Thus, certain methods will be used in those cases where specific market data exist (i.e. pari-passu transactions method), while the assesment methods are suggested in those cases where specific market data are not available;

[512] *Ibid.*

a) The Agency's reasoning

Its final word on this, the Agency gave in its decision from May 2021,[513] after it previously ordered the Government to suspend the granting of any further aid upon the Lex MA until the final decision. However, at that time, the Government had already transferred 43 million euros to the airline on the basis of the Lex MA, which gave the case an EU context, as Ryan Air reported[514] to the European Commission that MA had received illegal state aid.[515] This final punch to the national airline is not to be neglected, moreover, it marked the final end of its operating that followed soon after.

In its decision, the Agency stated that the Lex MA was not in accordance with the Law on Control of State Aid and that aid in amount of 43 million euros was illegally transferred to the airline. The Agency also instructed the Ministry of capital investments[516] to take the necessary measures for the return of the aid within four months from the date of receipt of the decision, as well as to prepare and submit a recovery plan with measures and deadlines for its implementation or notification of recovery measures. It was explained by the Agency that, since less than ten years have passed since the adoption of the MA Restructuring Plan, Montenegro Airlines can be approved to implement unrealized measures, but only to the extent and purpose that are determined by the Restructuring Plan. Therefore, as there are no measures that can be seen as such

[513] Decision of the Agency for Protection of Competition from May 2021, available at: http://www.azzk.me/dp/images/docs/Savjet_rjeenje_-_Zakon_o_ulaganju_u_konsolidaciju_i_razvoj_Montenegro_Airlines_ad_Podgorica.pdf

[514] Gajin, p. 3;

[515] Gecić Law, „Montenegro Airlines Part I: Keep the Flag Flying", https://www.coronavirus.geciclaw.com/keep-the-flag-flying-for-montenegro-airlines/, 28.04.2022.

[516] As there have been changes in the composition of the Government, the Ministry of capital investments is now the legal successor to the previous Ministry of Transport and Maritime Affairs.

in the Lex MA, it is not suitable to be viewed as a continuation of the Restructuring Plan.

As mentioned, since the state would be the sole investor in the case of MA, it is essential to prove that the decision to invest is profit-driven and that the average profitability will be achieved in a reasonable period due to investments. However, the Agency stated that in the process of evaluating the Lex MA it was not provided with evidence from which it can be seen that the state's investment will result in a return on capital. In further details, the opinion of the Agency is not based on the economic justification of the investment, but on the incompleteness of the evidence on the basis of which a decision can be made in accordance with the MEOP.[517] It was noticed that neither the Ministry of Transport and Maritime Affairs, nor its successor, the Ministry of Capital Investments, submitted a state aid application to the Agency, and that the evaluation procedure was started *ex officio*.

The agency also relied on the practice of the European Commission, according to which any investment in a company with below-average profitability will be considered state aid, and not state investment in accordance with the MEOP. It was emphasized that by applying the MEOP on investment by the state, the Agency cannot appreciate the goals that the state wants to achieve as a public authority, except those that would be achieved by a private investor under the same conditions. In this regard, the Agency has no legal basis to assess the MEOP through the need and importance of the existence of a national airline, but to examine this principle through the prescribed conditions. In final, the Agency determined that the Lex MA did not met the conditions for the application of the MEOP which would exclude the presence of state aid and that the company is obliged to repay illegally granted state aid in the amount of 43 million.

[517] Agency's Decision from May 2021, p. 17;

As Montenegro Airlines went bankrupt by the end of 2020 with an existing debt of over 100 million euros that cannot be covered through the bankruptcy proceedings, it is reasonable to expect that a significant portion of the debt will never be settled. Nonetheless, MA's insolvency administrators tried to seek in court the payment of 100 million euros due by the state,[518] on the basis of the Lex MA. As the Lex MA is now officially illegal, this almost desperate attempt will never come to a desired epilogue. Moreover, The Montenegrin Court of Appeals confirmed a first-degree ruling by the Commercial Court for the MA to pay Aerodromi Crne Gore around six million euros plus interest, for the debt which the MA partially contested.[519]

While many speculated whether the story of the national airline could have been better rounded off,[520] the next Montenegrin government established a new airline, ToMontenegro, with an investment of around 30 million euros. This act of the Government met with different interpretations and assessments, as the new company had to start business from the beginning and reposition itself in the market, leaving room for other companies to take part of the offer previously covered by Montenegro Airlines.[521] Certainly, it seems that ToMontenegro will start its business under the shadow of the former company, and it remains to be seen whether it will manage to avoid its fate with more responsible management and better performance.

---

[518] Montenegro Airlines administrators seek 100 mln euro in state aid - report, https://seenews.com/news/montenegro-airlines-administrators-seek-100-mln-euro-in-state-aid-report-765724, 28.04.2022.

[519] Court Confirms Montenegro Airlines' debt, https://betabriefing.com/archive/see-business/11013-court-confirms-montenegro-airlines-debt, 28.04.2022.

[520] Radio Free Europe, "Likvidacija Montenegro Airlinesa za jedne neophodnost za druge nonsense", https://www.slobodnaevropa.org/a/likvidacija-montenegro-airlinesa-za-jedne-neophodnost-za-druge-nonsens/31019265.html, 28.04.2022.

[521] Andrijašević, Art. N° 98589, p. 2;

V What remains to be done?

The case of the national airline is one piece of a puzzle when it comes to Montenegro's preparation for the fulfillment of the closing benchmarks of the Competition chapter. This especially in the context of Montenegro's EU path and its accession-integration process. Certainly, the importance of closing (or at least approaching to the closing) the MA case cannot be ignored, as it was one of the biggest thorns in the eyes of the European Commission and decision-makers when it comes to Montenegro's progress in this chapter. Just a little piece of the remaining puzzle regards to the (in)compatible aids in the case of Uniprom KAP, Adriatic Marinas (the operator of the Porto Montenegro marina)[522] and famous Bar-Boljare highway and whether there was incompatible aid in the financing of the construction of the highway and its operation.[523]

It seems that it would be naive to expect that the assessment of Montenegro's moderate readiness in the Competition chapter would significantly change after being left with this single solution in the MA case. Nevertheless, it would certainly contribute to a better picture of the capacities of Montenegrin institutions, especially the Agency for Protection of Competition, to act in extremely sensitive and complex cases of state aid, as Montenegro Airlines case certainly was.

Final closing of the MA case will also strengthen the internal market cluster,[524] a significant part of which are

[522] Radovanović, Tasić, p .75;

[523] Chapter 8 – Competition policy, https://www.eu.me/en/poglavlje-8-konkurencija/, 28.04.2022.

[524] Cluster consist of several thematically grouped negotiation chapters and aims to accelerate the sectoral harmonization and integration by strengthening synergies between related chapters within the cluster, but also among the clusters themselves. Currently, Montenegrin 33 negotiation chapter are grouped into six clusters: 1) Fundamentals; 2) Internal market; 3) Competitiveness and inclusive growth; 4) Green agenda and sustainable connectivity; 5) Resources, agriculture, and cohesion; 6) External relations;

activities in the field of improving freedom of competition and creating preconditions for the development of a well-regulated market economy in Montenegro. Altogether, this will certainly contribute to easier and faster integration of the small Montenegrin market into a large and developed European economy, but it is necessary that the overall goal for membership be accompanied by clear, interconnected and synchronized activities within all chapters.

It has been said several times that the internal market cluster is key for Montenegro's preparations to meet the requirements of the EU internal market[525] and is of high relevance for possible early integration measures, which is why it requires great attention both of the Montenegrin administration and policy makers. On the other hand, since all negotiation chapters are open, significant efforts are needed to meet the interim benchmarks and conditions of Chapters 23 and 24,[526] as the closure of negotiation chapters will depend on this.[527]

Taking into account the structural and political development of the Montenegrin society, as well as the influence of politics on the economic sphere and the development of institutions, it can be seen that great progress depends solely on political decision makers and their willingness to push some sensitive issues and weaknesses of

---

Lipovina Božović Milena, "Accelerated harmonization of legislation and more efficient implementation to meet the requirements of the EU internal market", Eurokaz Magazine on European Integration of Montenegro, No. 9, 2021. p. 7;

[525] Key findings of the 2021 Report on Montenegro, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5279, 29.04.2022.

[526] Chapter 23 (Judiciary and fundamental rights), Chapter 24 (Justice, freedom and security);

[527] *Mirković Milica*, "Montenegro and EU: application of the revised methodology", Weekly Briefing, Vol. 39, No. 4 (ME), April 2021, p. 2, available at: https://china-cee.eu/2021/05/21/montenegro-external-relations-briefing-montenegro-and-eu-application-of-the-revised-methodology/, 29.04.2022.

the Montenegrin economy. Bearing in mind that this year marks ten years since the negotiations started, we can assume that this year may be a turning point on Montenegro's EU path, especially in the context of current political changes that may affect the main chapters of the rule of law and the judiciary.
As Enlargement Commissioner Varhelji said during the presentation of the European Commission's report to members of the European Parliament in October 2021, "Montenegro knows what it needs to do."[528] It definitely needs to continue its commitment to fulfilling its obligations towards membership, building institutions and human capacities that will be able not only to bring Montenegro into the EU, but also to show that the Montenegrin community is up to all tasks expected from an EU member state.

Bibliography

- *Andrijašević Bisera*, "The Montenegrin Competition Authority opens investigations into the compatibility with State aid rules of aid granted to an airline company in the view of the COVID-19 pandemic (Lex MA)", e-Competitions September 2020, Art. N° 97482.
- *Andrijašević Bisera*, "The Montenegrin Government announces the end of the granting of State aid to the national airline company (Lex MA)", e-Competitions December 2020, Art. N° 98589.
- Begović Boris, Pavić Vladimir, Popović Dušan, *Uvod u pravo konkurencije*, 3rd edition, Belgrade, 2019.
- *Gajin Dragan*, "How State Aid Control Grounded Another Flag Carrier: The Case of Montenegro Airlines", Kluwer Competition Law Blog, March 2021.

[528] *Kordić Zorka*, "European Integration Office in 2021 - Support to institutions and process", Eurokaz Magazine on European Integration of Montenegro, No. 9, 2021. p. 4;

- *Heimer Alberto*, "State aid control: recent developments and some remaining challenges", EU state aid Law (eds. Pier L. Parcu, Giorgio Monti, and Marco Botta), ElgarOnline 2020.
- Jocović Mijat, *Competition Law in Montenegro*, Kluwer Law International, 2021.
- *Jovanović Nebojša*, „De minimis state aid“, Law and Economy 2021, Vol. 59, iss. 2, pp. 87-106;
- *Karim Rezaul*, "The EU Market Economy Investor Principle: A Good Paradigm", University of Birmingham, 2014, pp. 1-30.
- Meškić Zlatan, Samardžić Darko, *Pravo Evropske unije I*, Sarajevo, 2012.
- Misita Nevenko, *Evropska unija - pravo konkurencije*, Sarajevo 2012.
- *Radovanović Raško, Tasić Anja*, "The State of the Montenegrin State Aid Control Regime", Issue 7.8 of the CEE Legal Matters Magazine, 2020.
- *Savić Božić Dijana*, "Politika zaštite konkurencije u Evropskoj uniji", Časopis za poslovnu teoriju i praksu, no. 21-22 2019, pp. 215-224;
- Stojković Milica, *Pravo konkurencije u sudskoj praksi Evropske unije*, Univerzitet Privredna akademija, Novi Sad, 2017.
- *Turković Bisera*, "Policy study - State Aid in Montenegro", Podgorica, July 2012.